

**OFFICIAL CODE  
OF  
GEORGIA  

---

ANNOTATED**



**VOLUME 8**

**Title 10. Commerce and Trade**

**2009 Edition**









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# OFFICIAL CODE OF GEORGIA ANNOTATED

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With Provision for Subsequent Pocket Parts

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*Prepared by*

The Code Revision Commission  
The Office of Legislative Counsel  
*and*  
The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

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## Volume 8 2009 Edition

Title 10. Commerce and Trade

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Including Acts of the 2009 Session of the General Assembly of Georgia  
and Annotations taken from the Georgia Reports  
and the Georgia Appeals Reports

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2009

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## OFFICE OF SECRETARY OF STATE

*I, Karen C. Handel, Secretary of State of the State of Georgia, do  
hereby certify that*

the statutory portion of the Official Code of Georgia Annotated contained  
in this volume is a true and correct copy of such material as enacted by  
the General Assembly of Georgia: all as same appear of file and record in  
this office.



IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed  
the seal of my office, at the Capitol, in the City of Atlanta, this 15th day  
of July, in the year of our Lord Two Thousand and Nine and of the  
Independence of the United States of America the Two Hundred and  
Thirty-Fourth.

*Karen C. Handel*

Karen C. Handel, Secretary of State





## Preface

This volume cumulates and replaces the 2000 edition of Volume 8 of the Official Code of Georgia Annotated, as supplemented by the 2008 Cumulative Supplement. The 2000 Volume 8 and its 2008 Supplement may be recycled or, if so desired, retained for historical purposes. This volume contains all laws specifically codified in Title 10 by the General Assembly through the 2009 Session. This volume also contains case annotations reflecting decisions posted to LexisNexis® through April 10, 2009. These annotations will appear in the following traditional reporter sources: Georgia Supreme Court Opinions; Georgia Appeals Court Opinions; Southeastern Reporter, Second Series; Supreme Court Reporter; Federal Reporter, Third Series; Federal Supplement, Second Series; Federal Rules Decisions; and Bankruptcy Reporter. As official and traditional citations become available, substitutions for the LexisNexis® citations will be made.

Additionally, LexisNexis® has prepared annotations and references to Attorney General Opinions, law reviews, and other research sources that we hope will be beneficial as you utilize this product. A complete listing of those sources is as follows: Official and Unofficial Attorney General Opinions; Opinions of the Judicial Qualifications Commission; Advisory Opinions of the State Disciplinary Board of the State Bar; Formal Advisory Opinions of the State Disciplinary Board of the State Bar, issued by the Supreme Court of Georgia; Emory Law Journal; Georgia Law Review; Georgia State University Law Review; Mercer Law Review; Georgia State Bar Journal; American Law Reports; American Jurisprudence 2d; American Jurisprudence Pleading and Practice, American Jurisprudence Proof of Facts; American Jurisprudence Trials; Corpus Juris Secundum; and Uniform Laws Annotated. Also included, where appropriate, are cross references to the Official Code of Georgia Annotated.

This volume retains amendment notes and effective date notes for Acts passed during the 2007, 2008, and 2009 Sessions of the General Assembly. In order to determine the changes which were made or the effective date applied to a Code section by an Act passed prior to the 2007 Session of the General Assembly, the user should consult the Georgia Laws.

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## **User's Guide**

In order to assist both the legal profession and the layperson in obtaining the maximum benefit from the Official Code of Georgia Annotated, a User's Guide containing comments and information on the many features found within the Code has been included in Volume 1 of the Official Code of Georgia Annotated.



## Table of Titles

---

- Title 1. General Provisions.
2. Agriculture.
3. Alcoholic Beverages.
4. Animals.
5. Appeal and Error.
6. Aviation.
7. Banking and Finance.
8. Buildings and Housing.
9. Civil Practice.
10. Commerce and Trade.
11. Commercial Code.
12. Conservation and Natural Resources.
13. Contracts.
14. Corporations, Partnerships, and Associations.
15. Courts.
16. Crimes and Offenses.
17. Criminal Procedure.
18. Debtor and Creditor.
19. Domestic Relations.
20. Education.
21. Elections.
22. Eminent Domain.
23. Equity.
24. Evidence.
25. Fire Protection and Safety.
26. Food, Drugs, and Cosmetics.
27. Game and Fish.
28. General Assembly.
29. Guardian and Ward.

## TABLE OF TITLES

30. Handicapped Persons.
31. Health.
32. Highways, Bridges, and Ferries.
33. Insurance.
34. Labor and Industrial Relations.
35. Law Enforcement Officers and Agencies.
36. Local Government.
37. Mental Health.
38. Military, Emergency Management, and Veterans Affairs.
39. Minors.
40. Motor Vehicles and Traffic.
41. Nuisances.
42. Penal Institutions.
43. Professions and Businesses.
44. Property.
45. Public Officers and Employees.
46. Public Utilities and Public Transportation.
47. Retirement and Pensions.
48. Revenue and Taxation.
49. Social Services.
50. State Government.
51. Torts.
52. Waters of the State, Ports, and Watercraft.
53. Wills, Trusts, and Administration of Estates.

In Addition, This Publication Includes

Constitution of the United States

Constitution of the State of Georgia

Tables of Comparative Sections

Table of Acts

Index to Local and Special Laws



TABLE OF TITLES

Index to General Laws of Local Application

Short Title Index

General Index



# Table of Contents

## VOLUME 8

### TITLE 10

#### COMMERCE AND TRADE

CHAPTER	PAGE
1. Selling and Other Trade Practices, 10-1-1 through 10-1-915 ....	2
2. Weights and Measures, 10-2-1 through 10-2-54 .....	430
3. Notes and Other Evidences of Debt, 10-3-1 through 10-3-5 ....	449
4. Warehousemen, 10-4-1 through 10-4-215 .....	458
5. Georgia Uniform Securities, 10-5-1 through 10-5-90 .....	520
5A. Commodities and Commodity Contracts and Options, 10-5A-1 through 10-5A-31 .....	624
5B. Deceptive, Fraudulent, or Abusive Telemarketing, 10-5B-1 through 10-5B-8 .....	641
6. Agency, 10-6-1 through 10-6-142 .....	648
6A. Brokerage Relationships in Real Estate Transactions, 10-6A-1 through 10-6A-16 .....	828
7. Suretyship, 10-7-1 through 10-7-57 .....	849
8. Economic Development Council, 10-8-1 through 10-8-5. [Repealed] .....	944
9. Geo. L. Smith II Georgia World Congress Center, 10-9-1 through 10-9-61 .....	945
10. Seed Capital Fund, 10-10-1 through 10-10-7 .....	982
11. Business Records, 10-11-1 through 10-11-3 .....	994
12. Electronic Transactions, 10-12-1 through 10-12-20 .....	995
13. Tobacco Product Manufacturers, 10-13-1 through 10-13-4 .....	1008
13A. Master Settlement Agreement Enhancements, 10-13A-1 through 10-13A-9 .....	1015

# TABLE OF CONTENTS

CHAPTER	PAGE
14. Cemetery and Funeral Services, 10-14-1 through 10-14-30 .....	1026
15. Business Administration, 10-15-1 through 10-15-7 .....	1075
Index to Title 10 .....	1081

## TITLE 10

### COMMERCE AND TRADE

- Chap. 1. Selling and Other Trade Practices, 10-1-1 through 10-1-915.
2. Weights and Measures, 10-2-1 through 10-2-54.
3. Notes and Other Evidences of Debt, 10-3-1 through 10-3-5.
4. Warehousemen, 10-4-1 through 10-4-215.
5. Georgia Uniform Securities, 10-5-1 through 10-5-90.
- 5A. Commodities and Commodity Contracts and Options, 10-5A-1 through 10-5A-31.
- 5B. Deceptive, Fraudulent, or Abusive Telemarketing, 10-5B-1 through 10-5B-8.
6. Agency, 10-6-1 through 10-6-142.
- 6A. Brokerage Relationships in Real Estate Transactions, 10-6A-1 through 10-6A-16.
7. Suretyship, 10-7-1 through 10-7-57.
8. Economic Development Council, 10-8-1 through 10-8-5. [Repealed]
9. Geo. L. Smith II Georgia World Congress Center, 10-9-1 through 10-9-61.
10. Seed-Capital Fund, 10-10-1 through 10-10-7.
11. Business Records, 10-11-1 through 10-11-3.
12. Electronic Transactions, 10-12-1 through 10-12-20.
13. Tobacco Product Manufacturers, 10-13-1 through 10-13-4.
- 13A. Master Settlement Agreement Enhancements, 10-13A-1 through 10-13A-9.
14. Cemetery and Funeral Services, 10-14-1 through 10-14-30.
15. Business Administration, 10-15-1 through 10-15-7.

---

**Cross references.** — Declaration that contracts in general restraint of trade contravene public policy, § 13-8-2. Criminal penalty for theft of trade secrets, § 16-8-13. State

purchasing, § 50-5-50 et seq. Powers and duties of Board of Industry and Trade relating to commerce and trade, § 50-7-7 et seq.



CHAPTER 1

SELLING AND OTHER TRADE PRACTICES

Article 1		Sec.	
Retail Installment and Home Solicitation Sales		10-1-32.	Requirements for retail installment contracts; insurance; delinquency charges, attorneys' fees, and costs; receipts.
Sec.		10-1-33.	Finance charge limitations; assignment of contract.
10-1-1.	Short title.	10-1-33.1.	Advancement of money for satisfaction of lease, lien, or security interest in motor vehicle.
10-1-2.	Definitions; construction.	10-1-34.	Right to prepay debt; credit upon anticipation of payments.
10-1-3.	Requirements for retail installment contracts; time price differential; prepayment; inclusion of construction permit costs.	10-1-35.	Refinancing retail installment contract.
10-1-4.	Requirements for revolving accounts; limitations on time price differential.	10-1-36.	Disposition of motor vehicle repossessed after default; right to recover deficiency.
10-1-5.	Mail order and telephone sales.	10-1-36.1.	Assertion of violation on loan or contract secured by motor vehicle only in individual action.
10-1-6.	Buyer's right to cancel home solicitation sale.	10-1-37.	Waiver of this article void.
10-1-7.	Providing for payment of delinquency charges, attorneys' fees, court costs, and check dishonor fees.	10-1-38.	Criminal and civil penalties.
10-1-8.	Security interest not taken on certain items; application of payments to revolving accounts; written agreements.	10-1-39.	Additional definitions.
10-1-9.	Transfer of retail installment contracts or revolving accounts.	10-1-40.	Unlawful inducement of motor vehicle buyer or lessee under contract to sublease vehicle; unlawful offering of vehicle for hire by sublessee.
10-1-10.	Disposition of goods repossessed after default; right to recover deficiency.	10-1-41.	Actions brought by persons suffering damage against person inducing unlawful sublease of motor vehicle; remedies.
10-1-11.	Second mortgage statute not affected; exemption from loan and interest statutes.	10-1-42.	Advancement of money to satisfy lease, lien, or security interest in motor vehicle; inclusion in gross capitalized cost.
10-1-12.	Prior contracts or accounts not affected.		
10-1-13.	Waiver of this article void.		
10-1-14.	Limitation of actions.		
10-1-15.	Criminal and civil penalties.		
10-1-16.	Inapplicability of this article to educational entities and student loan transactions.		
Article 2		Article 3	
Motor Vehicle Sales Financing		Unsolicited Merchandise	
10-1-30.	Short title.	10-1-50.	Unsolicited merchandise not to be sent; recipient may treat as gift; enjoining payment requests.
10-1-31.	Definitions; construction.	10-1-51.	Unordered merchandise sent after membership terminated

Sec.

deemed gift; enjoining payment requests.

**Article 4****Furnishing Names of Prospective Purchasers**

- 10-1-70. Sales contract must state consideration for furnishing names of prospective purchasers; penalty.

**Article 5****Labeling Remanufactured or Rebuilt Items**

- 10-1-80. "Remanufactured" and "rebuilt" defined.
- 10-1-81. Label required for remanufactured item sold at retail.
- 10-1-82. Label required for rebuilt item sold at retail.
- 10-1-83. Penalty for violation of this article.

**Article 6****Interstate Purchase of Rifles and Shotguns**

- 10-1-100. Out of state purchase of rifles and shotguns by residents.
- 10-1-101. Nonresidents may purchase rifles and shotguns in Georgia.

**Article 7****Sale of Paints and Flaxseed or Linseed Oil**

- 10-1-120. "Paint" defined.
- 10-1-121. Enforcement of article; rules and regulations.
- 10-1-122. Labels on paint containers.
- 10-1-123. Purity of flaxseed or linseed oil; requirement for boiled linseed oil.
- 10-1-124. Flaxseed or linseed oil to be sold under true name; labeling tank cars, tanks, barrels, or vessels of such oil.
- 10-1-125. Possession of improperly labeled article prima-facie evidence of violation.
- 10-1-126. Requirements for timber-marking paint; penalty for violation; enjoining violation.
- 10-1-127. Penalty for sale of deceptively labeled paint.

**Article 8****Sale of Petroleum Products, Brake Fluid, and Antifreeze****PART 1****PETROLEUM PRODUCTS**

Sec.

- 10-1-140. Definitions.
- 10-1-141. "Petroleum products" not to include liquefied petroleum gas.
- 10-1-142. Appointment and duties of state oil chemist.
- 10-1-143. Employment of oil inspectors; expenses of inspectors.
- 10-1-144. Additional expenses; Commissioner of Agriculture to be chief oil inspector.
- 10-1-145. Payment of compensation and expenses.
- 10-1-146. Bonds of state oil chemist and inspectors.
- 10-1-147. Filling vacancies in offices of state oil chemist and inspectors.
- 10-1-148. Right to inspect premises; search warrants; refusal of admission as evidence of violation.
- 10-1-149. Gasoline and kerosene subject to inspection and analysis; manufacturers and wholesalers to file statements.
- 10-1-150. Approval of substitutes or improvers of fuels or other motor fuels.
- 10-1-151. Sale of substandard gasoline and kerosene illegal; confiscation.
- 10-1-151.1. Production and sale of biodiesel fuel.
- 10-1-152. Labeling gasoline and kerosene containers; cleaning kerosene containers of gasoline.
- 10-1-153. Notice and sample of petroleum products shipped into state.
- 10-1-154. How purchaser may obtain analysis of gasoline or illuminating or heating oils.
- 10-1-155. Rules and regulations; specifications for petroleum products; penalty for violations.
- 10-1-156. Enjoining marketing in viola-

Sec.

- 10-1-157. Collecting and testing samples of petroleum products; analyses as evidence.
- 10-1-158. Registration of gasoline dealers.
- 10-1-159. Inspection of self-measuring pumps; sealing accurate pumps; condemnation of inaccurate pumps.
- 10-1-160. Calibration of tank trucks, meters, containers, and other measures; condemnation of inaccurate measures.
- 10-1-161. No fee for gasoline or kerosene inspection.
- 10-1-162. "Person" defined; substitution or misbranding of petroleum products; sale of used or reclaimed lubricants; injunctions; enforcement.
- 10-1-163. Penalty for violating Code Section 10-1-162; individual liability.
- 10-1-164. Requirements for signs advertising retail motor fuel; advertising free gifts or services; enforcement; penalty.
- 10-1-164.1. Self-service gasoline price for drivers holding special disability permit.
- 10-1-165. Civil penalty.
- 10-1-166. Penalty for chemist or inspector having interest in sale or manufacture of gasoline.
- 10-1-167. Penalty for operating condemned self-measuring gasoline pumps.
- 10-1-168. Penalty for operating short-measure gasoline pump.
- 10-1-169. Penalty for violation of this part or regulations.

PART 2

BRAKE FLUID

- 10-1-180. Definitions.
- 10-1-181. When brake fluid deemed adulterated.
- 10-1-182. When brake fluid deemed misbranded.
- 10-1-183. Sale of misbranded or adul-

Sec.

- 10-1-184. Establishing minimum brake fluid standard and specifications.
- 10-1-185. Inspection of brake fluid samples; annual license to sell.
- 10-1-186. Enforcement; right of inspection; "stop-sale" orders; condemnation of adulterated or misbranded brake fluid.
- 10-1-187. Rules and regulations; powers of Commissioner's agents; list of inspected and licensed brands; advertising of licensing.
- 10-1-188. Certified analyses as evidence.
- 10-1-189. Penalty for violations; instituting prosecutions.

PART 3

ANTIFREEZE

- 10-1-200. Definitions.
- 10-1-201. When antifreeze deemed adulterated.
- 10-1-202. When antifreeze deemed misbranded.
- 10-1-203. Inspection of antifreeze samples; annual license to sell.
- 10-1-204. Enforcement; right of inspection; "stop-sale" orders.
- 10-1-205. Seizure and condemnation of noncomplying antifreeze.
- 10-1-206. List of inspected and licensed brands; advertising references to licensing.
- 10-1-207. Requiring statement of formula or contents; confidentiality of information furnished.
- 10-1-208. Certified analyses as evidence.
- 10-1-208.1. Recycled, reclaimed, or reprocessed antifreeze; exemption; regulations; violations.
- 10-1-209. Promulgation of rules and regulations.
- 10-1-210. Enjoining violations.
- 10-1-211. Penalty for violation of part or rules and regulations.

Article 9

Gasoline Marketing Practices

- 10-1-230. Short title.



Sec.	
10-1-231.	Legislative findings.
10-1-232.	Definitions.
10-1-233.	Acts of distributor violating article.
10-1-234.	Selling controlled product to another distributor for retail sale; selling to other dealers at distress prices.
10-1-234.1.	Suppliers may not inhibit gasoline distributors from being blenders.
10-1-235.	Action by dealer against distributor for violation of article authorized; nature of relief; attorneys' fees.
10-1-236.	Action by dealer against distributor for violation of article — Defense of termination of agreement [Repealed].
10-1-237.	Action by dealer against distributor for violation of article; notice of termination prior to expiration; when premises must be vacated.
10-1-238.	Action by distributor against dealer for breach of agreement; attorneys' fees.
10-1-239.	Limitation of actions.
10-1-240.	Marketing agreements subject to article.
10-1-241.	Sale of real property not affected.

#### Article 9A

##### Below Cost Sales

10-1-250.	Short title.
10-1-251.	Definitions.
10-1-252.	Reasonable transfer price.
10-1-253.	Computation of cost.
10-1-254.	Prohibited acts in sale of octane or cetane fuels; burden of rebutting prima-facie case.
10-1-255.	Civil actions; effect of written tender of settlement; limitation of actions.
10-1-256.	Declaration of legislative intent in construing Code Section 10-1-254.

#### Article 10

##### Sale and Storage of Liquefied Petroleum Gas

10-1-260.	Short title.
-----------	--------------

Sec.	
10-1-261.	Legislative finding.
10-1-262.	"Liquefied petroleum gas" defined.
10-1-263.	State fire marshal to enforce article.
10-1-264.	Assistants and employees of state fire marshal.
10-1-265.	Rules and regulations setting standards for liquefied petroleum gas equipment.
10-1-266.	Issuance of licenses or permits; annual fees.
10-1-267.	Insurance or bond requirements for license or permit holders.
10-1-268.	Minimum storage facilities required.
10-1-269.	Suspension or revocation of license or imposition of penalty by state fire marshal.
10-1-270.	Conflicting local ordinances or regulations prohibited.
10-1-271.	Reciprocal agreements with other states.
10-1-272.	Penalty for violating article or rules and regulations.

#### Article 11

##### Bidding by Motion Picture Exhibitors

10-1-290.	Short title.
10-1-291.	Legislative intent.
10-1-292.	Definitions.
10-1-293.	Blind bidding prohibited; trade screening required; notice of screening; waivers void.
10-1-294.	Enforcement by civil action; damages; attorneys' fees; injunctions.

#### Article 12

##### Ticket Scalping

10-1-310 and 10-1-311.	[Repealed].
------------------------	-------------

#### Article 13

##### Book, Periodical, or Newspaper Tie-in Sales

10-1-330.	Refusal to sell books, periodicals, or magazines to dealers refusing others not ordered.
10-1-331.	Penalty.

Article 14		Sec.	
Secondary Metals Recyclers		10-1-381.	Final order; collection of judgment; disbursement of funds, consumer preventive education plan.
Sec.		10-1-382.	Collection fees; reports.
10-1-350.	Definitions.		
10-1-351.	Record of transactions.		
10-1-352.	Inspections by law enforcement officers.		
10-1-352.1.	Payment by recyclers for copper property, catalytic converters, or aluminum property.		
10-1-353.	Hold on regulated metal property believed to be stolen; notice; release of hold.		
10-1-354.	Contesting identification or ownership of regulated metal property; action to recover property.		
10-1-355.	Purchases of regulated metal property exempted from application of article.		
10-1-356.	Prohibited acts.		
10-1-357.	Penalties for violations.		
10-1-358.	Superseding nature of this article.		
Article 14A			
Flea Market Vendors' Record Keeping			
10-1-360.	Definitions; records; penalties; applicability.		
10-1-361.	Exemptions from article.		
10-1-362.	Local ordinances or regulations.		
Article 15			
Deceptive or Unfair Practices			
PART 1			
UNIFORM DECEPTIVE TRADE PRACTICES ACT			
10-1-370.	Short title.		
10-1-371.	Definitions.		
10-1-372.	When trade practices are deceptive; common-law and other remedies unaffected.		
10-1-373.	Enjoining deceptive trade practices; costs and attorney's fees; relief cumulative.		
10-1-374.	Exemptions from part.		
10-1-375.	Uniform construction of part.		
PART 1A			
ADMINISTRATIVE RESOLUTION			
10-1-380.	Administrator defined.		
		10-1-381.	Final order; collection of judgment; disbursement of funds, consumer preventive education plan.
		10-1-382.	Collection fees; reports.
PART 2			
FAIR BUSINESS PRACTICES ACT			
		10-1-390.	Short title.
		10-1-391.	Purpose and construction of part.
		10-1-392.	Definitions; when intentional violation occurs.
		10-1-393.	Unfair or deceptive practices in consumer transactions unlawful; examples.
		10-1-393.1.	Office supply transactions; solicitations for telephone directory listings.
		10-1-393.2.	Requirements for health spas.
		10-1-393.3.	Prohibited use of purchaser's credit card information by merchant.
		10-1-393.4.	Prohibited pricing practices during state of emergency.
		10-1-393.5.	Prohibited telemarketing, Internet activities, or home repair.
		10-1-393.6.	Unlawful telemarketing transactions; criminal penalty.
		10-1-393.7.	Solicitation during final illness; penalty.
		10-1-393.8.	Protection from disclosure of an individual's social security number.
		10-1-393.9.	Registration of private child support collectors; surety bond or alternative.
		10-1-393.10.	Filing of contracts for collection; requirements for contracts; role of collector; cancellation of contract; forwarding of payments.
		10-1-394.	Adoption of federal rules prohibiting unfair or deceptive practices; application of Chapter 13 of Title 50.
		10-1-395.	Appointment and duties of administrator; Consumer Advisory Board; relations with other regulatory agencies.
		10-1-396.	Acts exempt from part.
		10-1-397.	Authority of administrator to



Sec.	
	issue cease and desist order or impose civil penalty; judicial relief; receivers.
10-1-397.1.	Initiation or intervention by administrator.
10-1-398.	Stay of cease and desist order; hearing.
10-1-398.1.	Appeal from order of administrator.
10-1-399.	Civil or equitable remedies by individuals.
10-1-400.	Limitation on recovery in case of bona fide error.
10-1-401.	Limitation of actions; right to set off damages or penalties not limited.
10-1-402.	Assurances of voluntary compliance.
10-1-403.	Investigations; demands for evidence.
10-1-404.	Administrator's subpoena and hearing powers; procedural rules; court enforcement orders; self-incrimination; confidentiality.
10-1-405.	Civil penalties; individual liability.
10-1-406.	Duty of prosecuting attorneys.
10-1-407.	Part not exclusive.

## PART 3

MULTILEVEL DISTRIBUTION COMPANIES;  
SALE OF BUSINESS OPPORTUNITIES

10-1-410.	Definitions.
10-1-411.	Prohibited activities by multi-level distribution company or participant in marketing program; disclosure statement.
10-1-412.	When bond or trust account required; escrow account required.
10-1-413.	Required disclosures; updating; form of notice.
10-1-414.	Prohibited acts by sellers.
10-1-415.	Contracts to be in writing; delivery of copy; required provisions; cancellation rights.
10-1-416.	Appointment of Secretary of State as agent for service of process.
10-1-417.	Purchaser and participant

Sec.	
	remedies; violations as unfair or deceptive acts; penalty.

## PART 4

## FALSE ADVERTISING

10-1-420.	Advertising without intending to sell on stated terms; disclaimers as to availability.
10-1-421.	False or fraudulent statements in advertising prohibited; broadcaster or publisher acting in good faith excepted; penalties.
10-1-422.	Degree to be designated in advertisements using "Doctor" or "Dr."; penalty for violation.
10-1-423.	Enjoining prohibited advertising.
10-1-424.	Misrepresenting nature of business.
10-1-425.	Misrepresenting ownership in advertising liquidation, auction, or going-out-of-business sale prohibited.
10-1-426.	Penalty for violations of Code Sections 10-1-424 and 10-1-425; broadcasters and publishers acting in good faith excepted.
10-1-427.	False advertising of legal services; exemption for broadcasters or publishers acting in good faith; complaints; violation of cease and desist order.

## PART 5

## LIMITED EDITION ART REPRODUCTIONS

10-1-430.	Definitions.
10-1-431.	Advertising and sale of multiples.
10-1-432.	Descriptive information.
10-1-433.	Warranties.
10-1-434.	Remedies not exclusive.
10-1-435.	Civil remedies for violations.
10-1-436.	Civil penalties; injunctions.
10-1-437.	Exemptions.

## PART 6

## DISASTER RELATED VIOLATIONS

10-1-438.	Definitions; disaster related violations of Part 1, 2, or 4 of
-----------	----------------------------------------------------------------

Sec.

this article; civil penalties; cause of action for damages and attorney's fees.

**Article 16****Trademarks, Service Marks, and Trade Names****PART 1****REGISTRATION AND USE OF TRADEMARKS AND SERVICE MARKS**

- 10-1-440. Definitions; when trademark or service mark used in state.
- 10-1-441. Registration of marks — When marks ineligible.
- 10-1-442. Registration of marks — Application; fee.
- 10-1-443. Registration of marks — Classes of goods and services for purposes of registration; application limited to one class.
- 10-1-444. Registration of marks — Certificate; use as evidence.
- 10-1-445. Registration of marks — Duration; renewal; fee.
- 10-1-446. Assignment of mark and registration; recordation; fee; new certificate.
- 10-1-447. Record of registrations and renewals to be kept by Secretary of State.
- 10-1-448. Cancellation of registrations.
- 10-1-449. Damages for fraud or false representation in registering mark.
- 10-1-450. Civil action for infringement of registered mark.
- 10-1-451. Injunctions against infringement; recovery of profits and damages; destruction or disposal of counterfeit trademarks; seizure.
- 10-1-452. Common-law rights in marks not affected.
- 10-1-453. Unauthorized and deceitful use of name or seal a misdemeanor.
- 10-1-454. Forged or counterfeited trademarks, service marks, or copyrighted or registered designs; unauthorized reproductions.

**PART 2****NAMES AND EMBLEMS OF FRATERNAL, CHARITABLE, AND OTHER ORGANIZATIONS**

Sec.

- 10-1-470. Imitation of name or emblem prohibited; priority of right to use name.
- 10-1-471. Injunction against infringement.
- 10-1-472. Unauthorized use of emblem or name or false claim of membership a misdemeanor.

**PART 3****REGISTRATION OF BUSINESSES USING TRADE NAMES**

- 10-1-490. Business using trade, partnership, or other name not showing ownership to file registration statement; indexing; fee.
- 10-1-491. Contracts of unregistered businesses valid; costs to be paid if name not registered.
- 10-1-492. Exemption of corporations, limited or professional partnerships, or limited liability companies.
- 10-1-493. Penalty for failing to register.

**Article 17****Rights in Works of Fine Art**

- 10-1-510. Conveyance of rights in works of fine art; statement of customer's right or license authorizing duplication; liability.

**Article 17A****Consignment of Art**

- 10-1-520. Short title.
- 10-1-521. Definitions.
- 10-1-522. Delivery of artwork to dealer for exhibition or sale in exchange for compensation constituting consignment.
- 10-1-523. Written contract required for consignment of work of art; violation by art dealer rendering artist's obligation voidable.
- 10-1-524. Effects of consignment.
- 10-1-525. Art received as consignment to remain trust property; not subject or subordinate to

Sec.	
	claims, liens, or security interests.
10-1-526.	Contractual waiver of liability for works of art consigned to cooperative.
10-1-527.	Use or display of work of art or photograph thereof.
10-1-528.	Applicability to contracts executed prior to July 1, 1995.
10-1-529.	Liability for violations by art dealers.

**Article 17B****Georgia Museum Property**

10-1-529.1.	Short title.
10-1-529.2.	Definitions.
10-1-529.3.	Accuracy of museum or archive records.
10-1-529.4.	Abandonment of property loaned to a museum or archives repository; museum acquisition of abandoned property.
10-1-529.5.	Acquisition of undocumented property.
10-1-529.6.	Application of conservation measures to property on loan to museum or archives.
10-1-529.7.	American Indian human remains and burial objects excluded.

**Article 18****Auctioneers**

10-1-530.	Liability for sale of stolen horse or mule.
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**Article 19****Sunday Motion Picture Shows and Athletic Events**

10-1-550 through 10-1-555. [Repealed].

**Article 20****Common Day of Rest**

10-1-570.	Short title.
10-1-571.	Definitions.
10-1-572.	Legislative intent.
10-1-573.	Employees to be given benefit of day of rest.
10-1-574.	General exemptions from article.

Sec.	
10-1-575.	Charitable or religious activities exempt.
10-1-576.	Governmental departments, agencies, and employees exempt.

**Article 21****Buying Services**

10-1-590.	Short title.
10-1-591.	Definitions.
10-1-592.	Buying services and clubs to obtain licenses.
10-1-593.	Conditions of licensure; bonds.
10-1-594.	Application for license; renewal; fee.
10-1-595.	Revocation, suspension, and nonrenewal of licenses; grounds; notice and hearing.
10-1-596.	Contracts of membership; approval of form by administrator; effect of noncompliance.
10-1-597.	Contracts of membership; right of cancellation; how exercised; entitlement to refund; right not waivable.
10-1-598.	Contracts of membership; requirements; notice; effect of noncompliance.
10-1-599.	Contracts of membership; authorized duration; notice thereof.
10-1-600.	Records to be kept; inspection thereof.
10-1-601.	Rules and regulations; orders.
10-1-602.	Application of "Georgia Administrative Procedure Act" and "Fair Business Practices Act of 1975."
10-1-603.	Injunctions.
10-1-604.	Civil penalty for violation; administrative hearing and review; judicial review; judgment on final order; remedy concurrent, alternative, and cumulative.
10-1-605.	Penalty.

**Article 22****Motor Vehicle Franchise Practices****PART 1****GENERAL CONSIDERATION**

10-1-620.	Short title.
-----------	--------------

Sec.	
10-1-621.	Legislative findings.
10-1-622.	Definitions.
10-1-623.	Action for violation of article; punitive damages; equitable relief; standing; venue.
10-1-624.	Persons subject to article; written instruments violating article void; franchisor's use of subsidiary to accomplish illegal act.
10-1-625.	Statute of limitations.
10-1-626.	Remedies not exclusive.
10-1-627.	Waiver of article void; voluntary releases valid.
10-1-628.	Attorney's fees in action to enforce article.

## PART 2

## MOTOR VEHICLE DEALER'S DAY IN COURT

10-1-630.	Short title.
10-1-631.	Practices violative of existing law.

## PART 3

## MOTOR VEHICLE WARRANTY PRACTICES

10-1-640.	Short title.
10-1-641.	Dealer's predelivery preparation, warranty service, and recall work obligations to be provided in writing.
10-1-642.	Risk of loss for vehicle in transit.
10-1-643.	Payment of dealer's attorney's fees by manufacturer, distributor, or warrantor.
10-1-644.	Exemptions from part.
10-1-645.	Uniform warranty reimbursement policy amongst dealers.

## PART 4

## MOTOR VEHICLE FRANCHISE CONTINUATION AND SUCCESSION

10-1-650.	Short title.
10-1-651.	Termination of franchise; grounds; notice; dealer costs reimbursed by franchisor; applicability to distributors.
10-1-652.	Succession to franchise upon death of franchisee.
10-1-653.	Sale of dealership franchise; notice to franchisor.

Sec.	
10-1-654.	Applicability of part [Repealed].

## PART 5

## MOTOR VEHICLE FAIR PRACTICES

10-1-660.	Short title.
10-1-661.	Delivery of motor vehicles; modification of facilities; transfer of sales contracts; warranties.
10-1-662.	Unlawful activities by franchisors.
10-1-663.	Advertising campaigns; change in capital structure or ownership; manner of distribution; increased prices; discrimination; unreasonable restrictions or changes.
10-1-663.1.	Right of first refusal.
10-1-664.	Establishing a new dealership or relocating an existing dealership in the market area of an existing dealership; notice; petitions to enjoin or prohibit.
10-1-664.1.	Restrictions on the ownership, operation, or control of dealerships by manufacturers and franchisors; competing unfairly with new dealers.

## PART 6

## ENFORCEMENT OF ARTICLE BY COMMISSIONER OF MOTOR VEHICLE SAFETY

10-1-665.	"Commissioner" and "department" defined.
10-1-666.	Enforcement of article by state revenue commissioner.
10-1-667.	Administrative review of alleged violation of this article by dealer, distributor, or manufacturer.
10-1-668.	Annual dealer registration and appropriation to department fund.

## PART 7

## IMPAIRMENT OF OBLIGATIONS

10-1-670.	Application to franchise agreements.
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**Article 22A****Marine Manufacturers**

Sec.

- 10-1-675. Legislative findings.  
 10-1-676. Definitions.  
 10-1-677. Termination of contractual relationship between dealer and manufacturer.  
 10-1-678. Application.

**Article 22B****Recreational Vehicle Dealers**

- 10-1-679. Definitions; considerations in determining "good cause".  
 10-1-679.1. Legislative purposes and policies.  
 10-1-679.2. Designation of area of sales responsibility assigned to a recreational vehicle dealer; change in assignment.  
 10-1-679.3. Published prices, charges, and terms of sale.  
 10-1-679.4. Termination or change of dealership agreements; burden of proving good cause.  
 10-1-679.5. Notice required for termination of or substantial change to dealership agreements.  
 10-1-679.6. Repurchase of inventory, equipment tools, accessories, and signage on termination of the dealership contract; reimbursement for accessories and parts returned.  
 10-1-679.7. Unlawful coercive practices.  
 10-1-679.8. Sale or transfer of ownership or change in management of dealerships; unlawful practices; required notices.  
 10-1-679.9. Requirement for dealers' opportunity to designate successors; requirement to honor succession; grounds for objection to succession.  
 10-1-679.10. Required specification of obligation for warranty service; compensation; time allowances; reimbursement for warranty parts; denial of claims; violations; damage to new recreational vehicles delivered to dealers.  
 10-1-679.11. Remedy for violations.

Sec.

- 10-1-679.12. Violations deemed irreparable injuries for the purpose of determining whether a temporary injunction should be issued.  
 10-1-679.13. Requirements for new dealerships.  
 10-1-679.14. Franchise agreement required for the sale or distribution of recreational vehicles; exceptions; enforcement.  
 10-1-679.15. Violations.

**Article 23****Lease-Purchase Agreements**

- 10-1-680. Short title.  
 10-1-681. Definitions.  
 10-1-682. Requirements for written statement of agreement.  
 10-1-683. Advertisements.  
 10-1-684. Prohibited agreement provisions.  
 10-1-685. Purchase of insurance; early termination or return of items; fees.  
 10-1-686. Right to reinstatement of agreement by lessee failing to make timely payments; fees; substitute items.  
 10-1-687. Penalties; grace period for compliance.  
 10-1-688. Limitation of actions.  
 10-1-689. Example of form.

**Article 24****Wholesale Distribution by Out-of-State Principal**

- 10-1-700. Definitions.  
 10-1-701. Contract for services in state [Repealed].  
 10-1-702. Rights of sales representative; frivolous actions.  
 10-1-703. Waiver of law prohibited.  
 10-1-704. Jurisdiction of court.

**Article 25****Retail Petroleum Product Dealers**

- 10-1-720. Definitions.  
 10-1-721. Successor to deceased retail dealer.



**Article 26**

**Multiline Heavy Equipment Dealers**

Sec.

10-1-730.

Short title.

10-1-731.

Definitions.

10-1-732.

Unilateral amendment, cancellation, termination, refusal to renew, or causing resignation from agreement for good cause.

10-1-733.

Notice of intent to amend, terminate, cancel, or decline to renew agreement; time within which dealer may rectify condition; contract for transfer of business; immediate termination, amendment, cancellation or expiration.

10-1-734.

Consent to transfer of dealer's business; notice of withholding of consent; assumption of transferor's obligations and rights; burden of proving justification for denying consent.

10-1-735.

Mailing of notice.

10-1-736.

When change in dealer's management or personnel may be required or prohibited.

10-1-737.

Article deemed incorporated in agreements subject to it; waiver of compliance; good faith settlements of disputes.

10-1-738.

Good faith, fair dealing, and reasonableness requirements.

10-1-739.

Venue; equitable relief; recovery of losses and damages for violation of Code Sections 10-1-732 and 10-1-734; when supplier may not cancel, terminate, or refuse to renew agreement.

10-1-740.

Applicability of article.

**Article 27**

**Trade Secrets**

10-1-760.

Short title.

10-1-761.

Definitions.

10-1-762.

Injunctive relief.

10-1-763.

Recovery of damages.

10-1-764.

Award of attorneys' fees.

Sec.

10-1-765.

Protection of trade secret during action.

10-1-766.

Limitation of action.

10-1-767.

Applicability of article.

**Article 28**

**Georgia Lemon Law**

10-1-780.

Short title.

10-1-781.

Legislative intent.

10-1-782.

Definitions.

10-1-783.

Provision of owner's manual and notice of rights; fully itemized and legible repair order; copies of reports.

10-1-784.

Reasonable attempts to correct nonconformity; option to repurchase or replace vehicle.

10-1-785.

Compelled replacement or repurchase through arbitration; manufacturer's informal dispute settlement mechanism; revocation of mechanism.

10-1-786.

Request for arbitration; determination of eligibility; notifications; timing; requirements for decision.

10-1-787.

Finality of arbitrator's decision; appeals by manufacturers; time for compliance with arbitrator's decision.

10-1-788.

Exhaustion of remedies under article required.

10-1-789.

Establishment of motor vehicle arbitration panel; compensation; conduct; liability.

10-1-790.

Requirements for transfer of reacquired vehicle.

10-1-791.

Consumer fees to implement provisions of article; enforcement.

10-1-792.

Other rights and remedies.

10-1-793.

Violations constitute unfair and deceptive act or practice; cumulative effect.

10-1-794.

Staff for administration.

10-1-795.

Promulgation of rules and regulations.

10-1-796.

Severability.

10-1-797.

Consumer cannot waive rights.

**Article 29**

**Farm Tractor Warranty Act**

10-1-810.

Short title.

Sec.	
10-1-811.	Definitions.
10-1-812.	Written notice of warranty supplied by manufacturer and presented by dealer to consumer at time of purchase.
10-1-813.	Opportunity to make repairs in order to conform to express written warranties.
10-1-814.	Replacement of or refund for nonconforming farm tractor; limitation of liability.
10-1-815.	Extension of period for reporting nonconformity and of 30 day repair period.
10-1-816.	Informal dispute settlement procedures; remedy for violation.
10-1-817.	Affirmative defenses against claims.
10-1-818.	Statute of limitations.
10-1-819.	Other remedies and rights not limited by article.

### Article 30

#### Beauty Pageants

10-1-830.	Definitions.
10-1-831.	Required information from operators.
10-1-832.	Bond requirements.
10-1-833.	Exemptions from bond requirements.
10-1-834.	Cancellation or default; refund of entrants' fees.
10-1-835.	Civil violation; remedies.
10-1-836.	Criminal violation.
10-1-837.	Escrow account.
10-1-838.	Liability for failure to post bond or establish escrow account.

### Article 31

#### Unfair or Deceptive Practices Toward the Elderly

10-1-850.	Definitions.
10-1-851.	Additional civil penalty for violation of Article 15, 17, or 21 of this chapter against elder or disabled persons.
10-1-852.	Determination to impose civil penalty and amount thereof.
10-1-853.	Cause of action for damage or

Sec.	
	injury from offense or violation under this article.
10-1-854.	State-wide educational initiatives as to consumer crimes against elder and disabled persons, applicable laws, and remedies available.
10-1-855.	Referral procedures to provide intervention and assistance.
10-1-856.	Construction with Part 2 of Article 15 of this chapter; confidentiality.
10-1-857.	Complaints, inquiries, investigations, and corrective action.

### Article 32

#### Assistive Technology Warranties

10-1-870.	Short title.
10-1-871.	Definitions.
10-1-872.	Express written warranties for assistive technology devices.
10-1-873.	Repair of nonconforming assistive technology devices; refund or replacement of devices; sale or lease of returned device.
10-1-874.	Thirty-day return privilege.
10-1-875.	Rights and remedies under other laws or contracts; waivers void; actions for damages.

### Article 33

#### Motorized Wheelchair Warranties

10-1-890.	Short title.
10-1-891.	Definitions.
10-1-892.	Express written warranties for motorized wheelchairs; failure to furnish warranty.
10-1-893.	Repair of nonconforming motorized wheelchairs; refund or replacement after reasonable attempt to repair; resale or lease of returned motorized wheelchair.
10-1-894.	Other rights or remedies under other law or contract; waiver void; action for damages.

### Article 34

#### Identity Theft

10-1-910.	Legislative findings.
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Sec.		Sec.	
10-1-911.	Definitions.	10-1-914.	Consumer requested security freeze on credit report; timing; notifications; temporary lifting of freeze; application; fees.
10-1-912.	Notification required upon breach of security regarding personal information.		
10-1-913.	Definitions for this Code section and Code Section 10-1-914.	10-1-915.	Notice of right to security freeze.

**Law reviews.** — For annual survey article discussing developments in commercial law, see 52 Mercer L. Rev. 143 (2000).

For note on 1999 amendments and enactments of Code sections in this chapter, see 16 Ga. St. U.L. Rev. 12 (1999).

RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Violation of the Truth-In-Lending Act and Regulation Z, 73 POF3d 275.

in cause of action under state unfair or deceptive trade practices law, 54 ALR5th 631.

**ALR.** — Constitutional right to jury trial

ARTICLE 1

RETAIL INSTALLMENT AND HOME SOLICITATION SALES

**Cross references.** — Criminal penalty for offense of improper solicitation of money, § 16-9-52. Criminal penalty for false statements by telephone solicitors, § 16-9-54.

**Law reviews.** — For article discussing federal truth-in-lending provisions and their relation to state laws, see 6 Ga. St. B.J. 19 (1969). For article, “Acceleration Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-In-Lending Act,” see 27 Mercer L. Rev. 969 (1976). For article discussing methods of computation of fi-

nance charges in Georgia consumer credit contracts, see 30 Mercer L. Rev. 281 (1978). For annual survey of commercial law, see 35 Mercer L. Rev. 53 (1983). For article, “The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement,” see 24 Ga. St. U.L. Rev. 663 (2008).

For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).

JUDICIAL DECISIONS

**Construction.** — Ga. L. 1967, p. 659, § 1 et seq. must be strictly construed. Busby v. Sea Island Bank, 151 Ga. App. 412, 260 S.E.2d 485 (1979).

**Decisions are sui generis.** — Decisions under Ga. L. 1967, p. 659, § 1 et seq. are to be treated sui generis. Bell v. Loosier of Albany, Inc., 140 Ga. App. 393, 231 S.E.2d 142 (1976).

**Ga. L. 1967, p. 659, § 1 et seq. and Ga. L. 1955, p. 431, § 1 et seq. are different in their purpose and effect, and the provisions of one are not controlling in the interpretation**

of the other. Liberty Loan Corp. v. Childs, 140 Ga. App. 473, 231 S.E.2d 352 (1976), cert. dismissed, 239 Ga. 220, 236 S.E.2d 373 (1977).

**Decisions under this article as evidence of intent of Ch. 3, T. 7.** — Judicial construction of O.C.G.A. Art. 1, Ch. 1, T. 10 is weak evidence of legislative intent in enacting the Georgia Industrial Loan Act, O.C.G.A. § 7-3-1 et seq. Ford v. Termplan, Inc., 528 F. Supp. 1016 (N.D. Ga. 1981).

**Decisions under §§ 7-3-1 through 7-3-29 inapplicable.** — Decisions rendered under



Ga. L. 1955, p. 431, § 1 are not applicable to Ga. L. 1967, p. 659, § 1 et seq. *Bell v. Loosier of Albany, Inc.*, 140 Ga. App. 393, 231 S.E.2d 142 (1976).

**Sales of motor vehicles.** — Ga. L. 1967, p. 659, § 1 et seq. does not apply to the sale of a motor vehicle. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973), overruled on other grounds, *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977).

**Conflict with UCC as to security agreement.** — Parties may contract to create a security interest which will then be governed by provisions of Ga. L. 1962, p. 156, § 1 unless those provisions conflict with the specific terms in Ga. L. 1967, p. 659, § 1 et seq. *Brown v. Jenkins*, 135 Ga. App. 694, 218 S.E.2d 690 (1975).

**Assignee or transferee of a retail install-**

**ment contract** is not given holder in due course status under Ga. L. 1967, p. 659, § 1 et seq. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), commented on in 8 Ga. St. B.J. 400 (1972).

**Assignee or transferee takes contract subject to defenses against assignor.** — Under simple contract law, an assignee or transferee takes a retail installment contract subject to any defenses that could be asserted against the assignor. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), commented on in 8 Ga. St. B.J. 400 (1972).

**Cited in** *Smith v. Singleton*, 124 Ga. App. 394, 184 S.E.2d 26 (1971); *Pike v. Universal C.I.T. Credit Corp.*, 125 Ga. App. 83, 186 S.E.2d 482 (1971); *Grimes v. Community Loan & Inv. Corp.*, 130 Ga. App. 8, 202 S.E.2d 265 (1973).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 35, 86, 87.

**ALR.** — Quantum, degree, or weight of evidence to sustain usury charge, 51 ALR2d 1087.

Scope and exceptions of state deceptive trade practice and consumer protection acts, 85 ALR3d 399.

Coverage of insurance transactions under

state consumer protection statutes, 77 ALR4th 991.

What constitutes Truth in Lending Act violation which “was not intentional and resulted from bona fide error notwithstanding maintenance of procedures reasonably adapted to avoid any such error” within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 ALR Fed. 193.

### 10-1-1. Short title.

This article shall be known and may be cited as “The Retail Installment and Home Solicitation Sales Act.” (Ga. L. 1967, p. 659, § 1.)

### 10-1-2. Definitions; construction.

(a) As used in this article, the term:

(1) “Cash sale price” means the price for which the seller would have sold or furnished to the buyer and the buyer would have bought or obtained from the seller the goods or services which are the subject matter of the retail installment transaction if such sale had been a sale for cash. The cash sale price may include any applicable taxes and charges for delivery, installation, servicing, repairs, alterations, or improvements.

(2) “Goods” means all personalty when purchased primarily for personal, family, or household use, including certificates or coupons issued by a retail seller exchangeable for personalty or services, but not

including motor vehicles. The term “goods” includes such personalty which is furnished or used at the time of sale or subsequently in the modernization, rehabilitation, repair, alteration, improvement, or construction of real property so as to become a part thereof, whether or not severable therefrom.

(3) “Holder” of a retail installment contract means the retail seller of the goods or services under the contract or, if the contract is purchased by a sales finance company or other assignee, the sales finance company or other assignee at the time of the determination.

(4) “Home solicitation sale” means a consumer credit sale in which the purchase price is payable in installments and the seller or his representative solicits the sale in person and the buyer’s agreement or offer to purchase is made at a home other than that of the person soliciting the sale and the contract is signed at the time of such solicitation.

(5) “Motor vehicle” means any device or vehicle operated over the public highways and streets of this state and propelled by other than muscular power but does not include traction engines, road rollers, implements of husbandry and other agricultural equipment, and such vehicles as run only upon a track.

(6) “Official fees” means the fees prescribed by law for filing, recording, or otherwise perfecting or releasing or satisfying any title or lien retained or taken by a seller in connection with a retail installment transaction.

(7) “Person” means an individual, partnership, corporation, association, and any other group however organized.

(8) “Retail buyer” or “buyer” means a person who buys goods or obtains services from a retail seller in a retail installment transaction and not principally for the purpose of resale.

(9) “Retail installment contract” or “contract” means an instrument or instruments reflecting one or more retail installment transactions entered into in this state pursuant to which goods or services may be paid for in installments. The term includes a series of transactions made pursuant to an instrument or instruments providing for the addition of the amount financed plus the time price differential for the current sale to an existing balance. It does not include a revolving account or an instrument reflecting a sale pursuant thereto.

(10) “Retail installment transaction” or “transaction” means any transaction to sell or furnish or the sale of or the furnishing of goods or services evidenced by a retail installment contract or a revolving account.

(11) “Retail seller” or “seller” means a person regularly engaged in,

and whose business consists to a substantial extent of, selling goods or services to a retail buyer. The term also includes a seller who regularly grants credit to retail buyers for the purpose of purchasing goods or services from any other person pursuant to a retail installment contract or a revolving charge account.

(12) “Revolving account” or “account” means an instrument or instruments prescribing the terms of retail installment transactions which may be made thereafter from time to time pursuant thereto, under which the buyer’s total unpaid balance, whenever incurred, is payable in installments over a period of time and under the terms of which a time price differential or finance charge is to be computed in relation to the buyer’s balance from time to time.

(13) “Sales finance company” means a person engaged in the business of purchasing retail installment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, or industrial loan company, if so engaged. The term does not include the pledge of an aggregate number of such contracts to secure a bona fide loan thereon.

(14) “Services” means:

(A) Work, labor, or other personal services furnished for personal, family, or household use, whether or not furnished in connection with the delivery, installation, servicing, repair, or improvement of goods, and includes such work, labor, or personal services furnished in connection with the modernization, rehabilitation, repair, alteration, improvement, or construction upon or in connection with real property;

(B) Privileges with respect to transportation, hotel and restaurant accommodations, education, entertainment, recreation, and the like; and

(C) Insurance provided in connection with a retail installment transaction.

(15) “Time price differential” means the amount, however denominated or expressed, paid or payable for the privilege of purchasing goods or services to be paid for by the buyer in installments; it does not include the amounts, if any, charged for insurance premiums, delinquency charges, attorneys’ fees, court costs, or official fees.

(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to this article. (Ga. L. 1967, p. 659, § 2; Ga. L. 1968, p. 1088, §§ 1, 2; Ga. L. 1976, p. 721, § 1; Ga. L. 1978, p. 1455, § 1; Ga. L. 1982, p. 3, § 10.)



## JUDICIAL DECISIONS

**Motor vehicles.** — Ga. L. 1967, p. 659, § 1 et seq. does not apply to the sale of a motor vehicle in view of paragraph (a)(2) of Ga. L. 1967, p. 659, § 2. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973), overruled on other grounds, *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977).

**Mobile homes.** — A mobile home falls within the definition of a “motor vehicle”. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973), overruled on other grounds, *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977).

**Farm equipment.** — O.C.G.A. Art. 1, Ch. 1, T. 10 is not applicable to farm equipment such as a tobacco combine. *Rigdon v. Walker Sales & Serv., Inc.*, 161 Ga. App. 459, 288 S.E.2d 711 (1982).

**Commercial accounts.** — Charges of 1½ percent on the unpaid balance on a commercial account were not authorized by the Retail Installment and Home Solicitation

Sales Act, O.C.G.A. § 10-1-1 et seq., even though the agreement involved was in the form set forth in the Retail Installment and Home Solicitation Sales Act because that statute applies only to purchases for personal, family, or household use. *Gold Kist, Inc. v. McNair*, 166 Ga. App. 66, 303 S.E.2d 290 (1983).

**Obligation arising out of farm supplies supplied to a farmer in the farmer’s business** is clearly a commercial account and is not a retail installment transaction. *McNair v. Gold Kist, Inc.*, 166 Ga. App. 782, 305 S.E.2d 478 (1983).

**Cited in** *Martin v. Glenn’s Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972); *Welmaker v. W.T. Grant Co.*, 365 F. Supp. 531 (N.D. Ga. 1972); *Brown v. Jenkins*, 135 Ga. App. 694, 218 S.E.2d 690 (1975); *Farmers Mut. Exch. of Wrens, Inc. v. Rabun*, 145 Ga. App. 798, 245 S.E.2d 52 (1978); *Vikowsky v. Savannah Appliance Serv. Corp.*, 179 Ga. App. 135, 345 S.E.2d 621 (1986).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 16.

**ALR.** — Constitutionality, construction, and application of statute respecting sale,

assignment, or transfer of retail installment contracts, 10 ALR2d 447.

### 10-1-3. Requirements for retail installment contracts; time price differential; prepayment; inclusion of construction permit costs.

(a) Every retail installment contract shall be in writing and shall be completed as to all essential provisions prior to the signing thereof by the buyer, except as provided in subsection (f) of this Code section. The printed portion of the contract, other than instructions for completion, shall be in at least six-point type. The contract shall contain substantially the following notice in clear and conspicuous type:

“Notice to the Buyer

Do not sign this before you read it or if it contains any blank spaces. You are entitled to an exact copy of the paper you sign. You have the right to pay in advance the full amount due and under certain conditions to obtain a partial refund of the time price differential.”

The contract shall contain the names of the seller and the buyer, the place of business of the seller, and the residence or place of business of the buyer as specified by the buyer.

(b) The maximum number of payments and the amount and date of each payment need not be separately listed if the payments are stated in terms of a series of scheduled amounts and if the amount of the final payment does not exceed by more than 50 percent the scheduled amount of any of the preceding installments; in such cases, the amount of the scheduled final payment shall be stated as the remaining unpaid balance. The initial date for the payment of the first installment may be a calendar date or may refer to the time of delivery or installation.

(c) A retail installment contract need not be contained in a single document. If the contract is contained in more than one document, then one such document may be an original document applicable to purchases of goods or services to be made by the retail buyer from time to time.

(d)(1) Notwithstanding any other law, the seller under a retail installment contract may charge, receive, and collect a time price differential, which shall not exceed 13¢ per \$1.00 per year on the unpaid balance.

(2) The time price differential under this subsection shall be computed on the unpaid balance of each transaction on contracts payable in successive monthly payments substantially equal in amount for the period from the date of the contract to and including the date when the final installment thereunder is payable. When a retail installment contract is payable other than in successive monthly payments substantially equal in amount, the time price differential may be at the effective rate provided in this subsection, having due regard for the schedule of payments. The time price differential may be computed on the basis of a full month for any fractional month period in excess of ten days. Notwithstanding the other provisions of this subsection, a minimum time price differential not in excess of the following amounts may be charged on any retail installment contract: \$12.00 on any retail installment contract involving an initial unpaid balance of \$50.00 or more, \$7.50 on a retail installment contract involving an initial unpaid balance of more than \$25.00 and less than \$50.00, and \$5.00 on a retail installment contract involving an initial unpaid balance of \$25.00 or less. As used in this subsection, "unpaid balance" shall be determined in accordance with Section 226.8(c) of Regulation Z promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321; 82 Stat. 146, et seq.) as the same existed upon its becoming effective on July 1, 1969.

(e) The seller shall present a completed copy of the retail installment contract to the buyer at the time it is signed by the buyer. Any acknowledgment by the buyer of receipt of a copy of the contract shall be in clear and conspicuous type and, if contained in the contract, shall appear directly above the buyer's signature.

(f) No retail installment contract shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed, except that, if

delivery of the goods or services is not made at the time of execution of the contract, the identification of the goods or services and the due date of the first installment may be left blank and later inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer. The buyer's written acknowledgment, conforming to the requirements of subsection (e) of this Code section, of delivery of a copy of a contract shall be presumptive proof in any action or proceeding of such delivery and that the contract, when signed, did not contain any blank spaces as provided in this subsection.

(g) The seller under any retail installment contract shall, within 30 days after execution of the contract, deliver or mail or cause to be delivered or mailed to the buyer at his aforesaid address any policy or policies of insurance the seller has agreed to purchase in connection therewith or in lieu thereof a certificate or certificates of such insurance. The amount, if any, included for insurance shall not exceed the applicable premiums chargeable in accordance with the rates filed with the Insurance Department; if any such insurance is canceled, unearned insurance premium refunds received by the holder shall be credited to the final maturing installment of the contract except to the extent applied toward the payment for similar insurance protecting the interests of the seller and the holder or either of them. Nothing in this article shall impair or abrogate the right of a buyer to procure insurance from an agent and company of his own selection, as provided by the insurance laws of this state; and nothing contained in this article shall modify, alter, or repeal any of the insurance laws of this state.

(h) If the buyer so requests, the holder shall give or forward to the buyer a receipt for any payment when made in cash.

(i) Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may prepay in full at any time before maturity the unpaid balance of any retail installment contract and in so paying the unpaid balance shall receive a refund credit thereon for such anticipation of payments. The amount of the refund shall represent at least as great a proportion of the time price differential after first deducting therefrom an acquisition cost of \$20.00 as the sum of the monthly time balances, beginning one month after prepayment is made, bears to the sum of all the monthly time balances under the schedule of payments in the contract. This method of refund upon prepayment is commonly referred to as the "Rule of 78" or the "Sum of the Digits" refund method. Where the amount of the refund credit is less than \$1.00, no refund need be made.

(j) In a retail installment transaction involving the modernization, rehabilitation, repair, alteration, improvement, or construction of real property, the buyer may be charged for and there may be collected from him or there may be added to the cash sale price the reasonable fees and costs actually to be paid for construction authorizations and similar permits



issued by public agencies. (Ga. L. 1967, p. 659, § 3; Ga. L. 1970, p. 98, § 1; Ga. L. 1981, p. 1797, § 1; Ga. L. 1998, p. 569, § 1; Ga. L. 2000, p. 136, § 10.)

**Cross references.** — Prohibition against suspension of gas or electrical service for failure to make payments on appliances purchased from or repaired by gas or electric utility company, § 16-12-3.

**Editor's notes.** — Ga. L. 1998, p. 569, § 2, not codified by the General Assembly, provided that the 1998 amendment was applicable to all retail installment contracts entered into on or after July 1, 1998.

**U.S. Code.** — Title I of the Consumer

Credit Protection Act, referred to in subsection (d) of this Code section, is codified as 15 U.S.C. § 1601 et seq.

Title V of the Consumer Credit Protection Act, referred to in subsection (d) of this Code section, appears as various sections throughout 15 U.S.C.

**Law reviews.** — For note discussing impact of federal truth-in-lending legislation on state law, see 12 Ga. L. Rev. 814 (1978).

### JUDICIAL DECISIONS

**All provisions of signed contract are "essential".** — Once a retail installment contract is reduced to writing and signed, all the contract's provisions must be regarded as "essential provisions." *Cook-Davis Furn. Co. v. Duskin*, 134 Ga. App. 264, 214 S.E.2d 565 (1975).

**Amount due under acceleration clause.** — Since a contract contained a time price, payable in installments and the balance was declared due after a default by the vendee, the vendor was entitled to judgment for the full amount of the time price, not just the cash price plus interest on the judgment. *Carter v. Whatley*, 97 Ga. App. 10, 101 S.E.2d 899 (1958) (decided prior to enactment of this section).

**Effective date of insurance if contract is silent.** — If a retail installment contract fails to state when insurance on purchased items would become effective, the contemplated effective date must be one which would afford protection at the time the risk of loss shifted to the buyer, which is the purpose of the insurance. *Cook-Davis Furn. Co. v. Duskin*, 134 Ga. App. 264, 214 S.E.2d 565 (1975).

**Violation in calculating interest rebate held no defense to recovery of goods.** — Violation of Ga. L. 1967, p. 659, § 3, in calculating the interest rebate does not constitute a willful violation of Ga. L. 1967, p. 659, § 1 et seq., and it is not a defense to the grant of a writ of possession in the goods in which a secured creditor holds the security interest. *Fluellen v. Commercial Credit Corp.*, 151 Ga. App. 373, 259 S.E.2d 648 (1979).

**Cited in** *Reese v. Termplan, Inc.*, 125 Ga. App. 473, 188 S.E.2d 177 (1972); *Martin v. Glenn's Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972); *Brown v. Jenkins*, 135 Ga. App. 694, 218 S.E.2d 690 (1975); *Bell v. Loosier of Albany, Inc.*, 237 Ga. 585, 229 S.E.2d 374 (1976); *Harrison v. Goodyear Serv. Stores*, 137 Ga. App. 223, 223 S.E.2d 261 (1976); *Bell v. Loosier of Albany, Inc.*, 140 Ga. App. 393, 231 S.E.2d 142 (1976); *Thomas v. Universal Guardian Corp.*, 144 Ga. App. 869, 243 S.E.2d 101 (1978); *Sumner v. Adel Banking Co.*, 244 Ga. 73, 259 S.E.2d 32 (1979); *Vikowsky v. Savannah Appliance Serv. Corp.*, 179 Ga. App. 135, 345 S.E.2d 621 (1986).

### RESEARCH REFERENCES

**ALR.** — Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Constitutionality, construction, and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 ALR2d 447.

What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 ALR3d 421.

Reformation of usurious contract, 74 ALR3d 1239.

**10-1-4. Requirements for revolving accounts; limitations on time price differential.**

(a) Every revolving account shall be in writing and shall be completed prior to the signing thereof by the retail buyer. The printed portion, other than instructions for completion, of any revolving account shall be in at least six-point type. Any such account shall contain the names of the seller and the buyer, the place of business of the seller, and the residence or place of business of the buyer as specified by the buyer, and substantially the following notice in clear and conspicuous type:

“Notice to the Buyer

Do not sign this before you read it or if it contains any blank spaces. You are entitled to an exact copy of the paper you sign. You have the right to pay in advance the full amount due.”

A copy of any such account shall be delivered or mailed to the retail buyer by the retail seller prior to the date on which the first payment is due thereunder. Any acknowledgment by the buyer of delivery of a copy of the account shall be in clear and conspicuous type and, if contained in the account, shall appear directly above the buyer's signature. No account shall be signed by the buyer when it contains blank spaces to be filled in after it has been signed. The buyer's acknowledgment, conforming to the requirements of this subsection, of delivery of a copy of an account shall be presumptive proof in any action or proceeding of such delivery and that the account, when signed, did not contain any blank spaces as provided in this subsection. A revolving account shall be presumed to be signed or accepted by the buyer if, after a request for a revolving account, such revolving account or application for a revolving account is in fact signed by the buyer or if such revolving account is used by the buyer or if such revolving account is used by another person authorized by the buyer to use it. The revolving account is not effective until: the buyer has received the disclosures required pursuant to the federal Truth in Lending Act, 15 U.S.C. Section 1601, et seq., as amended; the buyer or a person authorized by the buyer uses the revolving account; and the seller or its assignee extends credit to the buyer for transactions on the revolving account.

(b) Notwithstanding any other law, the seller under a revolving account may charge, receive, and collect a time price differential which shall not exceed 17.5¢ per \$10.00 per month computed on all amounts unpaid thereunder from month to month (which need not be a calendar month) or other regular period. If the amount of time price differential so computed shall be less than \$1.00 for any such month, a time price differential of \$1.00 for any such month may be charged, received, and collected. If the regular period is other than such monthly period or if the unpaid amount is less than or greater than \$10.00, the permitted time price differential shall be computed proportionately. Such time price differential

may be computed for all unpaid balances within a range of not in excess of \$10.00 on the basis of the median amount within such range if as so computed such time price differential is applied to all unpaid balances within such range. (Ga. L. 1967, p. 659, § 4; Ga. L. 1970, p. 98, § 2; Ga. L. 1981, p. 1795, § 1; Ga. L. 1997, p. 1403, § 1.)

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U. L. Rev. 38 (1997).

### JUDICIAL DECISIONS

**Rate of interest on judgments.** — Although former Code 1933, § 57-101 et seq. was inapplicable to revolving accounts, former Code 1933, § 57-108 did apply to the interest rates chargeable on judgments for actions on such accounts. *Farmers Mut. Exch. of Wrens, Inc. v. Rabun*, 145 Ga. App. 798, 245 S.E.2d 52 (1978).

**Security interest.** — A security interest can be created in a credit transaction pursuant to a revolving account. *Brown v. Jenkins*, 135 Ga. App. 694, 218 S.E.2d 690 (1975).

**Cited in** *Martin v. Glenn's Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972); *Harrison v. Goodyear Serv. Stores*, 137 Ga. App. 223, 223 S.E.2d 261 (1976).

### RESEARCH REFERENCES

**C.J.S.** — 77A C.J.S., Sales, § 368 et seq.

**ALR.** — Law of sales and liability in respect thereof as applied to transactions in self-service stores, 163 ALR 238.

Validity and construction of revolving

charge account contract or plan, 41 ALR3d 682.

Reformation of usurious contract, 74 ALR3d 1239.

### 10-1-5. Mail order and telephone sales.

Retail installment contracts negotiated and entered into by mail or telephone without personal solicitation by salesmen or other representatives of the seller, where a catalog of the seller or other printed solicitation of business which is distributed and made available generally to the public clearly sets forth the cash price and other terms of sales to be made through such medium, may be made as provided in this Code section. All of the provisions of this article relating to contracts shall apply to such sales, except that the seller shall not be required to deliver a copy of the contract to the buyer as provided in subsection (e) of Code Section 10-1-3; and, if the contract when received by the seller contains any blank spaces, the seller may insert in the appropriate blank space the amounts of money and other terms which are set forth in the seller's catalog or other printed solicitation which is then in effect. In lieu of presenting the buyer with a copy of the contract as provided in subsection (e) of Code Section 10-1-3, the seller shall furnish to the buyer a written statement of any items inserted in the blank spaces in the contract received from the buyer. (Ga. L. 1967, p. 659, § 5.)



**Administrative rules and regulations.** — State of Georgia, Rules of Office of Consumer Affairs, Chapter 122-2.  
Mail order merchandise, Official Compilation of the Rules and Regulations of the

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 125 et seq.      **C.J.S.** — 77A C.J.S., Sales, § 50 et seq.

#### 10-1-6. Buyer's right to cancel home solicitation sale.

(a) The buyer shall have a right to cancel a home solicitation sale agreement until 12:00 Midnight of the third business day after the day on which the buyer signs the agreement.

(b) Notice of cancellation under this Code section shall be given to the seller at the place of business as set forth in the agreement by certified mail or statutory overnight delivery, return receipt requested, which shall be posted not later than 12:00 Midnight on the third business day following execution of the agreement.

(c) In the event of cancellation pursuant to this Code section, the installment seller shall refund to the buyer within ten days after the cancellation all deposits, including any down payment made under the agreement, and redeliver any goods traded in to the seller on account or in contemplation of the home solicitation sale agreement.

(d) In the event of cancellation pursuant to this Code section, the seller shall have the right to charge the buyer 5 percent of the gross sales price of the merchandise purchased by the buyer or \$25.00, whichever is less, as liquidated damages. The seller shall also be entitled to reclaim and the buyer shall return, whenever possible, the home solicitation sale agreement. The buyer shall incur no additional liability for cancellation pursuant to this Code section.

(e) If the buyer has received the merchandise sold, the buyer must return that merchandise unused, in the same condition as received by the buyer. The seller shall pick up the merchandise at the place sold within a reasonable time after notice of cancellation; and the seller shall receive from the buyer at that time the actual cost of picking up the merchandise or \$5.00, whichever is less.

(f) Notice of cancellation given by the buyer need not take any particular form and, however expressed, is effective if it indicates the intention of the buyer not to be bound by the home solicitation sale. (Ga. L. 1967, p. 659, § 6; Ga. L. 1971, p. 560, § 1; Ga. L. 1972, p. 432, § 1; Ga. L. 2000, p. 1589, § 3.)



**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Administrative rules and regulations.** — Cooling off period for door-to-door sales,

Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Office of Consumer Affairs, Ch. 122-3.

**Law reviews.** — For note, "Pyramid Marketing Plans and Consumer Protection: State and Federal Regulation," see 21 J. of Pub. L. 445 (1972).

## RESEARCH REFERENCES

**ALR.** — Nature, construction, and effect of "lay away" or "will call" plan or system, 10 ALR3d 456.

### 10-1-7. Providing for payment of delinquency charges, attorneys' fees, court costs, and check dishonor fees.

(a) A retail installment contract or a revolving account may provide for payment by the buyer of a delinquency charge on any installment which is not paid within ten days from the date the payment is due. The charge may not exceed \$25.00. A delinquent charge shall not be collected more than once for the same default. A retail installment contract or a revolving account may provide for the payment of reasonable attorneys' fees, if referred for collection to an attorney not a salaried employee of the retail seller, and for the payment of court costs.

(b) A retail installment contract or a revolving account may provide that if the buyer submits to the retail seller as payment for an unpaid balance, or portion thereof, in that account or pursuant to that contract, a check, draft, or order for the payment of money on any bank or other depository, which check, draft, or order is not honored by the drawee, then a delinquency charge as specified in subsection (a) of this Code section may be charged; and a bad instrument fee not to exceed the amount specified in subsection (j) of Code Section 16-9-20 and Code Section 13-6-15 may be charged to the buyer and added to the unpaid balance on the buyer's account if ten days have elapsed since the retail seller has mailed to the buyer at his or her last known address written notice of the failure to honor the check, draft, or order without the check, draft, or order having been made good. A fee authorized by this Code section shall not be deemed to be time price differential, interest, or any other type of finance charge and shall not be included in determining whether any limitations on time price differential, interest, or other finance charges have been exceeded. (Ga. L. 1967, p. 659, § 7; Ga. L. 1983, p. 1430, § 1; Ga. L. 1986, p. 207, § 1; Ga. L. 1991, p. 913, § 1; Ga. L. 1991, p. 1299, § 1; Ga. L. 1995, p. 346, § 1; Ga. L. 2000, p. 1352, § 2; Ga. L. 2001, p. 782, § 1; Ga. L. 2003, p. 809, § 1; Ga. L. 2007, p. 597, § 1/HB 240.)

**The 2007 amendment**, effective July 1, 2007, substituted “\$25.00” for “\$18.00” in the second sentence of subsection (a).

### RESEARCH REFERENCES

**ALR.** — Contractual provision for attorney’s fees as including allowance for services rendered upon appellate review, 52 ALR2d 863.

Award of attorneys’ fees under § 813(a)(3) of Fair Debt Collection Practices Act (15 USCS § 1692k(a)(3)), 132 ALR Fed. 477.

### 10-1-8. Security interest not taken on certain items; application of payments to revolving accounts; written agreements.

(a) Any security interest taken pursuant to a retail installment contract or revolving account shall not be taken with respect to clothing, softwares, and other nondurable items. Each payment with respect to a revolving account shall be applied to goods and services as follows: first to unpaid time price differential or finance charge; then, as to goods purchased on different dates, the first purchased shall be deemed first paid for; as to goods purchased on the same date, the lowest priced shall be deemed first paid for.

(b) Nothing contained in subsection (a) of this Code section shall prevent the parties from agreeing in writing for the payments to be otherwise applied; provided, however, that this Code section shall be construed consistently with Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975.” Nothing in this Code section shall be deemed to authorize any act or practice which would otherwise be deemed unfair and deceptive under Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975.” (Ga. L. 1976, p. 721, § 2; Ga. L. 1994, p. 696, § 1.)

### JUDICIAL DECISIONS

**Section does not apply to duration of security interest.** — This section, which provides that payments on revolving accounts are to be applied first to goods which are first purchased has nothing to do with the creation, duration, definition, or enforcement of purchase money security interests in consumer goods, and, specifically, does not

purport to terminate a security interest contrary to the clear terms of a security agreement. In re Norrell, 426 F. Supp. 435 (M.D. Ga. 1977).

**Cited in** Ragsdale v. Credithrift of Am., Inc. (In re Derritt), 20 Bankr. 476 (Bankr. N.D. Ga. 1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 11.

**ALR.** — Validity and construction of re-

volving charge account contract or plan, 41 ALR3d 682.

**10-1-9. Transfer of retail installment contracts or revolving accounts.**

- (a) Any retail seller may assign, pledge, hypothecate, or otherwise transfer a retail installment contract or revolving account to any person, firm, or corporation on such terms and conditions and for such price as may be mutually agreed upon. Unless the buyer has notice of the assignment, payment thereunder made by the buyer to the last known owner of the contract or account shall be binding on all subsequent owners thereof.
- (b) In no event will any such assignment bar any right of action against the seller arising as a result of this article, nor will any such assignment bar any defense against the sales finance company or other assignee arising as a result of subsection (b) of Code Section 10-1-15. (Ga. L. 1967, p. 659, § 8.)

**JUDICIAL DECISIONS**

**Assignee or transferee of a retail installment contract** is not given holder in due course status under Ga. L. 1967, p. 659, § 1 et seq. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), commented on in 8 Ga. St. B.J. 400 (1972).

**Assignee or transferee takes contract subject to defenses against assignor.** — Under simple contract law, an assignee or transferee takes a retail installment contract subject to any defenses that could be asserted against the assignor. *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), commented on in 8 Ga. St. B.J. 400 (1972).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 347 et seq. and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 ALR2d 447.

**ALR.** — Constitutionality, construction,

**10-1-10. Disposition of goods repossessed after default; right to recover deficiency.**

When any goods have been repossessed after default in accordance with Part 6 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after said repossession he forwards by registered or certified mail or statutory overnight delivery to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of his rights of redemption, as well as his right to demand a public sale of the repossessed goods. In the event the buyer exercises his right to demand a public sale of the goods, he shall in writing so advise the seller or holder of his election by registered or certified mail or statutory overnight delivery addressed to the seller or holder at the address from which the seller's or holder's notice emanated, within ten days after the posting of the original seller's or holder's notice.



In the event of election of such public sale by the buyer, the seller or holder shall dispose of the repossessed goods at a public sale as provided by law, to be held in the state and county where the original sale took place or the state and county of the buyer's residence, at the seller's election.

This Code section is cumulative of Part 6 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing in this Code section shall be deemed to repeal said part. (Ga. L. 1967, p. 659, § 9; Ga. L. 2000, p. 1589, § 3.)

**Cross references.** — Uniform Commercial Code provisions regarding secured party's right to dispose of collateral after default, § 11-9-402.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, "Part 6" was substituted for "Part 5" twice in this Code section.

**Editor's notes.** — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, provides that the 2000 amendment is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For annual survey on commercial law, see 36 Mercer L. Rev. 115 (1984). For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B.J. 43 (1987).

## JUDICIAL DECISIONS

**Debtor to be notified debtor can redeem collateral at any time before sale.** — Where the debtor is told by notification letter that the debtor has ten days to redeem the debtor's repossessed collateral, but the collateral is sold after the tenth day, the debtor has not, as a matter of law, been notified that the debtor can redeem the debtor's collateral at any time before the sale, as required by O.C.G.A. §§ 10-1-10 and 11-9-506, and a verdict should be directed for the debtor when the creditor sues for a deficiency judgment. *Credithrift of Am., Inc. v. Smith*, 168 Ga. App. 45, 308 S.E.2d 53 (1983).

**Summary judgment to debtors when creditor did not dispute lack of notice.** — Because a credit company did not dispute the factual accuracy of the debtors' assertion that the company's deficiency claim was barred by the company's failure to send the debtors notice, after repossession, of the company's intention to pursue a deficiency claim, as required by O.C.G.A. § 10-1-10, the

debtors were entitled to summary judgment. *Fin. Fed. Credit Inc. v. Smith*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 17603 (S.D. Ga. Aug. 16, 2005).

**Notice insufficient.** — Notice, within ten days of the repossession of a debtor's equipment, was not provided of an intent to pursue a deficiency claim as required under O.C.G.A. § 10-1-10 as the notices on August 27 and 28 were more than ten days after the July 30 repossession and more than 60 days after the debtor signed the release on June 11; no indication was given that the notices were sent by registered or certified mail or statutory overnight delivery, and the notices also did not inform the debtor of the debtor's rights of redemption as well as the debtor's right to demand a public sale of the repossessed goods. *Parham v. Peterson, Goldman & Villani*, 296 Ga. App. 527, 675 S.E.2d 275 (2009).

**Cited in** *Meadows v. Charlie Wood, Inc.*, 448 F. Supp. 717 (M.D. Ga. 1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, § 983 et seq.

**10-1-11. Second mortgage statute not affected; exemption from loan and interest statutes.**

Nothing contained in this article shall be construed so as to amend, modify, supersede, or repeal Article 2 of Chapter 4 of Title 7, relating to charges and interest on loans secured by secondary security deeds, as now or hereafter amended, nor shall any of the provisions of the loan or interest statutes of this state affect or apply to any retail installment and home solicitation sale. (Ga. L. 1967, p. 659, § 11; Ga. L. 1968, p. 1088, § 3.)

**10-1-12. Prior contracts or accounts not affected.**

This article shall not make unlawful contracts or accounts in effect prior to October 1, 1967. (Ga. L. 1967, p. 659, § 12.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, § 84. remedy of specific performance for breach of contract, 58 ALR5th 387.  
**ALR.** — Illegality as basis for denying

**10-1-13. Waiver of this article void.**

Any waiver of this article shall be unenforceable and void. (Ga. L. 1967, p. 659, § 13.)

**JUDICIAL DECISIONS**

**Oral agreement not to furnish insurance is void.** — Any oral agreement that insurance would not be procured by the seller as provided for by the written contract is void and unenforceable. *Cook-Davis Furn. Co. v. Duskin*, 134 Ga. App. 264, 214 S.E.2d 565 (1975).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 84, 96. and application of statute respecting sale, assignment, or transfer of retail installment contracts, 10 ALR2d 447.  
**C.J.S.** — 77A C.J.S., Sales, § 122 et seq.  
**ALR.** — Constitutionality, construction,

**10-1-14. Limitation of actions.**

(a) No action shall be brought under this article more than four years after the person bringing the action knew or should have known of the occurrence of the alleged violation.

(b) The period of time specified by this Code section shall only apply to violations of this article which occur after July 1, 1979. (Ga. L. 1979, p. 1011, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, § 856 et seq.      **C.J.S.** — 77A C.J.S., Sales, §§ 495, 589.

**10-1-15. Criminal and civil penalties.**

(a) Any person who shall willfully and intentionally violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.00 for the first offense and shall be punished as for a misdemeanor for each subsequent offense.

(b) A violation of subsection (d) of Code Section 10-1-3 shall bar recovery of any finance charge, delinquency, or collection charge on the contract. A violation of subsection (b) of Code Section 10-1-4 shall bar recovery of any finance charge, delinquency, or collection charge stated on or collected in connection with the statement on which any such violation shall occur.

(c) In case of a willful violation of any provision of this article, with respect to any transaction, the retail buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of \$100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction; but the retail seller may recover from the retail buyer an amount equal to the cash price of the goods or services in such transaction and the cost of any insurance purchased by the retail seller for the retail buyer in connection therewith.

(d) Notwithstanding this Code section, any failure to comply with any provisions of subsection (d) of Code Section 10-1-3 may be corrected within ten days after the date of execution of the retail installment contract by the buyer; and, if so corrected, neither the seller nor the holder is subject to any penalty under this Code section.

(e) A seller or holder shall not be held liable in any action brought under this Code section for a violation of this article if the seller or holder shows by clear and convincing evidence that the violation was not intentional and resulted from a bona fide clerical or typographical error.

(f) The penalties under this Code section shall be the sole remedy for violations of this article and a claim of violation of this article may be asserted in an individual action only. (Ga. L. 1967, p. 659, § 10; Ga. L. 1996, p. 1506, § 1.)

**Law reviews.** — For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B.J. 43 (1987).



## JUDICIAL DECISIONS

**Legislative intent as to proof of willful violation.** — Legislature obviously intended that there be some showing that the violation be “willful” other than the mere fact of the violation itself. *Martin v. Glenn’s Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

**Cases do not apply to truth-in-lending situations.** — This section deals specifically with the terms of the contract. Truth-in-lending violations have no direct effect on the contractual terms of payment. Thus, cases involving this section are not authority regarding truth-in-lending situations. *First Citizens Bank & Trust Co. v. Owings*, 151 Ga. App. 389, 259 S.E.2d 747 (1979).

**Violation is determined by amount charged, not amount collected.** — The amount that a creditor may ultimately collect is not determinative of whether the creditor violates this section. Rather, it is the amount that a creditor charges the debtor at the time the creditor accelerates the unpaid balance that places the creditor in violation of this section. *Harrison v. Goodyear Serv. Stores*, 137 Ga. App. 223, 223 S.E.2d 261 (1976).

**Acceleration clause is not violation until collection of unearned interest attempted.** — An acceleration clause purporting to collect unearned interest does not violate Ga. L. 1967, p. 659, § 1 et seq., but the same clause plus an attempt under it to collect unearned interest does; once the creditor uses that clause to demand unearned interest, the clause states a default charge. *Thomas v. Universal Guardian Corp.*, 144 Ga. App. 869, 243 S.E.2d 101 (1978).

Acceleration by the seller plus filing a complaint against the buyer without deducting unearned interest from the alleged indebtedness constituted a “charge” by the seller in violation of the Retail Installment and Home Solicitation Sales Act, O.C.G.A. § 10-1-1 et seq., and such conduct amounted to a willful violation of the Act. *Palace Indus., Inc. v. Craig*, 177 Ga. App. 338, 339 S.E.2d 313 (1985).

**Premature acceleration of entire unpaid balance bars recovery of charges.** — To accelerate the entire unpaid balance as due

long before the time provided in the contract obviously discloses a claim exceeding the maximum finance charge allowable, which, under provisions of this section, shall bar recovery of any finance charge, delinquency, or collection charge on the contract. *Reese v. Termplan, Inc.*, 125 Ga. App. 473, 188 S.E.2d 177 (1972).

**Recovery of amount equal to cash price.** — This section does not bar the seller from recovering an amount equal to the cash price of the goods. *Fluellen v. Commercial Credit Corp.*, 151 Ga. App. 373, 259 S.E.2d 648 (1979).

**Mere violations or hazardous acts are not willful.** — Mere violations of this section and the doing of hazardous acts, where the danger is obvious, do not, without more, as a matter of law, constitute willful misconduct. *Martin v. Glenn’s Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

**Bare failure or refusal to perform duty is not willful.** — Where the misconduct consists of a failure or refusal to perform a duty required by this section, a bare failure or refusal, without more, does not constitute a willful failure or refusal to perform such duty. Such violations, failures, or refusals generally constitute mere negligence, and such negligence, however great, does not constitute willful misconduct, willful failure, or refusal to perform a duty required by this section. *Martin v. Glenn’s Furn. Co.*, 126 Ga. App. 692, 191 S.E.2d 567 (1972).

**Violation in calculating interest rebate is not willful.** — Violation of this section in calculating the interest rebate does not constitute a willful violation of this article and it is not a defense to the grant of a writ of possession in the goods in which a secured creditor holds the security interest. *Fluellen v. Commercial Credit Corp.*, 151 Ga. App. 373, 259 S.E.2d 648 (1979).

**Cited in** *Bell v. Loosier of Albany, Inc.*, 137 Ga. App. 50, 222 S.E.2d 839 (1975); *Bell v. Loosier of Albany, Inc.*, 237 Ga. 585, 229 S.E.2d 374 (1976); *Bell v. Loosier of Albany, Inc.*, 140 Ga. App. 393, 231 S.E.2d 142 (1976); *Liberty Loan Corp. v. Childs*, 140 Ga. App. 473, 231 S.E.2d 352 (1976); *Vikowsky v. Savannah Appliance Serv. Corp.*, 179 Ga. App. 135, 345 S.E.2d 621 (1986).

RESEARCH REFERENCES

**ALR.** — Right to private action under state consumer protection act, 62 ALR3d 169.

Coverage of insurance transactions under state consumer protection statutes, 77 ALR4th 991.

What constitutes Truth in Lending Act

violation which “was not intentional and resulted from bona fide error notwithstanding maintenance of procedures reasonably adapted to avoid any such error” within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 ALR Fed. 193.

**10-1-16. Inapplicability of this article to educational entities and student loan transactions.**

This article shall not apply to the University System of Georgia or its educational units, to private colleges and universities in this state and associations thereof, or to student loan transactions of such educational entities, which educational entities and student loan transactions thereof are expressly exempted from the operation of its provisions. (Code 1981, § 10-1-16, enacted by Ga. L. 1985, p. 251, § 1.)

ARTICLE 2

MOTOR VEHICLE SALES FINANCING

**Cross references.** — Purchase and resale of motor vehicles and parts generally, Ch. 4, T. 40. Used car dealers, Ch. 47, T. 43.

**Law reviews.** — For article discussing federal truth-in-lending provisions and their relation to state laws, see 6 Ga. St. B.J. 19 (1969). For article discussing methods of computation of finance charges in Georgia consumer credit contracts, see 30 Mercer L.

Rev. 281 (1978). For article, “The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement,” see 24 Ga. St. U.L. Rev. 663 (2008).

For note discussing transfer fees in home loan assumptions in reference to the Georgia usury laws, see 9 Ga. L. Rev. 454 (1975).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
FEDERAL PREEMPTION

General Consideration

**Mobile homes.** — The sale of a mobile home comes within the provisions of Ga. L. 1967, p. 674, § 1. *Holder v. Brock*, 129 Ga. App. 732, 200 S.E.2d 912 (1973), overruled on other grounds, *Tucker v. Chung Studio of Karate, Inc.*, 142 Ga. App. 818, 237 S.E.2d 223 (1977); *Smith v. Society Nat’l Bank*, 141 Ga. App. 19, 232 S.E.2d 367 (1977); *Porter v. Midland-Guardian Co.*, 145 Ga. App. 262, 243 S.E.2d 595, rev’d on other grounds, 242 Ga. 1, 247 S.E.2d 743 (1978).

**Article not violated by acceleration clause.** — The mere presence of an acceleration clause is not violative of Ga. L. 1967, p. 674, § 1. *Green v. Citizens & S. Bank*, 153 Ga. App. 342, 265 S.E.2d 286 (1980).

**Documentary preparation fee as finance charge.** — A “documentary preparation” fee explicitly identified as such in an automobile finance contract and added to the unpaid balance of the purchase price as an “other charge” was not a finance charge since it was charged to all consumer purchas-

ers (both cash and credit). Therefore, the contract complied with state and federal law. *Ferris v. Chrysler Credit Corp.*, 764 F.2d 1475 (11th Cir.), rehearing denied, 770 F.2d 1084 (11th Cir. 1985).

**Contract's choice of law provisions governs.** — Georgia law, rather than South Carolina law, governed a mobile home retail installment sales contract entered into by South Carolina buyers with a Georgia dealer since the contract contained a choice of law provision indicating that the contract should be construed in accordance with the laws of the state in which the seller's place of business was located. *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986).

**Cited in** *Motor Contract Co. v. Sawyer*, 123 Ga. App. 207, 180 S.E.2d 282 (1971); *Geiger Fin. Co. v. Graham*, 123 Ga. App. 771, 182 S.E.2d 521 (1971), commented on in *Ga. St. B.J.* 400 (1972); *Smith v. Singleton*, 124 Ga. App. 394, 184 S.E.2d 26 (1971); *Whittlesey v. Ford Motor Credit Co.*, 542 F.2d 245 (5th Cir. 1976); *Jordan v. Ford Motor Credit Co.*, 141 Ga. App. 280, 233 S.E.2d 256 (1977); *Smith v. General Fin. Corp.*, 143 Ga. App. 390, 238 S.E.2d 694 (1977); *Mullins v. Oden & Sims Used Cars, Inc.*, 148 Ga. App. 250,

251 S.E.2d 65 (1978); *Coppage v. Mellon Bank*, 150 Ga. App. 92, 256 S.E.2d 671 (1979); *Parker v. George Thompson Ford, Inc.*, 83 F.R.D. 378 (N.D. Ga. 1979); *Grover v. Vintage Credit Corp.*, 155 Ga. App. 759, 272 S.E.2d 732 (1980); *In re McLeod*, 5 Bankr. 520 (N.D. Ga. 1980); *In re Weaver*, 5 Bankr. 522 (N.D. Ga. 1980).

### Federal Preemption

**Protection of federal preemption from state law interest ceilings.** — A mobile home financing contract which did not affirmatively misrepresent the debtor's federal statutory guarantees satisfied the prerequisites for obtaining the protection of federal preemption from state law interest ceilings. *Grant v. GECC*, 764 F.2d 1404 (11th Cir. 1985), cert. denied, 476 U.S. 1124, 106 S. Ct. 1993, 90 L. Ed. 2d 673 (1986).

**Contracts in compliance with regulations of Federal Home Loan Bank Board.** — Federal law preempted the application of O.C.G.A. Art. 2, Ch. 1 to contracts which were made in compliance with regulations promulgated by the Federal Home Loan Bank Board. *Moyer v. Citicorp Homeowners, Inc.*, 799 F.2d 1445 (11th Cir. 1986).

## OPINIONS OF THE ATTORNEY GENERAL

**Mobile homes.** — Mobile homes are included in the definition of motor vehicles contained in Ga. L. 1967, p. 674, § 2 and

thereby subject to Ga. L. 1967, p. 659, § 1. 1967 Op. Att'y Gen. No. 67-410.

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Proof of Statutory Unfair Business Practices, 36 POF3d 221.

**ALR.** — Civil rights and liabilities as affected by failure to comply with statute upon

sale of motor vehicle, 63 ALR 688; 94 ALR 948.

Quantum, degree, or weight of evidence to sustain usury charge, 51 ALR2d 1087.

### 10-1-30. Short title.

This article shall be known and may be cited as the "Motor Vehicle Sales Finance Act." (Ga. L. 1967, p. 674, § 1.)

**Law reviews.** — For annual survey of commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985). For annual survey of commercial law in 1990-1991, see 43 Mercer

L. Rev. 119 (1991). For survey article on insurance law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 277 (2003).



**JUDICIAL DECISIONS**

**Cited in** Chrysler Credit Corp. v. Cooper, 11 Bankr. 391 (Bankr. N.D. Ga. 1981); Ford Motor Credit Co. v. London, 175 Ga. App. 33, 332 S.E.2d 345 (1985).

**10-1-31. Definitions; construction.**

(a) As used in this article, the term:

(1) “Cash sale price” means the price stated in a retail installment contract for which the seller would have sold to the buyer and the buyer would have bought from the seller the motor vehicle which is the subject matter of the retail installment contract if such sale had been a sale for cash instead of a retail installment transaction. The cash sale price may include any taxes; registration, certificate of title, license, and other fees; and charges for accessories and their installation and for delivery, servicing, repairing, or improving the motor vehicle. The cash sale price may also include any amount paid to the buyer or to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on the motor vehicle which is the subject of a retail installment transaction under this article.

(2) “Finance charge” means the amount agreed upon between the buyer and the seller, as limited in this article, to be added to the cash sale price, the amount, if any, included for insurance and other benefits, if a separate charge is made therefor, and official fees, in determining the time sale price.

(3) “Holder” of a retail installment contract means the retail seller of the motor vehicle under the contract or, if the contract is purchased by a sales finance company or another assignee, the sales finance company or other assignee at the time of the determination.

(4) “Motor vehicle” means any device or vehicle including automobiles, motorcycles, motor trucks, trailers, and all other vehicles operated over the public highways and streets of this state and propelled by power other than muscular power but does not include traction engines, road rollers, implements of husbandry and other agricultural equipment, and such vehicles as run only upon a track.

(5) “Official fees” means the fees prescribed by law for filing, recording, or otherwise perfecting and releasing or satisfying a retained title or a lien created by a retail installment contract.

(6) “Person” means an individual, partnership, corporation, association, or any other group however organized.

(7) “Purchase price” means the time balance shown in the contract plus the down payment.

(8) “Retail buyer” or “buyer” means a person who buys a motor vehicle from a retail seller not principally for the purpose of resale and

who executes a retail installment contract in connection therewith or a person who succeeds to the rights and obligations of such person.

(9) “Retail installment contract” or “contract” means an instrument or instruments creating a purchase money security interest.

(10) “Retail installment seller” or “seller” means a person engaged in the business of selling motor vehicles to retail buyers in retail installment transactions.

(11) “Retail installment transaction” means any transaction evidenced by a retail installment contract.

(12) “Sales finance company” means a person engaged in the business of purchasing retail installment contracts from one or more retail sellers. The term includes but is not limited to a bank, trust company, or industrial loan company, if so engaged. The term does not include the pledge of an aggregate number of such contracts to secure a bona fide loan thereon.

(13) “Time sale price” means the cash sale price of a motor vehicle, the amount included for insurance and other benefits if a separate charge is made therefor, official fees, and finance charges. The time sale price may also include, if it has not been included in the cash sale price, any amount paid to the buyer or to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on the motor vehicle which is the subject of a retail installment transaction under this article.

(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to this article. (Ga. L. 1967, p. 674, § 2; Ga. L. 1999, p. 1229, § 1.)

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
RETAIL INSTALLMENT TRANSACTION  
MOTOR VEHICLE

General Consideration

Cited in Holden v. Peoples, Inc., 122 Ga. App. 269, 176 S.E.2d 516 (1970); Pike v. Universal C.I.T. Credit Corp., 125 Ga. App. 83, 186 S.E.2d 482 (1971); Tollett v. Green Tree Acceptance, Inc., 190 Ga. App. 295, 379 S.E.2d 2 (1989); Ervin v. Arnold, 197 Ga. App. 841, 399 S.E.2d 548 (1990).

Retail Installment Transaction

Not “retail installment transaction” where bank, not seller, obtains lien. — Where seller sold mobile home for a “cash sales price”

and bank financed loan for the “cash sales price,” the proceeds of which were then paid to the seller, the bank, not the seller, had a purchase money security interest in the mobile home, and the actual sale was not a “retail installment transaction” under paragraphs (a)(9) and (a)(11) of this section. Massey v. Stephens, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

Motor Vehicle

Caterpillar 977L Traxcavator does not fall under the definition of “motor vehicle” found either in paragraph (a)(4) of



**Motor Vehicle** (Cont'd)

O.C.G.A. § 10-1-31 or the general definition of “motor vehicle” under O.C.G.A. § 40-1-1(33) but does fit the definition of “special mobile equipment” under § 40-1-1(59). *Battle v. Yancey Bros. Co.*, 157 Ga. App. 277, 277 S.E.2d 280 (1981).

**Purchase money interest in negative equity financed as part of trade-in.** — Because the definition of “cash sales price” included any amount paid to the buyer or to a third party to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in, pursuant to O.C.G.A. § 10-1-31, that entire amount was included in the purchase money security interest under 11 U.S.C. § 1325(a). *In re Graupner*, 356 B.R. 907 (Bankr. M.D. Ga. 2006), *aff'd*, 2007 U.S. Dist. LEXIS 46144 (M.D. Ga. 2007).

Monies paid on debtor’s behalf for an extended service contract and gap insurance were part of the purchase price of the debt-

or’s vehicle for purposes of O.C.G.A. § 11-9-103 and the unnumbered, hanging paragraph following 11 U.S.C. § 1325(a)(9). The service contract was a charge for “servicing” the motor vehicle under O.C.G.A. § 10-1-31(a)(1), and applying the close nexus standard in § 11-9-103 led the court to believe that gap insurance was also included in the purchase money security interest. *In re Spratling*, 377 B.R. 941 (Bankr. M.D. Ga. 2007).

Under O.C.G.A. §§ 10-1-31(a) and 11-9-103, negative equity in a debtor’s trade-in vehicle was properly regarded as a purchase money security interest under the hanging paragraph referencing 11 U.S.C. § 1325(a)(5) in that there was a close nexus to the purchase of a vehicle for personal use within 910 days of filing for Chapter 13 relief. Thus, 11 U.S.C. § 506 did not apply to cram down the creditor’s secured claim. *Graupner v. Nuvel Credit Corp.* (In re *Graupner*), 537 F.3d 1295 (11th Cir. 2008).

### **10-1-32. Requirements for retail installment contracts; insurance; delinquency charges, attorneys’ fees, and costs; receipts.**

(a) A retail installment contract shall be in writing, shall be signed by both the buyer and the seller, and shall be completed as to all essential provisions prior to the signing of the contract by the buyer.

(b) The printed portion of the contract, other than instructions for completion, shall be in at least six-point type. The contract shall contain, in clear and conspicuous type, the following:

(1) A specific statement that liability insurance coverage for bodily injury and property damage caused to others is not included, if that is the case; and

(2) The following notice:

“Notice to the Buyer

Do not sign this contract before you read it or if it contains any blank spaces. You are entitled to an exact copy of the contract you sign.”

(c) The seller shall present a completed copy of the contract to the buyer at the time it is signed by the buyer. Unless the seller does so, a buyer who has not accepted delivery of the motor vehicle shall have the right to rescind his agreement and to receive a refund of all payments made and return of all goods traded in to the seller on account of or in contemplation of the contract or, if such goods cannot be returned, the value thereof. Any acknowledgment by the buyer of receipt of a copy of the contract shall be

in clear and conspicuous type and, if contained in the contract, shall appear directly above the buyer's signature. This subsection provides cumulative additional rights and is cumulative of Code Section 11-2-302.

(d) The contract shall contain the names of the seller and the buyer, the place of business of the seller, the residence or place of business of the buyer as specified by the buyer, and a description of the motor vehicle, including its make, year model, model, and identification number or marks.

(e)(1) If any insurance is purchased by the holder of the retail installment contract, the amount charged therefor shall not exceed the applicable premiums chargeable in accordance with the rates filed with the Insurance Department. If dual interest insurance on the motor vehicle is purchased by the holder, it shall, within 30 days after execution of the retail installment contract, send or cause to be sent to the buyer a policy or policies or certificate of insurance, written by an insurance company authorized to do business in this state, clearly setting forth the amount of the premium, the kind or kinds of insurance, the coverages, and all the terms, exceptions, limitations, restrictions, and conditions of the contract or contracts of insurance.

(2) Nothing in this article shall impair or abrogate the right of a buyer, as defined in Code Section 10-1-31, to procure insurance from an agent and company of his own selection as provided by the insurance laws of this state; and nothing contained in this article shall modify, amend, alter, or repeal any of the insurance laws of the state.

(f) If any insurance is canceled or the premium adjusted, unearned insurance premium refunds received by the holder shall be credited to the final maturing installment of the contract except to the extent applied toward payment for a similar insurance protecting the interests of the buyer and the holder or either of them.

(g) The holder may, if the contract or refinancing agreement so provides, collect a delinquency charge on any installment which is not paid within ten days from the date the payment is due. Such charge may not exceed 5 percent of the installment or \$50.00, whichever is less; provided, however, that if the contract or refinancing agreement is related to a truck with a gross vehicle weight rating (GVWR) exceeding 6,000 pounds (size Class 3 and above), truck tractor, trailer, or semitrailer used primarily for business or commercial purposes, such delinquency charge may not exceed 5 percent of the installment. A delinquent charge shall not be collected more than once for the same default. In addition to the delinquency and collection charge, the contract may provide for the payment of reasonable attorneys' fees where the contract is referred for collection to an attorney not a salaried employee of the holder of the contract, plus the court costs.

(h) No retail installment contract shall be signed by any party thereto

when it contains blank spaces to be filled in after it has been signed except that, if delivery of the motor vehicle is not made at the time of the execution of the contract, the identifying numbers or marks of the motor vehicle or similar information and the due date of the first installment may be left blank and later inserted by the seller in the seller's counterpart of the contract after it has been signed by the buyer. The buyer's written acknowledgment, conforming to the requirements of subsection (c) of this Code section, of delivery of a copy of a contract shall be presumptive proof of such delivery in any action or proceeding by or against the holder of the contract and that the contract, when signed, did not contain any blank spaces except as provided in this subsection.

(i) If the buyer so requests, the holder shall give or forward to the buyer a receipt for any payment when made in cash. (Ga. L. 1967, p. 674, § 3; Ga. L. 1970, p. 101, §§ 1, 2; Ga. L. 1985, p. 698, § 1; Ga. L. 1996, p. 1058, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, the (1) and (2) designations were added in subsection (e).

**Law reviews.** — For article, "Acceleration

Clauses in Georgia: Consumer Installment Contracts and the Federal Truth-In-Lending Act," see 27 Mercer L. Rev. 969 (1976).

## JUDICIAL DECISIONS

**This section establishes requirements and prohibitions** as to "retail installment contracts." *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

**Not "retail installment transaction" where bank, not seller, obtains lien.** — Where seller sold mobile home for a "cash sales price" and bank financed loan for the "cash sales price," the proceeds of which were then paid to the seller, the bank, not the seller, had a purchase money security interest in the mobile home and the actual sale was not a "retail installment transaction" under paragraphs (a)(9) and (a)(11) of this section. *Massey v. Stephens*, 155 Ga. App. 243, 270 S.E.2d 796 (1980).

**Effect of signing contract without reading it.** — Where one who can read signs a contract without apprising oneself of the contract's contents otherwise than by accepting representations made by the opposite party with whom there exists no fiduciary or confidential relation, one cannot defend an action based on the contract, or have the contract canceled or reformed, on the

ground that the contract does not contain the contract actually made, unless it should appear that at the time one signed the contract some such emergency existed as would excuse one's failure to read the contract or that one's failure to read the contract was brought about by some misleading artifice or device perpetrated by the opposite party, amounting to actual fraud such as would reasonably prevent one from reading the contract. *Green v. Ford Motor Credit Co.*, 146 Ga. App. 531, 246 S.E.2d 721 (1978).

**No civil remedy for inadvertent failure to meet disclosure requirements.** — It being uncontroverted that the seller's failure to meet the disclosure requirements of O.C.G.A. § 10-1-32 was inadvertent rather than intentional, O.C.G.A. § 10-1-38(c) did not provide a civil remedy. *Vickery v. Mobile Home Indus., Inc.*, 171 Ga. App. 566, 320 S.E.2d 633 (1984).

**Cited in** *Layfield v. Bill Heard Chevrolet Co.*, 607 F.2d 1097 (5th Cir. 1979); *Troutt v. Nash AMC/Jeep, Inc.*, 157 Ga. App. 399, 278 S.E.2d 54 (1981).



OPINIONS OF THE ATTORNEY GENERAL

**Balloon payment permissible.** — Balloon payment on a retail installment contract is permissible under the Motor Vehicle Sales

Finance Act, O.C.G.A. § 10-1-30 et seq. 1985 Op. Att’y Gen. No. 85-10.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 86, 87, 106.

**ALR.** — Construction of statutes regulating form and contents of motor vehicle installment sales contracts, 73 ALR2d 1430; 46 ALR Fed. 657.

10-1-33. Finance charge limitations; assignment of contract.

(a) Notwithstanding any other law, the finance charge, exclusive of insurance and other benefits and official fees, shall not exceed the following rates:

Class 1. Any new motor vehicle designated by the manufacturer by a year model not earlier than the year in which the sale is made and all vehicles not previously titled — \$10.00 per \$100.00 per year.

Class 2. Any new motor vehicle not in Class 1 and any used motor vehicle designated by the manufacturer by a year model of the same or not more than two years prior to the year in which the sale is made — \$13.00 per \$100.00 per year.

Class 3. Any used motor vehicle not in Class 2 and designated by the manufacturer by a year model not more than four years prior to the year in which the sale is made — \$15.00 per \$100.00 per year.

Class 4. Any used motor vehicle not in Class 2 or Class 3 and designated by the manufacturer by a year model more than four years prior to the year in which the sale is made — \$17.00 per \$100.00 per year.

(b) Such finance charge shall be computed on the unpaid balance on contracts payable in successive monthly payments substantially equal in amount. Such finance charge may be computed on the basis of a full month for any fractional month period in excess of ten days. A minimum finance charge of \$25.00 may be charged on any retail installment transaction. As used in this subsection, the term “unpaid balance” shall be determined in accordance with Section 226.8(c) of Regulation Z promulgated by the Board of Governors of the Federal Reserve System pursuant to Title I (Truth in Lending Act) and Title V (General Provisions) of the Consumer Credit Protection Act (Public Law 90-321, 82 Stat. 146, et seq.), as the same existed upon its becoming effective on July 1, 1969.

(c) When a retail installment contract provides for unequal or irregular installment payments, the finance charge may be at a rate which will provide the same yield as is permitted on monthly payment contracts under

subsections (a) and (b) of this Code section, having due regard for the schedule of payments. Notwithstanding the foregoing, a seller who computes a finance charge on an actuarial basis may charge a finance charge, exclusive of insurance and other benefits and official fees, which, when calculated according to the actuarial method, does not exceed the yield which would have been permitted on monthly contracts under subsections (a) and (b) of this Code section, having due regard for the schedule of payments; provided, however, that when a seller computes the finance charge according to the actuarial method, then for purposes of computing the rate the entire term of the contract shall be considered to be the number of whole months within the scheduled payment period, disregarding any odd days.

(d) Notwithstanding the provisions of subsection (a) of this Code section, a buyer and a seller may establish any finance charge agreed upon in writing by the parties where the amount financed is more than \$5,000.00.

(e) Any sales finance company may purchase or acquire or agree to purchase or acquire from any seller any contract on such terms and conditions as may be agreed upon between them. Unless the buyer has notice of the assignment of his contract, payment thereunder made by the buyer to the last known holder of such contract shall be binding upon all subsequent holders.

(f) In no event will any such assignment bar any right of action against the seller arising as a result of this article nor will any such assignment bar any defense against the sales finance company or other assignee arising as a result of subsection (b) of Code Section 10-1-38. (Ga. L. 1967, p. 674, § 4; Ga. L. 1970, p. 101, § 3; Ga. L. 1980, p. 523, §§ 1, 2, 5; Ga. L. 1981, p. 703, § 1; Ga. L. 1985, p. 698, § 2; Ga. L. 2000, p. 136, § 10.)

**Cross references.** — Inapplicability of section to retail installment contracts pertaining to any manufactured home with a cash sale price of more than \$3,000, § 7-4-3.

**Code Commission notes.** — Subsection (a) of this Code section was amended by Ga. L. 1980, p. 523, § 1 to increase Class 1 and 2 rates from \$8.00 per \$100.00 and \$11.00 per \$100.00 to \$10.00 per \$100.00 and \$13.00 per \$100.00, respectively, and to make Class 1 applicable to all vehicles not previously registered. Section 5 of the 1980 Act provided for the repeal of this amendment on July 1, 1981, but § 5 was in turn repealed by Ga. L. 1981, p. 703, § 1, effective April 7, 1981. Thus, the language of subsection (a) of this Code section correctly reflects the Ga. L. 1980, p. 523, § 1 amendment.

**U.S. Code.** — Title I of the Consumer Credit Protection Act, referred to in subsection (b) of this section, is codified as 15 U.S.C. § 1601, et seq.

Title V of the Consumer Credit Protection Act, referred to in subsection (b) of this section, appears as various sections throughout 15 U.S.C.

**Law reviews.** — For article surveying Georgia cases in the area of commercial law from June 1979 through May 1980, see 32 Mercer L. Rev. 11 (1980).

For note discussing impact of federal truth-in-lending legislation on state law, see 12 Ga. L. Rev. 814 (1978).



## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## FINANCE CHARGES

## FEDERAL LAW

## 1. FHA AND VA

## 2. DEPOSITORY INSTITUTIONS DEREGULATION AND MONETARY CONTROL ACT

## 3. BANKRUPTCY

## VIOLATION OF CODE SECTION

## General Consideration

**“Year” construed.** — The term “year” in O.C.G.A. § 10-1-33 refers to “calendar year” rather than “model year.” *Lee v. National Bank & Trust Co.*, 153 Ga. App. 656, 266 S.E.2d 315 (1980).

**Construction of “any person” and “the person committing the violation.”** — In pari materia with O.C.G.A. § 10-1-33, the language “any person” and “the person committing the violation” found in subsections (a) and (c) of O.C.G.A. § 10-1-38 refers only to seller or holder and was not intended to expand the class of persons liable for usury violations. This is emphasized by § 10-1-38(d), which provides that if a violation is corrected within ten days after execution of the contract, “neither the seller nor the holder is subject to any penalty under this Code section.” *Tollett v. Green Tree Acceptance, Inc.*, 190 Ga. App. 295, 379 S.E.2d 2 (1989).

**Retroactivity of subsection (d).** — O.C.G.A. § 10-1-36.1, added to Georgia Motor Vehicles Sales Finance Act in 1985, expresses an intent by the General Assembly that neither the 1983 amendment of O.C.G.A. § 7-4-3, nor the addition of new subsection (d) to O.C.G.A. § 10-1-33 in 1985 (assuming it did apply to mobile home loans) was intended to apply retroactively. *Southern Guar. Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510, cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

Subsection (d) of O.C.G.A. § 10-1-33, which abolishes the interest limit for motor vehicle installment sales contracts in excess of \$5,000, is not applicable to a refinancing agreement dated prior to the effective date of O.C.G.A. § 10-1-33. *Parten v. GMAC*, 187 Ga. App. 516, 370 S.E.2d 778 (1988).

**Mobile home loans.** — “Motor vehicle” loans are defined to include mobile home

loans, but O.C.G.A. § 10-1-33 does not apply to other types of home loans or mortgages. *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986), cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

**Mobile home installment sales contracts.**

— Since the General Assembly, beginning in 1983, has distinguished between mobile home loans and motor vehicle loans, and since O.C.G.A. § 7-4-3(a)(1) and (b)(1), as amended in 1983, deal specifically with mobile home installment sales contracts, whereas subsection (d) of O.C.G.A. § 10-1-33, as amended in 1985, does not, § 7-4-3(a)(1) and (b)(1) express the controlling legislation and legislative intent on mobile home installment sales contracts in excess of \$3,000. *Southern Guar. Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510, cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

**Cited in** *Holden v. Peoples, Inc.*, 122 Ga. App. 269, 176 S.E.2d 516 (1970); *Leach v. Midland-Guardian Co.*, 127 Ga. App. 562, 194 S.E.2d 260 (1972); *Smith v. Society Nat'l Bank*, 141 Ga. App. 19, 232 S.E.2d 367 (1977); *Jordan v. Ford Motor Credit Co.*, 141 Ga. App. 280, 233 S.E.2d 256 (1977); *Green v. Ford Motor Credit Co.*, 146 Ga. App. 531, 246 S.E.2d 721 (1978); *Parker v. George Thompson Ford, Inc.*, 83 F.R.D. 378 (N.D. Ga. 1979); *Green v. Citizens & S. Bank*, 153 Ga. App. 342, 265 S.E.2d 286 (1980); *Ford Motor Credit Co. v. Spann*, 153 Ga. App. 535, 265 S.E.2d 863 (1980); *Chrysler Credit Corp. v. Cooper*, 7 Bankr. 537 (N.D. Ga. 1980); *Kelly v. Sylvan Motors, Inc.*, 160 Ga. App. 420, 287 S.E.2d 359 (1981); *Chrysler Credit Corp. v. Cooper*, 11 Bankr. 391 (Bankr. N.D. Ga. 1981); *Stewart v. Ford Motor Credit Co.*, 685 F.2d 391 (11th Cir. 1982); *Gibbs v. Green Tree Acceptance, Inc.*, 188 Ga. App. 633, 373 S.E.2d 637 (1988); *Cowan v. Miles Rich Chrysler-Plymouth*, 885

**General Consideration (Cont'd)**

F.2d 801 (11th Cir. 1989); *Purser Truck Sales, Inc. v. Patrick*, 201 Ga. App. 119, 410 S.E.2d 335 (1991).

**Finance Charges**

**Finance charge is figured as percentage of unpaid (principal) balance.** — The term “principal balance” in the original Motor Vehicle Sales Act has been changed to “unpaid balance” in subsection (b) of O.C.G.A. § 10-1-33, as used in § 226.8(c), Regulation Z, relating to the Truth in Lending Act as therein set out. Both terms refer to the same thing — that is, the balance arrived at by deducting from the cash price any down payment made and adding to that sum all other authorized charges and expenses except the finance charge itself. The finance charge is then figured as a given percentage of this unpaid (principal) balance per year throughout the lifetime of the installment payments. *Pike v. Universal C.I.T. Credit Corp.*, 125 Ga. App. 83, 186 S.E.2d 482 (1971).

**Unpaid balance may include insurance costs and other charges.** — Insurance costs and other authorized charges are properly included in the “unpaid balance” and subject to the finance charge. *Pitts v. Peoples Loan & Fin. Corp.*, 135 Ga. App. 38, 217 S.E.2d 181 (1975); *Busby v. Sea Island Bank*, 151 Ga. App. 412, 260 S.E.2d 485 (1979).

**Acceleration clauses are not per se unenforceable.** *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom., *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

**Collection of unearned interest** is not per se improper under Georgia law. *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom., *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

If an acceleration of unearned interest causes a note to become usurious, then there is a violation of the usury provision of Ga. L. 1967, p. 674, § 4, and thus, under Ga. L. 1967, p. 674, § 8, the creditor is barred from recovering any finance charge, delinquency, or collection charge on the contract. *McDaniel v. Fulton Nat'l Bank*, 395 F. Supp.

422 (N.D. Ga. 1974), rev'd on other grounds, 543 F.2d 568 (5th Cir. 1976).

**Acceleration without credit for unearned rates.** — Plaintiff's acceleration under the contract, followed by the filing of plaintiff's petition for writ of possession seeking recovery of a balance due, without deducting therefrom unearned rates that would have been earned except for acceleration, amounted to a “charge” by the seller in violation of O.C.G.A. § 10-1-33. *Bozeman v. Tifton Fed. Sav. & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982).

In computing the accelerated balance on an installment sales contract in a petition for a writ of possession of mobile homes sold under the contract, the contract assignee's initial failure to rebate any unearned interest and subsequent rebating of such charges according to the Rule of 78's method violated O.C.G.A. Art. 2, Ch. 1, T. 10. *Carter v. First Fed. Sav. & Loan Ass'n*, 179 Ga. App. 532, 347 S.E.2d 264 (1986).

**Rebate of unearned finance charges on a monthly basis** is harmonious with provisions of O.C.G.A. Art. 2, Ch. 1, T. 10. *Fitch v. GMAC*, 181 Ga. App. 7, 351 S.E.2d 215 (1986).

**Application of Rule of 78.** — In cases of acceleration of contracts under the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq., any refund credit for unearned finance charges may not be calculated under the Rule of 78. *Bozeman v. Tifton Fed. Sav. & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982).

**Creditor suing for deficiency cannot use “Rule of 78”.** — The “Rule of 78” cannot be used to compute the interest refund in a suit under an installment contract. *Cook v. First Nat'l Bank*, 130 Ga. App. 587, 203 S.E.2d 870 (1974).

**Use of “Rule of 78” results in charging more interest than allowed.** — Where the interest refund, calculated using the “Rule of 78,” results in interest totaling two-thirds of the total amount being charged for a period of less than half the time of the note, this is in excess of the maximum allowable for the period in question on the unpaid balance to finance. Hence, a violation of subsection (a) of Ga. L. 1967, p. 674, § 4 is shown by the evidence. Under Ga. L. 1967, p. 674, § 8 this bars recovery of any finance

charge, delinquency, or collection charge on the contract. *Cook v. First Nat'l Bank*, 130 Ga. App. 587, 203 S.E.2d 870 (1974).

**Presumption that contract rate applied overcome.** — Annual percentage rate of 22.55 percent should be applied to debtor's obligation to creditor since the creditor had overcome the presumption that the contract rate applied by showing that on a vehicle of the same age as debtor's vehicle, the creditor would obtain a 13 percent add-on rate. *In re McMichen*, 23 Bankr. 497 (Bankr. N.D. Ga. 1982).

### Federal Law

#### 1. FHA and VA

**Overriding of FHA and VA provisions.** — Notwithstanding the inclusion of FHA and VA consumer protections, the lenders could not avail themselves of either preemption statute, since when the General Assembly amended O.C.G.A. § 10-1-33 in 1980 (raising the interest rate limit from 8 percent add-on to 10 percent add-on), it invoked other provisions of the FHA and VA preemption statutes which under certain circumstances permit the states to override the FHA and VA preemptions. *Southern Guar. Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510, cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

Georgia overrode the FHA and VA preemptions when it amended its usury limit on mobile home transactions in 1980 and 1981, even though the amendments referred to neither the FHA/VA statutes nor to FHA/VA-insured loans. *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986), cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

#### 2. Depository Institutions Deregulation and Monetary Control Act

**Lender may still qualify for federal preemption** by complying with the Depository Institutions Deregulation and Monetary Control Act regulations unless, of course, the state has also overridden the DIDMCA preemption. *Doyle v. Southern Guar. Corp.*, 795 F.2d 907 (11th Cir. 1986), cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

**Federal Depository Institutions Deregulation and Monetary Control Act of 1980**

**(DIDMCA) was applicable**, in that the transaction in question, entered into after March 31, 1980, and before the enactment of exempting state legislation, involved a federally related residential mortgage loan, made by a "creditor" as defined in DIDMCA and secured by a first lien on a residential manufactured home. *Vickery v. Mobile Home Indus., Inc.*, 171 Ga. App. 566, 320 S.E.2d 633 (1984).

**DIDMCA contracts not containing required protections.** — Where lenders' mobile home contracts fell under § 501 of the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), but it was undisputed that the contracts did not contain the consumer protections required by DIDMCA, DIDMCA did not exempt those contracts from O.C.G.A. § 10-1-33. *Southern Guar. Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510, cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

#### 3. Bankruptcy

**Applicability to Ch. 13 bankruptcy plan.** — Where debtor's car has value less than debt and debtor proposes to pay creditor under a Ch. 13 bankruptcy plan, it is not an arms-length consumer transaction in which the debtor is buying and financing a used car. Creditor is not entitled to receive maximum interest allowable under Georgia law in this context. *In re Clements*, 16 Bankr. 196 (Bankr. N.D. Ga. 1981).

**Rate of interest of 22.75%**, specified in a purchase-money motor vehicle contract, arguably steep given the rehabilitative nature of the subsequent bankruptcy proceeding, but less than the statutory maximum, and while containing an element of profit, was the rate applied, given the risks involved, in calculating the total amount of payments that the bankruptcy debtor had to make. *In re Smith*, 42 Bankr. 198 (Bankr. N.D. Ga. 1984).

#### Violation of Code Section

**Violation forfeits charges.** — A violation of Ga. L. 1967, p. 674, § 4 invokes the penalty provisions of subsection (b) of Ga. L. 1967, p. 674, § 8 and results in forfeiture of "any finance charge, delinquency, or collection charge on the contract." *Porter v.*



**Violation of Code Section (Cont'd)**

Midland-Guardian Co., 145 Ga. App. 262, 243 S.E.2d 595, rev'd on other grounds, 242 Ga. 1, 247 S.E.2d 743 (1978).

**Principal is still collectible.** — Once the court has determined that the creditor is in fact attempting to extort usurious interest,

the lender is allowed to collect the principal, but the lender loses at least all unearned interest. *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom. *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

**OPINIONS OF THE ATTORNEY GENERAL**

**Balloon payment** on a retail installment contract is permissible under the Motor Vehicle Sales Finance Act, O.C.G.A.

§ 10-1-30 et seq. 1985 Op. Att'y Gen. No. 85-10.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 86, 87, 347 et seq.

**ALR.** — What is "compound interest" within meaning of statutes prohibiting the charging of such interest, 10 ALR3d 421.

Reformation of usurious contract, 74 ALR3d 1239.

Civil remedies of consumer for violations of credit transactions provisions of Truth in Lending Act (TILA) (15 USCS § 1601 et seq.), as amended by Truth in Lending

Simplification and Reform Act of 1982, 113 ALR Fed. 173.

What constitutes violation of requirements of Truth in Lending Act (15 USCS § 1601 et seq.) concerning disclosure of information in credit transactions — civil cases, 113 ALR Fed. 197.

What constitutes "finance charge" under § 106(a) of the Truth in Lending Act (15 USCA § 1605(a)) or applicable regulations, 154 ALR Fed. 431.

**10-1-33.1. Advancement of money for satisfaction of lease, lien, or security interest in motor vehicle.**

A retail installment seller may advance money to a buyer or pay money to a third party on behalf of the buyer to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on a motor vehicle which is the subject of a retail installment transaction under this article. Any amount so advanced or paid may be financed as part of a retail installment contract and shall not be considered a loan. The transaction and the seller making such advance or payment shall be exempt from the provisions of Chapter 3 of Title 7, relating to industrial loans, from the provisions of Chapter 4 of Title 7, relating to interest and usury, and from any other provision of Georgia law regulating loans. (Code 1981, § 10-1-33.1, enacted by Ga. L. 1999, p. 1229, § 2.)

**10-1-34. Right to prepay debt; credit upon anticipation of payments.**

Notwithstanding the provisions of any retail installment contract to the contrary, any buyer may pay in full at any time before maturity the debt of any retail installment contract and, in so paying the debt, shall receive a refund credit thereon for the anticipation of payments. The amount of the refund shall represent at least as great a proportion of the finance charge



as the sum of the monthly time balance after the month in which prepayment is made bears to the sum of all the monthly time balances under the schedule of payments in the contract. This method of refund upon prepayment is commonly referred to as the “Rule of 78” or the “Sum of the Digits” refund method. Where the amount of credit is less than \$1.00, no refund need be made. This Code section shall not apply to credit upon anticipation of payments or upon acceleration in those cases where the seller or holder of the contract has computed finance charges according to the actuarial method as set forth in Code Section 10-1-33. (Ga. L. 1967, p. 674, § 5; Ga. L. 1980, p. 523, § 3.)

JUDICIAL DECISIONS

**Rebate of unearned finance charges on a monthly basis** is harmonious with provisions of O.C.G.A. Art. 2, Ch. 1, T. 10. *Fitch v. GMAC*, 181 Ga. App. 7, 351 S.E.2d 215 (1986).

**Cited in** *Cook v. First Nat’l Bank*, 130 Ga. App. 587, 203 S.E.2d 870 (1974); *Stewart v. Ford Motor Credit Co.*, 685 F.2d 391 (11th Cir. 1982).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 9A Am. Jur. 2d, Bankruptcy, § 1131.

50 Am. Jur. 2d, Larceny, § 62.  
**C.J.S.** — 8B C.J.S., Bankruptcy, § 833.

10-1-35. Refinancing retail installment contract.

The holder of a contract, upon request by the buyer, may extend the scheduled due date of all or any part of any installment or installments or deferred payment or payments or renew or restate the unpaid time balance of such contract, the amount of the installments, and the time schedule therefor and may collect for such extension, deferment, renewal, or restatement a refinance charge computed as follows: In the event the unpaid time balance of the contract is extended, deferred, renewed, or restated, the holder may compute the refinance charge on such amount by adding to the unpaid time balance the cost for insurance and other benefits incidental to the refinancing plus any accrued delinquency and collection charges after deducting any refund which may be due the buyer at the time of the renewal or restatement by prepayment pursuant to Code Section 10-1-34, at the rate of the finance charge specified in subsection (a) of Code Section 10-1-33, and by reclassifying the motor vehicle by its then year model, for the term of the refinancing agreement, but otherwise subject to the provisions of this article governing computation of the original finance charge. The provisions of this article relating to minimum finance charges under subsection (b) of Code Section 10-1-33 and acquisition costs under the refund schedule in Code Section 10-1-34 shall not apply in calculating refinance charges on the contract extended, deferred, renewed, or restated. If all unpaid installments are deferred for not more than two months, the holder may, at his election, charge and collect for such deferment an

amount equal to the difference between the refund required for prepayment in full under Code Section 10-1-34 as of the scheduled due date of the first deferred installment and the refund required for prepayment in full as of one month prior to said date times the number of months in which no scheduled payment is made. (Ga. L. 1967, p. 674, § 6.)

### JUDICIAL DECISIONS

**Inapplicable where deficiency judgment not being sought.** — O.C.G.A. § 10-1-35 is inapplicable to a case which is not seeking a deficiency judgment but, instead, is a suit on a note. *F & M Bank v. Smith*, 162 Ga. App. 410, 291 S.E.2d 80 (1982).

**O.C.G.A. § 10-1-35 complements O.C.G.A. § 11-9-504** and provides some guidance as to what constitutes reasonable notice. *Lacy v. General Fin. Corp.*, 651 F.2d 1026 (5th Cir. 1981).

**Actual notice to debtor not required.** — There is no requirement in O.C.G.A. § 10-1-35 that the debtor actually receive notice. *Calcote v. Citizens & S. Nat'l Bank*, 179 Ga. App. 132, 345 S.E.2d 616 (1986).

**Caterpillar 977L Traxcavator** does not fall within purview of "motor vehicle" under O.C.G.A. § 10-1-35. *Battle v. Yancey Bros. Co.*, 157 Ga. App. 277, 277 S.E.2d 280 (1981).

**Cited in** *Green v. Ford Motor Credit Co.*, 146 Ga. App. 531, 246 S.E.2d 721 (1978); *Veitch v. National Bank*, 159 Ga. App. 473, 283 S.E.2d 686 (1981); *Flournoy v. City Fin. of Columbus, Inc.*, 679 F.2d 821 (11th Cir. 1982); *First Fed. Sav. & Loan Ass'n v. Jones*, 173 Ga. App. 356, 326 S.E.2d 554 (1985); *Mejia v. Citizens & S. Bank*, 175 Ga. App. 80, 332 S.E.2d 170 (1985).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 320, 328 et seq., 356.

### 10-1-36. Disposition of motor vehicle repossessed after default; right to recover deficiency.

(a) When any motor vehicle has been repossessed after default in accordance with Part 6 of Article 9 of Title 11, the seller or holder shall not be entitled to recover a deficiency against the buyer unless within ten days after the repossession he or she forwards by registered or certified mail or statutory overnight delivery to the address of the buyer shown on the contract or later designated by the buyer a notice of the seller's or holder's intention to pursue a deficiency claim against the buyer. The notice shall also advise the buyer of his or her rights of redemption, as well as his or her right to demand a public sale of the repossessed motor vehicle. In the event the buyer exercises his or her right to demand a public sale of the goods, he or she shall in writing so advise the seller or holder of his or her election by registered or certified mail or statutory overnight delivery addressed to the seller or holder at the address from which the seller's or holder's notice emanated within ten days after the posting of the original seller's or holder's notice.

(b) In the event of election of such public sale by the buyer, the seller or holder shall dispose of said repossessed motor vehicle at a public sale as

provided by law, to be held in the state and county where the original sale took place, or the state and county where the motor vehicle was repossessed, or the state and county of the buyer's residence, at the seller's election.

(c) This Code section is cumulative of Part 6 of Article 9 of Title 11 and provides cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer, and nothing herein shall be deemed to repeal said part. (Ga. L. 1967, p. 674, § 7; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 995, § 9.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B.J. 43 (1987). For annual survey article on commercial law, see 50 Mercer L. Rev. 193 (1998).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION NOTICE

##### General Consideration

**Section is cumulative to UCC.** — Ga. L. 1967, p. 674, § 7 provided that it was cumulative of former Code 1933, Ch. 109A-9-5 and provided cumulative additional rights and remedies which must be fulfilled before any deficiency claim will lie against a buyer. Georgia Cent. Credit Union v. Coleman, 155 Ga. App. 547, 271 S.E.2d 681 (1980).

**Application of both federal and state statutes.** — No inconsistency exists in applying both the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C. § 1735f-7, and the Georgia Motor Vehicle Sales Finance Act (MVSFA), O.C.G.A. § 10-1-30 et seq., as DIDMCA speaks only to procedures to be followed prior to foreclosure and the notice requirements of O.C.G.A. § 10-1-36(a) only apply to procedures that take place after repossession. Chambliss v. Oakwood Acceptance Corp. (In re Chambliss), 315 B.R. 166 (Bankr. S.D. Ga. 2004).

**Leases.** — The commercially reasonable sale provision under O.C.G.A. § 11-9-504 and the notice provision under O.C.G.A. § 10-1-36 were not applicable to a lease which was a "true lease" rather than a disguised secured transaction. Citizens & S. Nat'l Bank v. Thomas, 188 Ga. App. 312, 372 S.E.2d 687 (1988).

**Compliance required for recovery of deficiency.** — Compliance with this section is a condition precedent to recovery of any deficiency claim against a defaulting purchaser of a motor vehicle. Doughty v. Associates Com. Corp., 152 Ga. App. 575, 263 S.E.2d 493 (1979).

Trial court properly granted judgment to a debtor, finding that a reposessor failed to comply with O.C.G.A. § 10-1-36, and therefore was precluded from collecting a deficiency from the debtor following the sale of the debtor's vehicle, as the reposessor waived strict compliance with O.C.G.A. § 10-1-36 by admitting that it received a facsimile notice sent by the debtor, and raised no issue as to the timeliness of the notice or whether it was received by the proper person, and failed to send the required notice thereunder to the debtor's address shown on the contract or later designated by the debtor, opting instead to send the notice to a post office box. Consumer Portfolio Servs. v. Rouse, 282 Ga. App. 314, 638 S.E.2d 442 (2006).

**Noncompliance bars recovery.** — A creditor's failure to comply with the notice provisions of O.C.G.A. § 10-1-36 is an absolute bar to recovery of a deficiency judgment. Bryant Int'l, Inc. v. Crane, 188 Ga. App. 736, 374 S.E.2d 228 (1988).

**Compliance not required where creditor**



### General Consideration (Cont'd)

**was not a "seller".** — Compliance with O.C.G.A. § 10-1-36 was not required in disposing of a tractor and trailer given as collateral for a promissory note, since the lender was not engaged in the business of selling motor vehicles to retail buyers in retail installment actions. The repossession at issue was governed only by O.C.G.A. § 11-9-504(3). *Ervin v. Arnold*, 197 Ga. App. 841, 399 S.E.2d 548 (1990).

**Statute of limitations.** — While it appeared that O.C.G.A. § 9-3-24, rather than O.C.G.A. § 11-2-725, would most likely apply to defendant collection attorney's state court deficiency action against plaintiff consumer, and it was not for the federal court to say what the Georgia courts would hold, the uncertainty meant there was no intentional unfair conduct and the consumer's Fair Debt Collection Practices Act claim was dismissed; other parts of the Georgia Code, such as O.C.G.A. § 10-1-36 and O.C.G.A. § 40-3-50, and applicable case law indicated that Georgia's highest courts would most likely hold that the case fell within Ga. U.C.C. Art. 9 and not Ga. U.C.C. Art. 2. *Almand v. Reynolds & Robin, P.C.*, 485 F. Supp. 2d 1361 (M.D. Ga. 2007).

**Cited** in *Branch v. Charlie Pike Chevrolet-Buick, Inc.*, 198 Ga. App. 672, 402 S.E.2d 544 (1991); *Atlantic Coast Fed. Credit Union v. Delk*, 241 Ga. App. 589, 526 S.E.2d 425 (1999).

### Notice

**Notice required within ten days of repossession, not acquisition of interest.** — This section makes no mention of sending a notice within ten days after an interest in the property is acquired. To give this section such a construction would be to allow a party who is a subsequent holder of the note to give notice six months, or perhaps even a year, after the repossession occurred based merely on the fact that the party then acquired a right to possession of the vehicle. This section is clear in its import to protect the debtor by giving the debtor notice within ten days of the repossession so that the debtor might act to prevent the loss of any rights the debtor might have. *Barnett v. Trussell Ford, Inc.*, 129 Ga. App. 176, 198 S.E.2d 903 (1973).

**Cure period does not stop 10 days.** — Creditor had the right to repossess debtor's truck on the date the debtor surrendered the truck, not at the end of a ten-day period extended by the creditor for the debtor to "cure" the debtor's default, and the "cure" period did not stop the running of the ten-day notice requirement of O.C.G.A. § 10-1-36. *Welch v. Ford Motor Credit Co.*, 227 Ga. App. 904, 490 S.E.2d 206 (1997).

**Triggering of ten-day period.** — It is only when the debtor is in default and the right to repossess exists that no distinction should be made between repossession and voluntary surrender with regard to triggering the running of the ten-day period within which the required notice must be sent. *Central & S. Bank v. Williford*, 192 Ga. App. 843, 386 S.E.2d 688 (1989).

Because the lessor was not bound to renew a vehicle lease agreement or become the owner of the vehicle and the residual purchase option price was not nominal or unreasonably low, the lease agreement did not serve as a security interest that triggered notice requirements under O.C.G.A. § 10-1-36. *Lewis v. Lease Atlanta, Inc.*, 234 Ga. App. 812, 508 S.E.2d 188 (1998).

**No requirement that notice be received.** — Under O.C.G.A. § 10-1-36 there is no requirement that the required notice be received, but only that it be sent within ten days of repossession by registered or certified mail to the address shown on the contract or later designated by the buyer. *Brack Rowe Chevrolet Co. v. Walls*, 201 Ga. App. 822, 412 S.E.2d 603 (1991).

**Two attempts to deliver certified mail to the buyer's correct address met the requirements of O.C.G.A. § 10-1-36.** *Hill v. Federal Employees Credit Union*, 193 Ga. App. 44, 386 S.E.2d 874 (1989).

**Use of language "you may redeem said collateral" is sufficient compliance** with the terms of this section. *Gary v. GMAC*, 128 Ga. App. 10, 195 S.E.2d 458 (1973).

**Statement of balance is not required.** — Although a statement of the balance owed would be preferable in advising the buyer of the buyer's rights of redemption, this section does not require such specification. *Cook v. First Nat'l Bank*, 130 Ga. App. 587, 203 S.E.2d 870 (1974).

**Compliance with notice requirements.** — After the Chapter 13 debtors objected to a



secured creditor's amended proof of claim that alleged the existence of a deficiency balance after it had repossessed and sold the collateral, the creditor complied with the Depository Institutions Deregulation and Monetary Control Act of 1980 (DIDMCA), 12 U.S.C.S. § 1735f-7, by giving the debtors 30 days notice of default and right to cure before it repossessed their mobile home, and complied with the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq., by sending the post-repossession notice to the debtors within 10 days of repossession; therefore, its post-repossession notice was timely. *Chambliss v. Oakwood Acceptance Corp.* (In re Chambliss), 315 B.R. 166 (Bankr. S.D. Ga. 2004).

**Noncompliance with notice requirements.**

— Where a bank forwarded separate deficiency notices to a loan cosigner and the cosigner's daughter by certified mail within 10 days after repossession of a financed vehicle but mailed both notices to the daughter's address, even though the cosigner's address was the one shown on the contract, the notice was not in compliance with O.C.G.A. § 10-1-36. *Whatley v. Bank S.*, 185 Ga. App. 896, 366 S.E.2d 182, cert. denied, 185 Ga. App. 911, 375 S.E.2d 245 (1988).

The repossession of defendant's automobile occurred when the defendant notified the bank of the defendant's intention the defendant's to allow repossession, not when the bank physically removed the car from the seller's premises; the bank therefore did not comply with the 10-day notice requirements of O.C.G.A. § 10-1-36 by sending notice on the day after the car was returned. *Sikes & Swanson Pontiac-GMC Truck, Inc. v. Cantrell*, 194 Ga. App. 818, 392 S.E.2d 36 (1990).

Failure to comply with the notice provisions of O.C.G.A. § 10-1-36 is an absolute bar to recovery. *Brack Rowe Chevrolet Co. v. Walls*, 201 Ga. App. 822, 412 S.E.2d 603 (1991).

The absence of any proof that the notice was sent by certified mail coupled with evidence that it was never received, left the trial court with a disputed fact regarding whether the notice was properly sent in compliance with O.C.G.A. § 10-1-36. *Pitts v. Bank S. Corp.*, 209 Ga. App. 124, 433 S.E.2d 96 (1993).

Creditor, who did not comply with the notice requirements of O.C.G.A. § 10-1-36 in repossessing and selling a debtor's vehicle, was not entitled to assert a deficiency claim over the debtor's objection, despite the language of the bankruptcy plan and the creditor's belief that the practice in the district was to allow such claim. *Gibson v. Citifinancial Auto Corp.* (In re Gibson), Bankr. , 2005 Bankr. LEXIS 2672 (Bankr. N.D. Ga. Nov. 15, 2005).

**Creditor, who was secured by debtor's car,** was not entitled to a deficiency claim after the sale of the car failed to satisfy the full amount of the debt owed since the creditor did not give notice under state law of the creditor's intention to seek a deficiency claim. *Baxter v. Sys. & Servs. Techs., Inc.* (In re Dykes), 287 Bankr. 298 (Bankr. S.D. Ga. 2002).

**Plaintiff's good faith held question of fact.** — Where it cannot be determined if notice of the sale was returned prior to or after the sale, plaintiff's good faith in the transaction is a question for the trier of fact. *Slocum v. First Nat'l Bank*, 152 Ga. App. 632, 263 S.E.2d 516 (1979).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 67A Am. Jur. 2d, Sales, § 983 et seq.

### 10-1-36.1. Assertion of violation on loan or contract secured by motor vehicle only in individual action.

(a) A claim of violation on any loan or contract secured by an interest in a motor vehicle may be asserted in an individual action only and may not be the subject of a class action under Code Section 9-11-23 or any other provisions of law.

(b) Nothing contained in this Code section shall apply to class actions involving mobile homes or manufactured homes pending in any courts of this state, including any United States courts, on February 22, 1985, as to the parties to and subject matter then before such courts. (Code 1981, § 10-1-36.1, enacted by Ga. L. 1985, p. 698, § 3.)

### JUDICIAL DECISIONS

**Purpose of section.** — Subsection (a) of O.C.G.A. § 10-1-36.1 is intended to prohibit class action certification for a claim that any loan or contract secured by an interest in a motor vehicle violates the Motor Vehicle Sales Finance Act, O.C.G.A. § 10-1-30 et seq. *Taylor Auto Group, Inc. v. Jessie*, 241 Ga. App. 602, 527 S.E.2d 256 (1999).

### 10-1-37. Waiver of this article void.

Any waiver of this article shall be unenforceable and void. (Ga. L. 1967, p. 674, § 9.)

### JUDICIAL DECISIONS

**Waiver prohibited.** — Code section expressly prohibits any waiver of the provisions of Ga. L. 1967, p. 674, § 1 et seq. *Barnett v. Trussell Ford, Inc.*, 129 Ga. App. 176, 198 S.E.2d 903 (1973). **Cited in** *Kelley v. GMAC*, 145 Ga. App. 739, 244 S.E.2d 911 (1978).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 84, 96. **C.J.S.** — 77A C.J.S., Sales, § 122 et seq.

### 10-1-38. Criminal and civil penalties.

(a) Any person who shall willfully and intentionally violate this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.00 for the first offense and shall be punished as for a misdemeanor for each subsequent offense.

(b) A violation of Code Section 10-1-33 by the seller or holder shall bar recovery of any finance charge, delinquency, or collection charge on the contract.

(c) In case of a willful violation of this article with respect to any transaction, the buyer in such transaction may recover from the person committing the violation (or may set off or counterclaim in any action by such person) a minimum of \$100.00 or double the time price differential and any delinquency charge and any attorneys' fees and court costs charged and paid with respect to such transaction, but the seller may recover from the buyer an amount equal to the cash price of the goods or services in such

transaction and the cost of any insurance purchased by the seller for the buyer in connection therewith.

(d) Notwithstanding this Code section, any failure to comply with Code Section 10-1-33 may be corrected within ten days after the date of execution of the retail installment contract by the buyer; and, if so corrected, neither the seller nor the holder is subject to any penalty under this Code section. (Ga. L. 1967, p. 674, § 8.)

**Law reviews.** — For article, "Nonjudicial Foreclosures in Georgia Revisited," see 24 Ga. St. B.J. 43 (1987).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION PENALTIES

##### General Consideration

**Construction of "any person" and "the person committing the violation."** — In pari materia with O.C.G.A. § 10-1-33, the language "any person" and "the person committing the violation" found in subsections (a) and (c) of O.C.G.A. § 10-1-38 refers only to the seller or holder and was not intended to expand the class of persons liable for usury violations. This is emphasized by subsection (d), which provides that if a violation is corrected within ten days after execution of the contract, "neither the seller nor the holder is subject to any penalty under this Code section." *Tollett v. Green Tree Acceptance, Inc.*, 190 Ga. App. 295, 379 S.E.2d 2 (1989).

**Insurance costs and other authorized charges are properly included in the "unpaid balance"** and are properly subject to the finance charge; therefore, if included, there is no violation of Ga. L. 1970, p. 101, § 3 and no resultant forfeiture of interest. *Busby v. Sea Island Bank*, 151 Ga. App. 412, 260 S.E.2d 485 (1979).

**Retroactivity of 1983 amendment to § 7-4-3(a).** — The 1983 amendment to O.C.G.A. § 7-4-3(a), which provides that O.C.G.A. § 10-1-33 shall not apply to retail installment contracts pertaining to any manufactured home with a cash sales price of more than \$3,000.00 does not operate retroactively so as to eliminate any cause of action a manufactured home purchaser may have

acquired under O.C.G.A. § 10-1-38 by a transaction prior to the 1983 act's effective date. *Southern Guar. Corp. v. Doyle*, 256 Ga. 790, 353 S.E.2d 510, cert. denied, 484 U.S. 926, 108 S. Ct. 289, 98 L. Ed. 2d 249 (1987).

**No civil remedy for inadvertent failure to disclose.** — It being uncontroverted that the seller's failure to meet the disclosure requirements of O.C.G.A. § 10-1-32 was inadvertent rather than intentional, subsection (c) of O.C.G.A. § 10-1-38 did not provide a civil remedy. *Vickery v. Mobile Home Indus., Inc.*, 171 Ga. App. 566, 320 S.E.2d 633 (1984).

Subsection (c) of O.C.G.A. § 10-1-38 does not provide a civil remedy for nonwillful violations of the relevant statutory provisions. *Ogletree v. Brokers S., Inc.*, 192 Ga. App. 53, 383 S.E.2d 900 (1989).

**Acceleration clauses are not per se unenforceable.** *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom. *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

**Collection of unearned interest is not per se improper** under Georgia law. *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom. *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

**Acceleration clause not bad unless usurious.** — An acceleration clause is bad only if it attempts to accelerate unearned interest



**General Consideration** (Cont'd)

and enforcement of the clause would cause the note to become usurious. *McDaniel v. Fulton Nat'l Bank*, 395 F. Supp. 422 (N.D. Ga. 1974), rev'd on other grounds, 543 F.2d 568 (5th Cir. 1976).

**Excess finance charge alone does not show willfulness.** — A finding of willfulness is not authorized merely because it has been established that a finance charge exceeds the legal limit set forth in subsection (a) of Ga. L. 1970, p. 101, § 3. *Lee v. National Bank & Trust Co.*, 153 Ga. App. 656, 266 S.E.2d 315 (1980).

**Award of attorneys' fees.** — In determining appropriate award of attorneys' fees, contingency nature of fee arrangement should be considered. *Stokes v. Fidelity Acceptance Corp.*, 644 F.2d 355 (5th Cir. 1981).

Where the jury was asked to indicate its finding as to whether there had been any "willful and intentional violation" on the part of plaintiff, by striking out this language on the verdict form, the jury obviously found that there had not been such a violation and therefore, the verdict showed, on the verdict's face, that there was no predicate for any recovery of attorney's fees. *First Union Nat'l Bank v. Big John's Auto Sales, Inc.*, 203 Ga. App. 797, 417 S.E.2d 416 (1992).

O.C.G.A. § 10-1-38 permits a recoupment of attorney's fees previously paid to a seller who had willfully violated the Motor Vehicle State Finance Act, O.C.G.A. § 10-1-30 et seq., but it does not permit a recovery of any attorney's fees incurred in litigating the seller's willful violation of that statute. *First Union Nat'l Bank v. Big John's Auto Sales, Inc.*, 203 Ga. App. 797, 417 S.E.2d 416 (1992).

**Evidence held to support findings as to usury.** — Where less than \$100.00 of the total \$540.96 finance charge was refunded upon acceleration of one note prior to the half-way point in the contract and no interest was refunded to the promisor upon acceleration of second note, there was ample evidence to support the trial court's finding usurious both contracts which were the basis for the bank's counterclaim. *Adamson v. Trust Co. Bank*, 155 Ga. App. 646, 271 S.E.2d 899 (1980).

**Cited in** *Smith v. Society Nat'l Bank*, 141 Ga. App. 19, 232 S.E.2d 367 (1977); *Smith v.*

*Society Nat'l Bank*, 143 Ga. App. 370, 238 S.E.2d 739 (1977); *Porter v. Midland-Guardian Co.*, 145 Ga. App. 262, 243 S.E.2d 595 (1978); *Green v. Ford Motor Credit Co.*, 146 Ga. App. 531, 246 S.E.2d 721 (1978); *Ford Motor Credit Co. v. Spann*, 153 Ga. App. 535, 265 S.E.2d 863 (1980); *Bozeman v. Tifton Fed. Sav. & Loan Ass'n*, 164 Ga. App. 260, 297 S.E.2d 49 (1982); *Bozeman v. Tifton Fed. Sav. & Loan Ass'n*, 172 Ga. App. 652, 324 S.E.2d 199 (1984); *Carter v. First Fed. Sav. & Loan Ass'n*, 179 Ga. App. 532, 347 S.E.2d 264 (1986).

**Penalties**

**Minimum penalty.** — The General Assembly did not intend by the legislature's language in O.C.G.A. § 10-1-38 to allow courts to choose the \$100.00 penalty in cases involving willful violations; rather, the \$100.00 minimum was meant to apply only in cases where the illegal finance charge amounted to less than \$50.00. *Stokes v. Fidelity Acceptance Corp.*, 644 F.2d 355 (5th Cir. 1981).

**No provision as to degree of overcharge or penalty.** — There is no provision in O.C.G.A. § 10-1-38 for degrees of overcharging or degrees of penalty. The penalty for overcharging is forfeiture of any finance charge, delinquency, or collection charge on the contract. The language used is absolute and the trial court is without authority to decline to apply the language. *Kelly v. Sylvan Motors, Inc.*, 160 Ga. App. 420, 287 S.E.2d 359 (1981).

**Forfeiture of finance charge.** — O.C.G.A. § 10-1-38 provides for forfeiture of finance charge as a consequence of any violation of O.C.G.A. Art. 2, Ch. 1, T. 10, regardless of the violation's character. *Stokes v. Fidelity Acceptance Corp.*, 644 F.2d 355 (5th Cir. 1981).

**Usury violation bars recovery of charges.** — If an acceleration of unearned interest caused a note to become usurious, then there was a violation of the usury provision of Ga. L. 1970, p. 101, § 3, and thus, under former Code 1933, § 96-1008, the creditor was barred from recovering any finance charge, delinquency, or collection charge on the contract. *McDaniel v. Fulton Nat'l Bank*, 395 F. Supp. 422 (N.D. Ga. 1974), rev'd on other grounds, 543 F.2d 568 (5th Cir. 1976).

Where the interest refund in a suit for a deficiency balance resulting from a sale un-



der an installment contract, calculated using the "Rule of 78," results in interest totaling two-thirds of the total amount being charged for a period of less than half the time of the note, this is in excess of the maximum allowable on the unpaid balance to finance. Hence, a violation of subsection (a) of Ga. L. 1970, p. 101, § 3 is shown by the evidence. Under Ga. L. 1967, p. 674, § 8 this bars recovery of any finance charge, delinquency, or collection charge on the contract. *Cook v. First Nat'l Bank*, 130 Ga. App. 587, 203 S.E.2d 870 (1974).

**Principal may be collected.** — Once the court has determined that the creditor is in fact attempting to extort usurious interest, under this article the lender is allowed to collect the principal, but the lender loses at least all unearned interest. *Barrett v. Vernie Jones Ford, Inc.*, 395 F. Supp. 904 (N.D. Ga. 1975), rev'd on other grounds sub nom. *McDaniel v. Fulton Nat'l Bank*, 543 F.2d 568 (5th Cir. 1976), aff'd, 578 F.2d 1185 (5th Cir. 1978).

### RESEARCH REFERENCES

**ALR.** — Right to private action under state consumer protection Act, 62 ALR3d 169.

### 10-1-39. Additional definitions.

In addition to the definitions provided for in Code Section 10-1-31, as used in Code Sections 10-1-40 through 10-1-42, the term:

(1) "Induce" means to cause a buyer of a motor vehicle under a retail installment contract or a lessee of a motor vehicle under a motor vehicle lease contract to sublease the subject motor vehicle or to arrange for or cause such a buyer or lessee to be so induced.

(2) "Lessee" means a person who obtains possession and use of a motor vehicle through a motor vehicle lease contract.

(3) "Lessor" means any person who in the regular course of business or as a part of regular business activity leases motor vehicles under motor vehicle lease contracts or purchases motor vehicle lease contracts or any sales finance company that purchases motor vehicle lease contracts.

(4) "Motor vehicle lease contract" means an agreement between a lessor and a lessee whereby the lessee obtains the possession and use of a motor vehicle for such period of time, for such purposes, and for such consideration as set forth in the agreement.

(5) "Subject motor vehicle" means the motor vehicle sold to a buyer under a retail installment contract or the motor vehicle obtained by a lessee under a motor vehicle lease contract.

(6) "Sublease" means:

(A) To transfer possession of a motor vehicle which is the subject of a retail installment contract to a person who is not a party to that contract or to transfer or assign any of the buyer's rights or interests

under the retail installment contract to such a person, whether or not such transfer or assignment is effective; or

(B) To transfer possession of a motor vehicle which is the subject of a motor vehicle lease contract to a person who is not a party to that contract or to transfer or assign any of the lessee's or lessor's rights or interests under the motor vehicle lease contract to such a person, whether or not such transfer or assignment is effective. (Code 1981, § 10-1-39, enacted by Ga. L. 1988, p. 861, § 1; Ga. L. 1999, p. 1229, § 3.)

**10-1-40. Unlawful inducement of motor vehicle buyer or lessee under contract to sublease vehicle; unlawful offering of vehicle for hire by sublessee.**

(a) It is unlawful for any person to induce the buyer of a motor vehicle under a retail installment contract to sublease the subject motor vehicle to that person or to any other sublessee without first obtaining written consent to the sublease from the holder of the retail installment contract.

(b) It is unlawful for any person to induce the lessee of a motor vehicle under a motor vehicle lease contract to sublease the subject motor vehicle to that person or to any other sublessee without first obtaining written consent to the sublease from the lessor under the motor vehicle lease contract.

(c) It is unlawful for any person who is the sublessee of a motor vehicle to offer the motor vehicle for hire or to offer it to another person to offer for hire if such person induced the sublease of the motor vehicle in violation of subsection (a) or (b) of this Code section or if such person knew or reasonably should have known that the sublease of the motor vehicle was induced in violation of subsection (a) or (b) of this Code section.

(d) Any person who violates any provision of subsection (a), (b), or (c) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 10-1-40, enacted by Ga. L. 1988, p. 861, § 1.)

**Code Commission notes.** — Pursuant to inserted following “guilty of” in subsection Code Section 28-9-5, in 1988, an “a” was (d).

**10-1-41. Actions brought by persons suffering damage against person inducing unlawful sublease of motor vehicle; remedies.**

(a) Any one or more of the following persons may suffer damage as a result of a violation of subsection (a) or (b) of Code Section 10-1-40:

(1) The holder of a retail installment contract;

(2) The lessor of a motor vehicle under a motor vehicle lease contract;

(3) The buyer of a motor vehicle under a retail installment contract or the lessee of a motor vehicle under a motor vehicle lease contract;

(4) The sublessee of the subject motor vehicle when such sublessee did not know and could not reasonably be expected to have known that the sublease of the motor vehicle was induced in violation of subsection (a) or (b) of Code Section 10-1-40.

(b) A person who suffers damage as described in subsection (a) of this Code section may bring an action against the person who induced the sublease of the subject motor vehicle in violation of subsection (a) or (b) of Code Section 10-1-40. The person who suffers damage may recover or obtain against the person who induced such sublease any of the following:

(1) Actual damages;

(2) Equitable relief, including, but not limited to, an injunction or restitution of money and property;

(3) Punitive damages;

(4) Reasonable attorney's fees and costs; and

(5) Any other relief which the court deems proper.

(c) The rights and remedies provided for in this Code section are in addition to any other rights and remedies provided by law. (Code 1981, § 10-1-41, enacted by Ga. L. 1988, p. 861, § 1.)

**10-1-42. Advancement of money to satisfy lease, lien, or security interest in motor vehicle; inclusion in gross capitalized cost.**

A lessor or the entity which sells the motor vehicle to the lessor for lease to a lessee may advance money to a lessee or pay money to a third party on behalf of the lessee to satisfy a lease on or a lien on or a security interest in a motor vehicle used as a trade-in on a motor vehicle which is the subject of a motor vehicle lease contract. Any amount so advanced or paid may be included in the gross capitalized cost under the motor vehicle lease contract and shall not be considered a loan. Such advance and the seller or lessor making such advance or payment shall be exempt from the provisions of Chapter 3 of Title 7, relating to industrial loans, from the provisions of Chapter 4 of Title 7, relating to interest and usury, and from any other provision of Georgia law regulating loans. (Code 1981, § 10-1-42, enacted by Ga. L. 1999, p. 1229, § 4.)

## ARTICLE 3

## UNSOLICITED MERCHANDISE

**10-1-50. Unsolicited merchandise not to be sent; recipient may treat as gift; enjoining payment requests.**

No person, firm, partnership, association, or corporation, or agent or employee thereof, shall, in any manner or by any means, offer for sale goods, wares, or merchandise where the offer includes the voluntary and unsolicited sending of such goods, wares, or merchandise not actually ordered or requested by the recipient, either orally or in writing. The receipt of any such goods, wares, or merchandise shall for all purposes be deemed an unconditional gift to the recipient, who may use or dispose of such goods, wares, or merchandise, unless such goods, wares, or merchandise were delivered to recipient as a result of a bona fide mistake, in any manner he sees fit without any obligation on his part to the sender.

If, after any such receipt deemed to be an unconditional gift under this Code section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party. (Ga. L. 1970, p. 565, § 1.)

## RESEARCH REFERENCES

Am. Jur. 2d. — 67 Am. Jur. 2d, Sales, § 28.

**10-1-51. Unordered merchandise sent after membership terminated deemed gift; enjoining payment requests.**

If a person is a member of an organization which makes retail sales of any goods, wares, or merchandise to its members and the person notifies the organization of his termination of membership by certified mail or statutory overnight delivery, return receipt requested, any unordered goods, wares, or merchandise which are sent to the person after 30 days following execution of the return receipt for the certified letter by the organization shall for all purposes be deemed unconditional gifts to the person, who may use or dispose of the goods, wares, or merchandise in any manner he sees fit without any obligation on his part to the organization.

If the termination of a person's membership in such organization breaches any agreement with the organization, nothing in this Code section shall relieve the person from liability for damages to which he might be otherwise subjected to pursuant to law; but he shall not be subject to any damages with respect to any goods, wares, or merchandise which are deemed unconditional gifts to him under this Code section.



If, after any receipt deemed to be an unconditional gift under this Code section, the sender continues to send bill statements or requests for payment with respect thereto, an action may be brought by the recipient to enjoin such conduct, in which action there may also be awarded reasonable attorneys' fees and costs to the prevailing party. (Ga. L. 1970, p. 565, § 2; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, cable with respect to notices delivered on or § 16, not codified by the General Assembly, after July 1, 2000. provides that the 2000 amendment is appli-

## ARTICLE 4

### FURNISHING NAMES OF PROSPECTIVE PURCHASERS

#### **10-1-70. Sales contract must state consideration for furnishing names of prospective purchasers; penalty.**

(a) It shall be unlawful for any person, firm, or corporation engaged in the business of selling any type of merchandise in the State of Georgia to promise a consideration, either cash or otherwise, to a buyer of such merchandise for providing the names or other information relative to other prospective purchasers of such merchandise, unless the promise of such consideration is contained in the contract of sale between the seller and the buyer.

(b) Any person, firm, or corporation violating subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1965, p. 247, §§ 1, 2.)

## ARTICLE 5

### LABELING REMANUFACTURED OR REBUILT ITEMS

#### RESEARCH REFERENCES

**C.J.S.** — 77A C.J.S., Sales, § 122 et seq. representation that article, other than motor  
**ALR.** — Sales: Liability for warranty or vehicle, is new, 36 ALR3d 237.

#### **10-1-80. “Remanufactured” and “rebuilt” defined.**

As used in this article, the term:

(1) “Rebuilt” means the reconditioning of a motor, engine, well pump, or other mechanical item by the replacement of parts of the motor, engine, well pump, or other mechanical item without changing the original size, shape, or tolerance of the item except by the use of parts therefor.

(2) “Remanufactured” means the changing of the size, shape, or tolerance in any motor, engine, well pump, or other mechanical item by machinery grinding or cutting away of the original item. (Ga. L. 1959, p. 372, § 3.)

#### **10-1-81. Label required for remanufactured item sold at retail.**

Any remanufactured item sold at retail in the State of Georgia shall be labeled “Remanufactured.” Such label shall be placed adjacent to and shall be of the same size and type of marking as the old marking on the remanufactured item. (Ga. L. 1959, p. 372, § 1.)

**Cross references.** — Labeling of second-hand watches, Ch. 49, T. 43.

#### **10-1-82. Label required for rebuilt item sold at retail.**

Any rebuilt item sold at retail in the State of Georgia shall be labeled “Rebuilt.” Such label shall be placed adjacent to and shall be of the same size and type of marking as the old marking on the rebuilt item. (Ga. L. 1959, p. 372, § 2.)

**Cross references.** — Labeling of second-hand watches, Ch. 49, T. 43.

#### **10-1-83. Penalty for violation of this article.**

Noncompliance with this article shall be a misdemeanor, and punishment shall be as provided by law. (Ga. L. 1959, p. 372, § 4.)

### **ARTICLE 6**

#### **INTERSTATE PURCHASE OF RIFLES AND SHOTGUNS**

##### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weapons and Firearms, §§ 4, 5, 7.      Application of statute or regulation dealing with registration or carrying of weapons

**C.J.S.** — 94 C.J.S., Weapons, § 3 et seq.      to transient nonresident, 68 ALR3d 1253.

**ALR.** — Applicability of state anti-trust act to interstate transaction, 24 ALR 787.

#### **10-1-100. Out of state purchase of rifles and shotguns by residents.**

Residents of the State of Georgia may purchase rifles and shotguns in any state of the United States, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the State of Georgia, and of the state in which the purchase is made. (Ga. L. 1969, p. 804, § 1; Ga. L. 2002, p. 977, § 1.)

**Cross references.** — Regulation of sale, possession of weapons generally, § 16-11-100 et seq.

### 10-1-101. Nonresidents may purchase rifles and shotguns in Georgia.

Residents of any state of the United States may purchase rifles and shotguns in the State of Georgia, provided such residents conform to applicable provisions of statutes and regulations of the United States, of the State of Georgia, and of the state in which such persons reside. (Ga. L. 1969, p. 804, § 2; Ga. L. 2002, p. 977, § 1.)

**Cross references.** — Regulation of sale, possession of weapons generally, § 16-11-100 et seq.

## ARTICLE 7

### SALE OF PAINTS AND FLAXSEED OR LINSEED OIL

#### RESEARCH REFERENCES

**ALR.** — Products liability: sufficiency of evidence to support product misuse defense in actions concerning paint, cleaners, or other chemicals, 58 ALR4th 76.

### 10-1-120. “Paint” defined.

The term “paint,” as used in this article, shall include white lead basic, carbonate, or sublimate, in any kind of oil, or any compound intended for the same use, paste or semipaste, and liquid or mixed paint ready for use. (Ga. L. 1920, p. 225, § 3; Code 1933, § 73-102.)

#### RESEARCH REFERENCES

**Am. Jur. Trials.** — Childhood Lead-Based Paint Poisoning Litigation, 66 Am. Jur. Trials 47.

### 10-1-121. Enforcement of article; rules and regulations.

The director of the Georgia Drugs and Narcotics Agency is charged with the proper enforcement of this article and is empowered to formulate and promulgate such rules and regulations as may be necessary in carrying out the purposes of this article. (Ga. L. 1920, p. 225, § 7; Code 1933, § 73-101.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 49 et seq. **C.J.S.** — 3 C.J.S., Agriculture, § 19 et seq.

**10-1-122. Labels on paint containers.**

The labels on containers of paints shall clearly and distinctly state the name and residence of the manufacturer of the paint or the distributor thereof or of the party for whom the same is manufactured. The label shall also clearly state the quantity contained in the package; the quantity, in the case of liquid or mixed paints, to be designated in United States standard gallons or fraction thereof and, in the case of paste or semipaste paints, such as are commonly sold by weight, to be shown by weight avoirdupois. Said labels shall be printed in the English language in plain, legible type. (Ga. L. 1920, p. 225, § 2; Code 1933, § 73-103.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 49. 38 Am. Jur. 2d, Gas and Oil, § 255.      **Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 49. 38 Am. Jur. 2d, Gas and Oil, § 255.      **Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 49. 38 Am. Jur. 2d, Gas and Oil, § 255.      **Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 49. 38 Am. Jur. 2d, Gas and Oil, § 255.

**C.J.S.** — 2 C.J.S., Adulteration, § 1 et seq.      **C.J.S.** — 2 C.J.S., Adulteration, § 1 et seq.      **C.J.S.** — 2 C.J.S., Adulteration, § 1 et seq.      **C.J.S.** — 2 C.J.S., Adulteration, § 1 et seq.

**ALR.** — Constitutionality of statutes re-

quiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 ALR 572.

**10-1-123. Purity of flaxseed or linseed oil; requirement for boiled linseed oil.**

No person, firm, corporation, or agent or employee of any person, firm, or corporation shall manufacture for sale or offer or expose for sale any flaxseed or linseed oil unless the same shall answer all the chemical tests for purity recognized in the United States Pharmacopoeia or offer or expose for sale any flaxseed or linseed oil as “boiled linseed oil” unless in its manufacture the same shall have been put to a temperature of 225 degrees Fahrenheit. (Ga. L. 1920, p. 225, § 4; Code 1933, § 73-104.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 52.      **C.J.S.** — 3 C.J.S., Agriculture, §§ 80, 81.

**10-1-124. Flaxseed or linseed oil to be sold under true name; labeling tank cars, tanks, barrels, or vessels of such oil.**

No person, firm, corporation, or agent or employee of any person, firm, or corporation shall sell or expose or offer for sale any flaxseed or linseed oil unless it shall be done under its true name; and each tank car, tank, barrel, keg, or any vessel of such oil shall have distinctly and durably printed, stamped, stenciled, or labeled thereon the true name of such oil and in ordinary boldface capital letters the words “PURE LINSEED OIL RAW” or “PURE LINSEED OIL BOILED” and the name and address of the manufacturer thereof or of the party for whom the same is manufactured and under whose brand the same is sold. (Ga. L. 1920, p. 225, § 5; Code 1933, § 73-105.)



## RESEARCH REFERENCES

- Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 52.      quiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 ALR 572.
- C.J.S.** — 3 C.J.S., Agriculture, §§ 80, 81.
- ALR.** — Constitutionality of statutes re-

**10-1-125. Possession of improperly labeled article prima-facie evidence of violation.**

Possession by any person, firm, or corporation, or agent or employee of any person, firm, or corporation dealing in said articles, of any article described in Code Sections 10-1-120 through 10-1-124 and not properly labeled shall be considered prima-facie evidence that the same is kept by such person, firm, or corporation in violation of this article and punishable under it. (Ga. L. 1920, p. 225, § 6; Code 1933, § 73-106.)

## RESEARCH REFERENCES

- Am. Jur. 2d.** — 3 Am. Jur. 2d, Agriculture, § 52.      **C.J.S.** — 2 C.J.S., Adulteration, §§ 9, 10.

**10-1-126. Requirements for timber-marking paint; penalty for violation; enjoining violation.**

(a) It shall be unlawful for any person, firm, or corporation to distribute, sell, or offer for sale within this state any paint used specifically for marking timber if such paint will not remain effective for a period of at least 12 months if applied to timber in a nondiluted state. The label on the container of any such paint sold in this state shall have clearly printed thereon in bold type the following: "EFFECTIVE FOR A MINIMUM OF 12 MONTHS IF USED IN A NONDILUTED STATE."

(b) As used in this Code section, the term "paint" means any substance or mixture of substances, liquid, powder, or paste intended for use primarily for marking timber.

(c) Any person violating this Code section shall be guilty of a misdemeanor.

(d) In addition to the remedies provided in this Code section, the director and drug agents of the Georgia Drugs and Narcotics Agency may apply to an appropriate court for, and such court shall have jurisdiction upon hearing and for cause shown to grant, a temporary or permanent injunction restraining any person from violating this Code section irrespective of whether or not there exists an adequate remedy at law. (Code 1933, § 73-107, enacted by Ga. L. 1976, p. 1556, § 1.)

RESEARCH REFERENCES

C.J.S. — 2 C.J.S., Adulteration, §§ 2, 3.

10-1-127. Penalty for sale of deceptively labeled paint.

Whoever shall sell or offer or expose for sale any paint which shall be labeled or marked in such manner as to tend to deceive the purchaser as to its nature or composition or which shall not be accurately labeled as required in this article shall be guilty of a misdemeanor and, upon conviction thereof, for each offense shall be punished by a fine of not less than \$25.00 and not more than \$100.00 or by imprisonment in the county jail not exceeding 60 days. (Ga. L. 1920, p. 225, § 1; Code 1933, § 73-9901.)

RESEARCH REFERENCES

C.J.S. — 2 C.J.S., Adulteration, § 5.

ARTICLE 8

SALE OF PETROLEUM PRODUCTS, BRAKE FLUID, AND  
ANTIFREEZE

**Administrative rules and regulations.** — Regulations of the State of Georgia, Georgia Substantive Regulations; Petroleum Products, Official Compilation of the Rules and Department of Agriculture, Chapter 40-20-1.

RESEARCH REFERENCES

**ALR.** — Public regulation or authorization of gas filling stations, 49 ALR 767; 55 ALR 256; 79 ALR 918; 96 ALR 1337. Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

Constitutionality and construction of gasoline inspection and tax statutes, 111 ALR 185.

PART 1

PETROLEUM PRODUCTS

**Cross references.** — Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

10-1-140. Definitions.

As used in this part, the term:

- (1) “Gasoline” means gasoline, naphtha, benzol, and other products of petroleum, under whatever name designated, used for heating or power purposes.

(2) “Kerosene” means kerosene and other products of petroleum, under whatever name designated, used for illuminating, heating, or cooking purposes.

(3) “Lubricating oils” means rerefined, reprocessed, or reconditioned used oils as well as virgin petroleum oils or blends thereof. (Ga. L. 1927, p. 279, § 1; Code 1933, § 73-209; Ga. L. 1979, p. 981, § 2.)

### JUDICIAL DECISIONS

**Cited in** General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

#### 10-1-141. “Petroleum products” not to include liquefied petroleum gas.

The term “petroleum products,” as used in this part, shall in no way be construed to include liquefied petroleum gas as defined in Code Section 10-1-262. (Ga. L. 1960, p. 1043, § 18.)

#### 10-1-142. Appointment and duties of state oil chemist.

The Commissioner of Agriculture is required to appoint, in accordance with Chapter 20 of Title 45, a chemist, who shall be an expert oil analyst, to be designated as the state oil chemist, whose duty it shall be to analyze all samples of gasoline and kerosene and all fluids purporting to be substitutes therefor or motor fuel improvements or other like products of petroleum, under whatever name they may be designated, and used for illuminating, heating, cooking, power, or lubricating purposes, submitted by the Commissioner of Agriculture or any duly authorized inspector or inspectors. (Ga. L. 1927, p. 279, § 9; Code 1933, § 73-201; Ga. L. 1960, p. 1043, §§ 1, 2; Ga. L. 1972, p. 1015, § 505; Ga. L. 1979, p. 981, § 1.)

### OPINIONS OF THE ATTORNEY GENERAL

**Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist** as the duly authorized agent of the Commissioner of Agricul-

ture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att’y Gen. No. 66-141.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 157 et seq.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

#### 10-1-143. Employment of oil inspectors; expenses of inspectors.

The Commissioner of Agriculture is authorized to employ, in accordance with Chapter 20 of Title 45, oil inspectors as he deems necessary to enforce this part. Oil inspectors so appointed shall be allowed such expenses as shall

be approved by the Commissioner of Agriculture. (Ga. L. 1927, p. 279, § 10; Code 1933, § 73-202; Ga. L. 1937, p. 475, § 1; Ga. L. 1960, p. 1043, § 3; Ga. L. 1972, p. 1015, § 505.)

**Cross references.** — Reimbursement of Expense of travel by private automobile, certain travel expenses, § 45-7-29 et seq. § 50-19-7.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172. **C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

#### 10-1-144. Additional expenses; Commissioner of Agriculture to be chief oil inspector.

In addition to the expenses of inspectors as provided for in Code Section 10-1-143, there shall be allowed such further sums for the purchase of equipment, supplies, and clerical help and to pay any other expenses incident to and necessary for the enforcement of this part as may hereafter be appropriated. The Commissioner of Agriculture is constituted chief oil inspector for the purpose of the enforcement of this part. (Ga. L. 1927, p. 279, § 19; Ga. L. 1931, p. 7, § 78; Code 1933, § 73-203; Ga. L. 1960, p. 1043, §§ 1, 4; Ga. L. 1972, p. 1015, § 505.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist** as the duly authorized agent of the Commissioner of Agriculture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att'y Gen. No. 66-141.

#### 10-1-145. Payment of compensation and expenses.

The compensation of the state oil chemist and state oil inspectors and the expenses of enforcing this part shall be paid in the same manner as compensation and expenses of other employees of the Department of Agriculture are paid. (Ga. L. 1927, p. 279, § 20; Code 1933, § 73-204; Ga. L. 1960, p. 1043, § 5.)

#### 10-1-146. Bonds of state oil chemist and inspectors.

The Commissioner of Agriculture is authorized to have the state oil chemist and state oil inspectors bonded for the faithful performance of their respective duties at the expense of the Department of Agriculture if and to the extent he deems it necessary for the proper protection of the state and the public. (Ga. L. 1927, p. 279, § 23; Code 1933, § 73-205; Ga. L. 1960, p. 1043, § 6.)



**10-1-147. Filling vacancies in offices of state oil chemist and inspectors.**

The Commissioner of Agriculture is authorized to fill any vacancies which may occur in the offices of state oil chemist and oil inspector on account of death, resignation, or other cause. (Ga. L. 1927, p. 279, § 25; Code 1933, § 73-207; Ga. L. 1960, p. 1043, § 1.)

**10-1-148. Right to inspect premises; search warrants; refusal of admission as evidence of violation.**

In the performance of their duties, the Commissioner of Agriculture or any of his duly authorized agents shall have free access at all reasonable hours to any store, warehouse, factory, storage house, or railway depot where petroleum products are kept or otherwise stored, for the purpose of examination or inspection and drawing samples. If such access shall be refused by the owner of such premises or his agent or other persons occupying and using the same, the Commissioner of Agriculture or his duly authorized inspectors or agents may apply for a search warrant, which shall be obtained in the same manner as provided for obtaining search warrants in other cases. Their refusal to admit an inspector to any of the above-mentioned premises during reasonable hours shall be construed as prima-facie evidence of a violation of this part. (Ga. L. 1927, p. 279, § 16; Code 1933, § 73-208; Ga. L. 1960, p. 1043, §§ 1, 7.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

**10-1-149. Gasoline and kerosene subject to inspection and analysis; manufacturers and wholesalers to file statements.**

For the purpose of this part, all gasoline and kerosene sold or offered or exposed for sale shall be subject to inspection and analysis as provided in this part. All manufacturers, refiners, wholesalers, and jobbers, before selling or offering for sale any gasoline or kerosene or like products, under whatever name designated, for power, lubricating, illuminating, heating, or cooking purposes, shall file with the Commissioner of Agriculture a declaration or statement that they desire to sell such products in this state and shall furnish the name, brand, or a trademark of the product which they desire to sell, together with the name and address of the manufacturer thereof, and that all such products are in conformity with the specifications established pursuant to this part by the state oil chemist and approved by the Commissioner of Agriculture. (Ga. L. 1927, p. 279, § 2; Code 1933, § 73-210; Ga. L. 1960, p. 1043, §§ 1, 8; Ga. L. 1979, p. 981, § 3.)

**Administrative rules and regulations.** — Petroleum Products to be Inspected, Official Compilation of the Rules and Regulations of

the State of Georgia, Georgia Department of Agriculture, Sec. 40-10-1-.09.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 172, 173.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

#### 10-1-150. Approval of substitutes or improvers of fuels or other motor fuels.

All materials, fluids, or substances offered or exposed for sale, purporting to be substitutes for or improvers of fuels or other motor fuels to be used for power, cooking, or heating purposes, shall, before being sold or exposed or offered for sale, be submitted to the Commissioner of Agriculture for examination and inspection and shall receive the approval of the state oil chemist and the Commissioner of Agriculture and shall be sold or offered for sale only when properly labeled with a label, the form and contents of which shall have been approved by the state oil chemist and the Commissioner of Agriculture. (Ga. L. 1927, p. 279, § 3; Code 1933, § 73-211; Ga. L. 1960, p. 1043, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

#### 10-1-151. Sale of substandard gasoline and kerosene illegal; confiscation.

It shall be illegal to sell or offer for sale any gasoline or kerosene which is described and designated in this part and which is used or intended to be used for power, lubricating, illuminating, cooking, or heating purposes, when sold under whatever name, and which falls below the standard provided in this part. Any such gasoline or kerosene shall be subject to confiscation and destruction by order of the Commissioner of Agriculture. (Ga. L. 1927, p. 279, § 4; Code 1933, § 73-212; Ga. L. 1960, p. 1043, § 1; Ga. L. 1979, p. 981, § 4.)

**Administrative rules and regulations.** — Water in Retail Tanks; Dispenser Filters, Official Compilation of the Rules and Regu-

lations of the State of Georgia, Georgia Department of Agriculture, Sec. 40-20-1-.10.

#### JUDICIAL DECISIONS

**Cited in** General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq. 58 C.J.S., Mines and Minerals, § 334 et seq.

**ALR.** — Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

**10-1-151.1. Production and sale of biodiesel fuel.**

It shall be unlawful for any person to produce, offer for sale, or sell any biodiesel fuel to be used in blending such biodiesel fuel with petroleum diesel fuel to create a blended fuel for subsequent sale for use in diesel engines unless the biodiesel fuel meets the specifications of American Society for Testing and Materials Standard D 6751. (Code 1981, § 10-1-151.1, enacted by Ga. L. 2006, p. 547, § 1/SB 636.)

**Cross references.** — Study and review of gasoline additives, § 12-9-70.

**10-1-152. Labeling gasoline and kerosene containers; cleaning kerosene containers of gasoline.**

Every person, firm, or corporation delivering at wholesale or retail any gasoline in this state shall deliver the same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word “gasoline” plainly stenciled or labeled thereon in vermilion red, in English. Such dealers shall not deliver kerosene oil in any barrel, cask, can, or other container which shall have been so stenciled or labeled or that has ever contained gasoline unless such barrel, cask, can, or other container shall have been thoroughly cleaned and all traces of gasoline removed. Every purchaser of gasoline for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as provided in this Code section. Every person delivering at wholesale or retail any kerosene in this state shall deliver same to the purchaser only in tanks, barrels, casks, cans, or other containers having the word “kerosene” in English, plainly stenciled or labeled thereon in vermilion red; and every person purchasing same for use or sale shall procure and keep the same only in tanks, barrels, casks, cans, or other containers stenciled or labeled as provided in this Code section. Nothing in this Code section shall prohibit the delivery of gasoline by hose or pipe from a tank directly into the tank of any automobile or other motor. In cases where gasoline or kerosene is sold in bottles, cans, or other containers of not more than one gallon, for cleaning and other similar purposes, such bottles, cans, or other containers shall bear a label with the words “unsafe when exposed to heat or fire.” (Ga. L. 1927, p. 279, § 5; Code 1933, § 73-213.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 161, 162.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.



**ALR.** — Validity of regulations as to keeping or storage of gasoline, 43 ALR 858; 128 ALR 364. Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

### 10-1-153. Notice and sample of petroleum products shipped into state.

When gasoline or kerosene or other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes are shipped into this state in any manner whatsoever, the manufacturer, refiner, or jobber shall promptly give notice to the Commissioner of Agriculture of the date of shipment and shall furnish a sample of such size as designated by the Commissioner of Agriculture, but not in excess of 16 ounces, of the gasoline or kerosene and other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes shipped and labeled, giving the tank car number, truck number, or other container number, with the name and address of the person, company, firm, or corporation to whom it is sent and the number of gallons contained in the shipment made. In each instance where gasoline or kerosene and other petroleum products used for heating, cooking, illuminating, power, or lubricating purposes are shipped in tank cars, the record of the capacity of each tank car furnished by the railroad company shall be accepted. (Ga. L. 1927, p. 279, § 6; Code 1933, § 73-214; Ga. L. 1960, p. 1043, §§ 1, 9; Ga. L. 1979, p. 981, § 5.)

**Administrative rules and regulations.** — Sample Size, Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Agriculture, Sec. 40-20-1.06.

## JUDICIAL DECISIONS

**Cited** in General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 163. **C.J.S.** — 58 C.J.S., Mines and Minerals, §§ 371, 372.

### 10-1-154. How purchaser may obtain analysis of gasoline or illuminating or heating oils.

Any person purchasing any gasoline or illuminating or heating oils from any manufacturer, refiner, jobber, or vendor for his own use may submit fair samples of said gasoline or illuminating or heating oils to the Commissioner of Agriculture to be tested or analyzed by the state oil chemist. In order to protect the manufacturer or vendor from the submission of spurious samples, the person selecting the same shall do so in the presence of two or more disinterested persons, which samples shall be not less than one pint in quantity and shall be bottled, corked, and sealed in the presence of said witnesses and the sample shall be placed in the hands of a disinterested



person, who shall forward the same at the expense of the purchaser to the Commissioner of Agriculture. Upon the receipt by the Commissioner of any such sample he shall have the state oil chemist promptly test and analyze the sample. The Commissioner shall return to such purchaser or purchasers a certificate of analysis, which, when verified by the affidavit of the state oil chemist, shall be competent evidence in any court of law or equity. (Ga. L. 1927, p. 279, § 7; Code 1933, § 73-215; Ga. L. 1960, p. 1043, § 1.)

### JUDICIAL DECISIONS

**Cited** in *General Oil Co. v. Crowe*, 54 Ga. App. 139, 187 S.E. 221 (1936).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

### 10-1-155. Rules and regulations; specifications for petroleum products; penalty for violations.

(a) The Commissioner of Agriculture shall have authority to prescribe such rules and regulations, consistent with the terms, intent, and purposes of this part, as he finds necessary for the proper administration and enforcement thereof. He shall establish by regulation specifications for the various petroleum products used for heating, cooking, illuminating, power, or lubricating purposes in this state so as to provide quality control and suitability for the intended use of such products and the effective enforcement of the laws pertaining to the sale, distribution, or use of such products and shall have authority to change such specifications, but only after giving a 60 days' notice and a public hearing in regard to such changes to refiners and distributors doing business in this state.

(b) Any manufacturer, refiner, wholesaler, jobber, or vendor who shall violate this Code section or any regulation issued pursuant thereto prescribing specifications for the various petroleum products regulated by this part shall be guilty of a misdemeanor. (Ga. L. 1927, p. 279, § 8; Code 1933, §§ 73-216, 73-9904; Ga. L. 1943, p. 303, § 1; Ga. L. 1960, p. 1043, §§ 10, 16; Ga. L. 1972, p. 1015, § 504; Ga. L. 1979, p. 981, § 6.)

### JUDICIAL DECISIONS

**Cited** in *Shermer v. Crowe*, 53 Ga. App. 418, 186 S.E. 224 (1936); *General Oil Co. v. Crowe*, 54 Ga. App. 139, 187 S.E. 221 (1936);

*Hodges v. Ashurst*, 60 Ga. App. 157, 3 S.E.2d 99 (1939).

### OPINIONS OF THE ATTORNEY GENERAL

**Signs indicating price is for “self-service” pumps.** — The Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to “self-service” pumps if there is a differentiation in price for the same gasoline sold from “self-service” pumps and “full-service” pumps. 1975 Op. Att’y Gen. No. 75-124.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 161, 162.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

**ALR.** — Liability of manufacturer or seller for injury caused by firearms, explosives, and flammables, 80 ALR2d 488; 94 ALR3d 291; 15 ALR4th 909; 18 ALR4th 206.

### 10-1-156. Enjoining marketing in violation of part, specifications, or rules and regulations.

Whenever the Commissioner of Agriculture shall find any person willfully marketing petroleum products in this state which are regulated by this part and which do not comply with the prescribed specifications therefor or otherwise willfully marketing petroleum products in violation of this part and rules and regulations promulgated pursuant to this part, the Commissioner shall be authorized to apply to the superior court having jurisdiction over the offender for an injunction against the continuance of any such violations. The appropriate superior court shall have jurisdiction, upon hearing and for cause shown, to grant such temporary or permanent injunction restraining further violations as the circumstances appear to require. (Ga. L. 1960, p. 1043, § 11; Ga. L. 1979, p. 981, § 6.)

### 10-1-157. Collecting and testing samples of petroleum products; analyses as evidence.

The Commissioner of Agriculture shall, from time to time, collect or cause to be collected samples of all petroleum products subject to regulation under this part which are sold, offered, or exposed for sale in this state and cause such samples to be tested or analyzed by the state oil chemist. The state oil chemist shall certify, under oath, an analysis of each such sample and such certificate shall be competent evidence of the composition of such petroleum product in any legal proceeding. (Ga. L. 1927, p. 279, § 13; Code 1933, § 73-218; Ga. L. 1960, p. 1043, § 13.)

### JUDICIAL DECISIONS

**Cited in** General Oil Co. v. Crowe, 54 Ga. App. 139, 187 S.E. 221 (1936).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

**10-1-158. Registration of gasoline dealers.**

Every dealer in gasoline, before selling or exposing or offering for sale any gasoline, and annually thereafter, shall be required to register and shall make known to the Commissioner of Agriculture his desire to sell gasoline giving the name and manner and kind of pump or pumps he will use and the location of same, and shall keep the certificate or certificates of registration issued by the Commissioner of Agriculture posted in a prominent and accessible place in his place of business where such gasoline is sold. The form of such certificate shall be designated by the Commissioner of Agriculture. (Ga. L. 1927, p. 279, § 14; Code 1933, § 73-219; Ga. L. 1960, p. 1043, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 173.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

**10-1-159. Inspection of self-measuring pumps; sealing accurate pumps; condemnation of inaccurate pumps.**

(a) It shall be the duty of the inspectors provided for in this part to familiarize themselves with the accuracy and adjusting devices on the various makes of self-measuring pumps in use; and they shall carefully inspect all of such pumps located in the territory assigned to them.

(b) All such pumps found to be giving accurate measure within the tolerance established by regulations of the Commissioner of Agriculture shall have the adjusting device sealed with an official lead and wire seal applied by an inspector duly authorized by the Commissioner of Agriculture in such a manner that the adjustment cannot be altered without breaking the seal.

(c) If any pump shall be found to be giving inaccurate measure in excess of the tolerance established by regulations of the Commissioner of Agriculture, the inspector shall then and there notify the operator of the pump, whether owner or lessee, to make the necessary adjustments, the inspector to lend his assistance with the standard measure provided for testing such pumps. After the adjustments have been made, the adjusting devices shall be sealed in the manner provided for those pumps found originally accurate. The inspector shall notify the operator, whether owner or lessee, of every pump that apparently has been altered for the purpose of giving short measure in excess of eight ounces on a measure of five gallons or that



cannot be adjusted within a range of eight ounces, either over or under, on a measure of five gallons that it must immediately be adjusted, the inspector to lend his assistance with the standard measure for testing such pumps. Should the operator fail or refuse to then and there make such adjustments as shall be necessary to bring the measure within the allowed variation, the same shall be condemned and rendered inoperable immediately by the inspector examining the same; and such pump shall not again be operated without the written consent of the Commissioner of Agriculture. Inspectors shall be required to report to the Commissioner of Agriculture immediately the name and number of all pumps condemned and rendered inoperable.

(d) When any pump shall be condemned under this part by any inspector, it shall be the duty of the inspector immediately to make affidavit before the judge of the probate court of the county in which the pump is located that the pump is being operated by the person who shall be named in the affidavit, contrary to law. Thereupon the judge of the probate court shall issue an order to the person named in the affidavit to show cause before him on the day named in the order, not more than ten days nor less than three days from the issuance of the order, why the pump should not be confiscated and dismantled. On the day named in the order, it shall be the duty of the judge of the probate court to hear the respective parties and to determine whether or not the pump has been operated contrary to the provisions of this part. If the judge of the probate court shall find that the pump has been so operated, he shall forthwith issue an order adjudging the pump to be forfeited and confiscated to the state and direct the sheriff of the county to dismantle the pump and take it into his possession, and, after ten days' notice by posting or publication, as the court may direct, to sell the pump to the highest bidder for cash. The proceeds of sale, or as much thereof as may be necessary, shall be used by the sheriff, first, to pay the costs, which shall be the same as in cases of attachment, and the sheriff shall thereupon pay over and deliver the residue, if any, to the person from whose possession the pump has been taken.

(e) It shall be unlawful to install or operate any self-measuring pump which can be secretly manipulated in such manner as to give short measure. Such inaccurate self-measuring pump shall be condemned as provided in this Code section, and thereafter it shall be unlawful for any person to sell any kerosene or gasoline from such pump until such pump has been made or altered to comply with this part and has been inspected and approved for service by the inspector.

(f) It shall be unlawful for anyone to break a seal applied by an inspector to a pump without first securing consent of the Commissioner of Agriculture, which consent may be given through one of the duly authorized inspectors. (Ga. L. 1927, p. 279, § 15; Code 1933, § 73-220; Ga. L. 1960, p. 1043, §§ 1, 14.)



## OPINIONS OF THE ATTORNEY GENERAL

**Applicability to tank wagons and trucks.** — The laws providing for the inspection and calibration of pumps used in the sale of petroleum products are applicable to tank wagons and transport trucks used by whole-

sale dealers making delivery of petroleum products in Georgia, as well as retail dealers. 1952-53 Op. Att'y Gen. p. 484 (rendered prior to enactment of Code Section 10-1-160).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

**10-1-160. Calibration of tank trucks, meters, containers, and other measures; condemnation of inaccurate measures.**

The Commissioner of Agriculture is authorized to prescribe regulations governing the calibration of tank trucks, meters, containers, and other measures used in dispensing petroleum products subject to regulation under this part; and, when any such measure is found giving inaccurate measure and such condition cannot be or is not adjusted to the requirements of the regulations, then such measures shall be seized by the Commissioner or his agents and subject to condemnation in a manner similar to that prescribed in subsections (c) and (d) of Code Section 10-1-159 or destroyed if the court shall find that the measure cannot be properly adjusted. (Ga. L. 1960, p. 1043, § 15; Ga. L. 1972, p. 1015, § 505.)

**10-1-161. No fee for gasoline or kerosene inspection.**

No inspection fees of any kind or character shall be paid for the inspection of gasoline or kerosene. (Ga. L. 1927, p. 279, § 24; Code 1933, § 73-221.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

**ALR.** — Constitutionality and construction of gasoline inspection and tax statutes, 47 ALR 980; 84 ALR 839; 111 ALR 185.

**10-1-162. "Person" defined; substitution or misbranding of petroleum products; sale of used or reclaimed lubricants; injunctions; enforcement.**

(a) As used in this Code section and in Code Section 10-1-163, the term "person" means natural persons; partnerships, firms, associations, joint-stock companies, syndicates, and corporations; any receiver, trustee, conservator, or other officer appointed by any state or federal court; counties, municipalities, or other political subdivisions of this state, singular

or plural; and the State of Georgia. The use of the singular number shall include the plural number.

(b) No person shall store, sell, expose, or offer for sale any liquid fuels, lubricating oils, greases, or other similar products:

(1) In or from any container, receptacle, tank, pump, or other distributing device other than those products manufactured or distributed by the manufacturer or distributor indicated by the trademark, trade name, name, symbol, sign, or other distinguishing mark or device displayed upon the container, receptacle, tank, pump, or other distributing device in or from which such products are stored, sold, exposed, or offered for sale or distributed; or

(2) Under any trademark, trade name, name, symbol, sign, or other distinguishing mark or device other than those products manufactured or distributed by the manufacturer or distributor marketing such products under such trademark, trade name, name, symbol, sign, or other distinguishing mark or device; or

(3) In any manner whatsoever which may deceive or have the effect of deceiving the purchaser of such products as to the nature, price, quality, or quantity of the products so stored, sold, exposed, or offered for sale.

(c) No person shall store, sell, expose, or offer for sale any previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants unless such person shall at all times have each and every container or item of equipment in or through which any of such products are sold, kept for sale, displayed, or dispensed plainly labeled "reprocessed or rerefined." No person shall cause to be published, displayed, or circulated any advertising matter offering for sale any previously used or previously used and reclaimed, used, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants unless he shall state in such advertising the fact that such products have been previously used. Nothing in this Code section shall apply to the sale of unfiltered crankcase drainings, and nothing in this Code section shall apply to the sale of crankcase drainings for use on livestock.

(d) Any person dealing in previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants without having each and every container or item of equipment in or through which any of such products are sold, kept for sale, displayed, or dispensed plainly labeled as required in this Code section or advertising any of such products for sale without inserting in such advertising a statement as required in this Code section may upon proper hearing be enjoined from selling any of such products or offering, displaying, or advertising any of the same for sale. Action for such injunction may be brought in any court having jurisdiction to hear and decide equity cases in the county in which the defendant resides and may be brought either by the

Attorney General of this state or by the district attorney in and for such county. The authority granted by this Code section shall be in addition to and not in lieu of authority to prosecute criminally any person for a violation of this Code section. The granting or enforcing of any injunction under this Code section is a preventive measure for the protection of the people of this state, not a punitive measure; and the fact that a person has been charged or convicted of a violation of this Code section shall not prevent the issuance of a writ of injunction to prevent further unlawful dealing in previously used or previously used and reclaimed, recleaned, or reconditioned lubricating oils, lubricants, or mixtures of lubricants, nor shall the fact that a writ of injunction has been granted under this Code section preclude the institution of criminal prosecution or punishment.

(e) No person shall disguise or camouflage his equipment by imitating the trademark, trade name, name, symbol, sign, or other distinguishing mark or device under which recognized brands of liquid fuels, lubricating oils, greases, or other similar products are generally marketed.

(f) No person shall mix, blend, or compound the liquid fuels, lubricating oils, greases, or similar products of a manufacturer or distributor with the products of any other manufacturer or distributor or adulterate the same or store, sell, expose, or offer for sale such mixed, blended, or compounded products under the trademark, trade name, name, symbol, sign, or other distinguishing mark or device of either of said manufacturer or distributor or as the adulterated products of such manufacturer or distributor.

(g) No person shall aid or assist any other person in violating any of the provisions of this Code section by depositing or delivering into any container, receptacle, tank, pump, or other distributing device any liquid fuels, lubricating oils, greases, or other similar products other than those intended to be stored therein as indicated by the name of the manufacturer or distributor or the trademark, trade name, name, symbol, sign, or other distinguishing mark or device of the product displayed on the container, receptacle, tank, pump, or other distributing device used in connection therewith or shall by any other means aid or assist another in the violation of any of the provisions of this Code section.

(h) Nothing in this Code section shall prevent the lawful owner thereof from applying his or its own trademark, trade name, name, symbol, sign, or other distinguishing mark or device to any product or material.

(i) The state oil chemist and all law enforcement officers in the State of Georgia are charged with the enforcement of this Code section. (Code 1933, §§ 73-222, 73-223, enacted by Ga. L. 1937, p. 477, § 1; Ga. L. 1952, p. 391, §§ 1-3; Ga. L. 1958, p. 618, § 1; Ga. L. 1959, p. 128, § 1; Ga. L. 1979, p. 981, § 7.)



### OPINIONS OF THE ATTORNEY GENERAL

**Subsections (f) and (h) of this section are consistent.** 1965-66 Op. Att'y Gen. No. 66-139.

**Enforcement of former Code 1933, §§ 73-222 and 73-223 was within the power of the state oil chemist** as the duly authorized agent of the Commissioner of Agriculture, who was constituted the chief oil inspector under former Code 1933, § 73-203. 1965-66 Op. Att'y Gen. No. 66-141.

**Selling below advertised price is not proscribed.** — Advertising one price and selling a product at a lower price is not the kind of

deception proscribed by this section. 1965-66 Op. Att'y Gen. No. 66-141.

**Signs indicating price is for "self-service" pumps.** — The Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to "self-service" pumps if there is a differentiation in price for the same gasoline sold from "self-service" pumps and "full-service" pumps. 1975 Op. Att'y Gen. No. 75-124.

### RESEARCH REFERENCES

**C.J.S.** — 2 C.J.S., Adulteration, §§ 2, 3.

**ALR.** — Constitutionality of statutes requiring notice by label or otherwise of the

fact that product is imported, or as to place of production, 124 ALR 572.

#### 10-1-163. Penalty for violating Code Section 10-1-162; individual liability.

(a) Any person who shall violate any of the provisions of Code Section 10-1-162 for preventing deception, substitution, and misbranding of liquid fuel, oil, grease, and similar products shall be guilty of a misdemeanor.

(b) If any partnership, firm, association, joint-stock company, syndicate, or corporation violates any of the provisions of Code Section 10-1-162, every director, officer, agent, employee, or member participating in, aiding, or authorizing the act or acts constituting the violation of Code Section 10-1-162 shall be guilty of a misdemeanor. (Code 1933, § 73-223, enacted by Ga. L. 1937, p. 477, §§ 1, 2; Ga. L. 1979, p. 981, § 7.)

### JUDICIAL DECISIONS

**Cited** in *Amoco Oil Co. v. Joyner*, 46 Bankr. 130 (Bankr. M.D. Ga. 1985).

#### 10-1-164. Requirements for signs advertising retail motor fuel; advertising free gifts or services; enforcement; penalty.

(a) Any sign or placard or other means used to advertise the price of motor fuel for sale at retail for use in motor vehicles may contain a separate listing of the price and a separate listing of each tax thereon, but must contain a total of such price and taxes which shall be at least as large as the listing of the price or any tax thereon. Numbers used to advertise the total price of such motor fuel shall be of uniform size; and, where fractions are used, the numerator and denominator thereof combined shall be of the same size as any whole numbers used. It shall not be necessary that a



denominator be used to indicate fractions; but, if one is not used, the numerator must be at least half the size of the whole number used. If the price of motor fuel is advertised on any sign, billboard, placard, or other advertising medium, it shall be unlawful to place a higher price on any pump dispensing such motor fuel or to charge a higher price for such motor fuel. Any person dispensing motor fuel shall not be precluded from giving a discount from the posted or advertised price if the purchaser of the motor fuel buys additional merchandise.

(b) It shall be unlawful for any person dispensing motor fuel to advertise upon the purchase of motor fuel either free:

(1) Gifts or other products unless such person has sufficient number of gifts or products on hand to supply the reasonably expectable demand or the advertisement discloses a limitation of quantity; or

(2) Car washes or other services unless such person is prepared, in the absence of causes beyond the reasonable control of the offerer, to perform such car washes or the services advertised at the time of the purchase at such person's place of business or at a place of business affiliated by trademark or agreement with such person. If the free car washes or other services advertised are to be performed at a place of business affiliated by trademark or agreement but in a separate location, such fact shall be so stated on the sign, billboard, placard, or other advertising medium used.

(c) Nothing in this Code section shall preclude posting on any pumps dispensing motor fuel a separate statement of taxes included in the total purchase price for the purpose of complying with Chapter 8 of Title 48.

(d) The state oil chemist and any and all law enforcement officers in the State of Georgia are charged with enforcement of this Code section.

(e) Any person, firm, association, or corporation violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1959, p. 135, §§ 1-3; Ga. L. 1960, p. 826, § 1; Ga. L. 1973, p. 790, § 2.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Signs indicating price is for "self-service" pumps.** — The Commissioner of Agriculture may require retail gasoline sales establishments to include on signs or billboard advertisements a designation that the price for gasoline posted thereto is to apply to "self-service" pumps if there is a differentiation in price for the same gasoline sold from "self-service" pumps and "full-service" pumps. 1975 Op. Att'y Gen. No. 75-124.

**Sign indicating that sales tax in addition to price shown on pump.** — A regulation re-

quiring that a statement be posted on each pump dispensing motor fuel that the Georgia sales tax is in addition to the price shown on the pump would be reasonable, would be in furtherance of the enforcement of the former Georgia Retailers' and Consumers' Sales and Use Tax Act and would not be inconsistent with such Code sections or the laws or Constitution of the United States and the State of Georgia. 1967 Op. Att'y Gen. No. 67-139.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Garages, and Filling and Parking Stations, § 18.

**C.J.S.** — 16D C.J.S., Constitutional Law, §§ 2005, 2028.

**ALR.** — Validity and construction of stat-

ute or ordinance requiring or prohibiting posting or other publication of price of commodity or services, 89 ALR2d 901; 80 ALR3d 740.

### 10-1-164.1. Self-service gasoline price for drivers holding special disability permit.

(a) Any owner or operator of a gasoline station which sells gasoline at one price when an employee of the station dispenses the gasoline into a motor vehicle and at a lower price when the customer dispenses the gasoline on a self-service basis shall comply with this Code section. Any such owner or operator shall conduct the operations of the station so that the holder of a special disability permit provided for in subsection (e) of Code Section 40-6-222 will, upon request, have gasoline dispensed by an employee of the station at the self-service pump and will be allowed to purchase such gasoline at the price otherwise charged for gasoline purchased on a self-service basis if:

(1) The holder of the permit is driving the motor vehicle into which the gasoline is to be dispensed; and

(2) The holder of the permit is not accompanied by another person 16 years of age or older who is not mobility impaired or blind. However, in such cases, the employee shall not be required to provide any other service.

(b) Any owner or operator who violates subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 10-1-164.1, enacted by Ga. L. 1987, p. 1464, § 1.)

**Editor's notes.** — Code Section 40-6-222, referred to in subsection (a), was repealed by Ga. L. 2006, p. 659, § 2, effective May 1, 2006.

### 10-1-165. Civil penalty.

Any person violating any provision of:

(1) This part relating to the inspection and sale of gasoline, kerosene, and other petroleum products; or

(2) Code Section 10-1-164 providing for the regulation of signs advertising the price of motor fuel which are displayed by retailers of motor fuel; or

(3) Any rule, regulation, or standard promulgated or adopted by the Commissioner of Agriculture or the Department of Agriculture under the provisions of any of the above

shall be liable to a civil penalty not to exceed \$1,000.00 for such violation. The Commissioner, after a hearing, shall determine whether any person has violated this Code section and upon a proper finding may issue his order imposing a civil penalty as provided in this Code section. All hearings and proceedings under this Code section shall be held and taken under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1933, § 73-223.1, enacted by Ga. L. 1973, p. 790, § 1.)

#### RESEARCH REFERENCES

**ALR.** — Recovery of cumulative statutory penalties, 71 ALR2d 986.

#### **10-1-166. Penalty for chemist or inspector having interest in sale or manufacture of gasoline.**

Any chemist or inspector who, while in office, shall be interested directly or indirectly in the manufacture or vending of any gasoline shall be guilty of a misdemeanor. (Ga. L. 1927, p. 279, § 11; Code 1933, § 73-9903.)

#### **10-1-167. Penalty for operating condemned self-measuring gasoline pumps.**

Any person, company, firm, or corporation who shall operate any pump, without the written consent of the Commissioner of Agriculture, which has been condemned by a duly authorized inspector as provided for in this part because of giving short measure in excess of the tolerance established by regulation of the Commissioner shall be guilty of a misdemeanor. (Ga. L. 1927, p. 279, § 15; Code 1933, § 73-9905; Ga. L. 1960, p. 1043, § 17.)

#### **10-1-168. Penalty for operating short-measure gasoline pump.**

Any person, company, firm, or corporation who shall install or operate a self-measuring pump which has a device or other mechanical means used for the purpose of giving short measure shall be guilty of a misdemeanor. (Ga. L. 1927, p. 279, § 15; Code 1933, § 73-9906.)

#### **10-1-169. Penalty for violation of this part or regulations.**

Any person or association of persons, firm, or corporation who shall violate any of the provisions of this part relating to inspection, labeling, sale, etc., of gasoline, kerosene, and other petroleum products or any rule or regulation promulgated by the Commissioner of Agriculture for the enforcement of this part shall be guilty of a misdemeanor. (Ga. L. 1927, p. 279, § 17; Code 1933, § 73-9902; Ga. L. 1960, p. 1043, § 1.)

## PART 2

## BRAKE FLUID

**Administrative rules and regulations.** — the State of Georgia, Georgia Department of Brake Fluid; Definitions; Standards, Official Agriculture, Sec. 40-20-1-.02.  
Compilation of the Rules and Regulations of

## OPINIONS OF THE ATTORNEY GENERAL

**Only federal standards enforceable.** — to the federal standards regulating brake Georgia is unable to enforce brake fluid fluids. 1968 Op. Att'y Gen. No. 68-320.  
standards unless such standards are identical

**10-1-180. Definitions.**

As used in this part, the term:

(1) "Brake fluid" means the liquid medium through which force is transmitted in the hydraulic brake system of any motor vehicle operated in this state.

(2) "Chemist" means the state oil chemist.

(3) "Commissioner" means the Commissioner of Agriculture. (Ga. L. 1956, p. 237, § 1; Ga. L. 1972, p. 1015, § 505.)

**10-1-181. When brake fluid deemed adulterated.**

Brake fluid shall be deemed to be adulterated unless it meets the minimum standard for brake fluid as provided in this part. Brake fluid shall also be deemed to be adulterated if it contains any substance which will render it injurious to the hydraulic brake system of any motor vehicle or that will impair the normal operation of the hydraulic brake system. (Ga. L. 1956, p. 237, § 2.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and **C.J.S.** — 2 C.J.S., Adulteration, § 1 et seq.  
Oil, § 172.

**10-1-182. When brake fluid deemed misbranded.**

A brake fluid shall be deemed to be misbranded:

(1) If its labeling is false or misleading in any particular;

(2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, seller, or distributor; an accurate statement of quantity of the contents in terms of weight or measure; and the words "brake fluid" and "heavy duty"; and if such



information is not plainly and clearly stated on the outside of the package or container. (Ga. L. 1956, p. 237, § 3.)

#### RESEARCH REFERENCES

- Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 255.      quiring notice by label or otherwise of the fact that product is imported, or as to place of production, 124 ALR 572.  
**C.J.S.** — 2 C.J.S., Adulteration, §§ 11, 12.  
**ALR.** — Constitutionality of statutes re-

### 10-1-183. Sale of misbranded or adulterated brake fluid prohibited.

No person shall sell, have for sale, offer for sale, give, donate, distribute, or add to the hydraulic brake system of a motor vehicle in this state any brake fluid which is misbranded or adulterated. (Ga. L. 1956, p. 237, § 4.)

#### RESEARCH REFERENCES

- Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 255.      **C.J.S.** — 2 C.J.S., Adulteration, §§ 9, 10.

### 10-1-184. Establishing minimum brake fluid standard and specifications.

The Commissioner shall establish by rule or regulation the minimum standard and specifications for brake fluid. The Commissioner shall not adopt a minimum standard or specification that is below the minimum standard and specifications established by the Society of Automotive Engineers for heavy-duty type brake fluids No. 70R1. (Ga. L. 1956, p. 237, § 5.)

#### RESEARCH REFERENCES

- Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.      **ALR.** — Products liability: personal injury or death allegedly caused by defect in braking system in motor vehicle, 99 ALR3d 179.  
**C.J.S.** — 2 C.J.S., Adulteration, §§ 2, 3.

### 10-1-185. Inspection of brake fluid samples; annual license to sell.

Before any brake fluid shall be sold, exposed for sale, or stored, packed, or held with intent to sell within this state, a sample thereof must be inspected or approved by the state oil chemist. Upon application of the manufacturer, packer, seller, or distributor and the payment of a license or inspection fee of \$25.00 for each brand or type of brake fluid submitted, the state oil chemist shall subject to inspection or analysis the brake fluid so submitted. If the brake fluid is not adulterated or misbranded and meets the standards established and promulgated by the Commissioner and is not such a type or kind that is in violation of this part, the Commissioner may issue the applicant a written license or permit authorizing the sale of such brake fluid in this state for the calendar year in which the license or

inspection fee is paid, which license or permit shall be subject to renewal annually upon payment of a \$25.00 renewal fee. If, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," the Commissioner shall find that any brake fluid has been materially altered or adulterated or a change has been made in the name, brand, or trademark under which the brake fluid is sold or that it violates this part, he shall notify the applicant; and the license or permit shall be canceled forthwith. No license or permit for the sale of brake fluid in this state shall be issued until application has been made as provided by this part and such samples of the brake fluid as may be necessary for the state oil chemist to inspect it have been submitted and until the state oil chemist notifies the Commissioner that said brake fluid meets the specifications adopted by the Commissioner. (Ga. L. 1956, p. 237, § 6.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 172, 173. 42 Am. Jur. 2d, Inspection Laws, § 9 et seq.

#### **10-1-186. Enforcement; right of inspection; "stop-sale" orders; condemnation of adulterated or misbranded brake fluid.**

(a) The Commissioner shall administer and enforce this part by inspections, chemical analyses, or by any other appropriate methods. All quantities or samples of brake fluid submitted for inspection or analysis shall be taken from stocks in this state or intended for sale in this state; or the Commissioner, through his agents, may call upon the manufacturer or distributor applying for an inspection or analysis of brake fluid to supply such sample thereof for inspection or analysis. The Commissioner, through his agents or inspectors, shall have free access during business hours to all places of business, buildings, vehicles, cars, and vessels used in the manufacture, transportation, sale, or storage of any brake fluid; and the Commissioner, acting through his agents, may open any box, carton, parcel, package, or container holding, containing, or supposed to contain any brake fluid and may take therefrom samples for analysis.

(b) If it appears that any of the provisions of this part have been violated, the Commissioner, acting through his authorized agents, inspectors, or representatives, is authorized to issue a "stop-sale" order which shall prohibit further sale or gift of any brake fluid being sold, exposed for sale, or held with intent to sell within this state in violation of this part until this part has been complied with.

(c) Any brake fluid not in compliance with this part shall be subject to seizure upon complaint of the Commissioner or any of his agents, inspectors, or representatives to a superior court in the county in which said brake fluid is located. In the event the court finds that any brake fluid is

adulterated or misbranded, it may order the condemnation of said brake fluid; and such brake fluid shall be disposed of in any manner consistent with the rules and regulations of the Commissioner and the laws of this state, provided that in no instance shall the disposition of said brake fluid be ordered by the court without first giving the claimant or owner of same an opportunity to apply to the court for the release of said brake fluid or for permission to process or label said brake fluid so as to bring it into compliance with this part.

(d) In case any “stop-sale” order shall be issued under this part, the agents, inspectors, or representatives of the Commissioner shall release the brake fluid so withdrawn from sale when the requirements of this part have been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (Ga. L. 1956, p. 237, § 7; Ga. L. 1983, p. 884, § 3-9.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172. 42 Am. Jur. 2d, Inspection Laws, § 1 et seq. used in violation of law as prerequisite to forfeiture action or proceeding, 8 ALR3d 473.

**ALR.** — Lawfulness of seizure of property

#### **10-1-187. Rules and regulations; powers of Commissioner’s agents; list of inspected and licensed brands; advertising of licensing.**

The Commissioner shall have authority to establish and promulgate such rules and regulations as are necessary promptly and efficiently to enforce this part. All authority vested in the Commissioner by virtue of this part may, with like force and effect, be executed by such employees, agents, inspectors, and representatives of the Commissioner as he may, from time to time, designate for such purpose. The Commissioner may publish or furnish, upon request, a list of the brands and classes or types of brake fluid inspected by the chemist which have been found to be in accord with this part and for which a license or permit for sale has been issued; and it shall be lawful for any manufacturer, packer, seller, or distributor of brake fluid to show, by advertising, in any manner, that his or its brand of brake fluid has been inspected, analyzed, and licensed for sale by the Commissioner, acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, seller, or distributor of brake fluid to advertise, in any manner, that such brake fluid so advertised for sale has been approved by the Commissioner. (Ga. L. 1956, p. 237, § 8.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 255. 42 Am. Jur. 2d, Inspection Laws, § 9.

**10-1-188. Certified analyses as evidence.**

A copy of the analysis made by the state oil chemist of any brake fluid certified by him shall be admitted as evidence in any court of this state on the trial of any issue involving the analysis, standards, or specifications of brake fluid as defined and covered by this part. (Ga. L. 1956, p. 237, § 9.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection Laws, § 12.

**10-1-189. Penalty for violations; instituting prosecutions.**

Any person, firm, association, or corporation violating or failing to comply with this part or any rule, regulation, standard, or specification issued pursuant to this part shall be guilty of a misdemeanor; and each day that any violation of this part shall exist shall be deemed to be a separate offense. Whenever the Commissioner or his agents or representatives shall discover that any brake fluid is being sold or has been sold in violation of this part, the Commissioner or his agents or representatives may furnish the facts to the prosecuting attorney of the court having jurisdiction in the county in which such violation occurred; and it shall be the duty of such prosecuting attorney promptly to institute appropriate legal proceedings. (Ga. L. 1956, p. 237, § 10.)

**JUDICIAL DECISIONS**

**Cited** in *Shermer v. Crowe*, 53 Ga. App. 418, 186 S.E. 224 (1936).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 255. 42 Am. Jur. 2d, Inspection Laws, § 21 et seq.

**C.J.S.** — 2 C.J.S., Adulteration, § 14.

**PART 3****ANTIFREEZE**

**Cross references.** — Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

**Administrative rules and regulations.** — Regulations and Standards for Antifreeze,

Official Compilation of the Rules and Regulations of the State of Georgia, Georgia Department of Agriculture, Sec. 40-20-1-.03.



10-1-200. Definitions.

As used in this part, the term:

- (1) “Antifreeze” means all substances and preparations intended for use as the cooling medium or to be added to the cooling liquid in the cooling system of internal combustion engines to prevent freezing of the cooling liquid or to lower its freezing point.
- (2) “Person” means individuals, partnerships, corporations, companies, and associations. (Ga. L. 1975, p. 706, § 1.)

10-1-201. When antifreeze deemed adulterated.

An antifreeze shall be deemed to be adulterated:

- (1) If it consists in whole or in part of any substance which will render it injurious to the cooling system of an internal combustion engine or will make the operation of the engine dangerous to the user;
- (2) If its strength, quality, or purity falls below the standard of strength, quality, or purity under which it is sold; or
- (3) If it consists of or is compounded with calcium chloride, magnesium chloride, petroleum distillates, or other chemicals or substances in quantities harmful to the cooling system of internal combustion engines. (Ga. L. 1975, p. 706, § 2.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 172.      **C.J.S.** — 2 C.J.S., Adulteration, § 1.

10-1-202. When antifreeze deemed misbranded.

An antifreeze shall be deemed to be misbranded:

- (1) If its labeling is false or misleading in any particular; or
- (2) If in package form it does not bear a label containing the name and place of business of the manufacturer, packer, or distributor and an accurate statement of quantity of the contents in terms of weight or measure and they are not plainly and correctly stated on the outside of the package or container. (Ga. L. 1975, p. 706, § 3.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 1.      **C.J.S.** — 2 C.J.S., Adulteration, §§ 11, 12, 94 C.J.S., Weights and Measures, § 4.

**10-1-203. Inspection of antifreeze samples; annual license to sell.**

Before any antifreeze shall be sold, exposed for sale, or stored, packed, or held with intent to sell within this state, a current certified test report thereof prepared by an independent laboratory recognized by the Department of Agriculture to do such testing must be submitted and evaluated under the supervision of the state oil chemist in the Department of Agriculture. Under application of the manufacturer or packer or distributor, submission of container label, and the payment of a license fee of \$25.00 for each brand or type of antifreeze submitted, the state oil chemist shall evaluate the test report so submitted. If the antifreeze is not adulterated or misbranded, if it meets the standards established and promulgated by the Commissioner of Agriculture, and if the antifreeze is not a type or kind that is in violation of this part, the Commissioner shall issue the applicant a written license or permit authorizing the wholesale and retail sale by the applicant and by others of such antifreeze in this state for the fiscal year in which the license is issued, which license or permit shall be subject to renewal annually. If the Commissioner shall find at a later date that the antifreeze product or substance to be sold, exposed for sale, or held with intent to sell has been materially altered or adulterated or that a change has been made in the name, brand, or trademark under which the antifreeze is sold or that it violates this part, the Commissioner is authorized to revoke or suspend the license or permit issued under this part of the licensee found in violation of this part after notice and hearing before the Commissioner. No license or permit for the sale of antifreeze in this state shall be issued until the application, fee, and label submission have been made as provided by this part, the certified test report has been evaluated by the state oil chemist, and the state oil chemist notifies the Commissioner of Agriculture that said antifreeze meets the requirements of this part. (Ga. L. 1975, p. 706, § 4; Ga. L. 1997, p. 416, § 1; Ga. L. 2000, p. 136, § 10.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection  
Laws, §§ 1 et seq., 7 et seq.

**10-1-204. Enforcement; right of inspection; “stop-sale” orders.**

It shall be the duty of the Commissioner of Agriculture to administer and enforce this part by inspections, chemical analysis, or any other appropriate methods and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. All quantities or samples of antifreeze submitted for inspection or analysis shall be taken from stocks in this state or intended for sale in this state, or the Commissioner may require the manufacturer or distributor applying for an inspection of antifreeze to supply such sample thereof for analysis. The Commissioner and his inspectors shall have free access during business hours to all places of

business, buildings, vehicles, cars, and vessels used in the manufacture, transportation, sale, or storage of any antifreeze and may open any box, carton, parcel, package, or container holding or containing or supposed to contain any antifreeze and may take therefrom samples for analysis. If it appears that any provisions of this part have been violated, the Commissioner and his inspectors or representatives are authorized to issue a "stop-sale" order which shall prohibit further sale of any antifreeze being sold, exposed for sale, or held with intent to sell within this state in violation of this part until this part has been complied with or said violation has otherwise been legally disposed of. In case any "stop-sale" order shall be issued under this part, the Commissioner shall release the antifreeze so withdrawn from sale when this part has been complied with and upon payment of all costs and expenses incurred in connection with the withdrawal. (Ga. L. 1975, p. 706, § 5.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection Laws, § 10.

#### **10-1-205. Seizure and condemnation of noncomplying antifreeze.**

Any antifreeze not in compliance with this part shall be subject to seizure upon complaint of the Commissioner of Agriculture or his inspectors or representatives to the superior court in the county in which said antifreeze is located. In the event the superior court finds said antifreeze to be in violation of this part, it may order the condemnation of said antifreeze; and the same shall be disposed of in any manner consistent with the rules and regulations of the Department of Agriculture and the laws of this state, provided that in no instance shall the disposition of the antifreeze be ordered by the court without first affording the claimant or owner of the antifreeze an opportunity to apply to the court for the release of the antifreeze or for permission to process or relabel the antifreeze so as to bring it into compliance with this part. (Ga. L. 1975, p. 706, § 6.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection Laws, § 4.

#### **10-1-206. List of inspected and licensed brands; advertising references to licensing.**

The Commissioner of Agriculture may publish or furnish upon request a list of the brands and classes or types of antifreeze inspected by the state oil chemist during the fiscal year which have been found to be in compliance with this part and for which a license or permit for sale has been issued. It shall be lawful for any manufacturer, packer, or distributor of antifreeze to



show, by advertising, in any manner, that its brand of antifreeze has been inspected, analyzed, or licensed for sale by the Commissioner of Agriculture acting through the state oil chemist. It shall be unlawful for any manufacturer, packer, or distributor of antifreeze to advertise in any manner that such antifreeze so advertised for sale has been "approved" by the Commissioner of Agriculture. (Ga. L. 1975, p. 706, § 7.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection  
Laws, § 12.

#### **10-1-207. Requiring statement of formula or contents; confidentiality of information furnished.**

When any manufacturer, packer, or distributor applies to the Commissioner of Agriculture for a license or permit to sell antifreeze in this state, the Commissioner may require the manufacturer, packer, or distributor to furnish to the state oil chemist a statement of the formula or contents of the antifreeze, which statements shall conform to rules and regulations established by the Commissioner, provided that the statement of the formula or contents need not include the inhibitor ingredients if such inhibitor ingredients total less than 5 percent by weight of the antifreeze and if in lieu thereof the manufacturer, packer, or distributor furnishes to the state oil chemist satisfactory evidence, other than by disclosure of the inhibitor ingredients, that the antifreeze is not adulterated as defined in Code Section 10-1-201. All statements of contents, formula, or trade secrets furnished under this Code section shall be privileged and confidential and shall not be subject to subpoena nor shall the same be exhibited or disclosed before any administrative or judicial tribunal by virtue of any order or subpoena of such tribunal unless with the consent of the person, firm, association, or corporation owning or furnishing to the state oil chemist such statement of contents. (Ga. L. 1975, p. 706, § 8.)

#### **10-1-208. Certified analyses as evidence.**

A copy of the analysis made by the state oil chemist of the Department of Agriculture of any antifreeze and certified by him shall be admitted as evidence in any court of this state upon trial of any issue involving the merits of antifreeze as defined and covered by this part. (Ga. L. 1975, p. 706, § 9.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 42 Am. Jur. 2d, Inspection  
Laws, § 12.



**10-1-208.1. Recycled, reclaimed, or reprocessed antifreeze; exemption; regulations; violations.**

This part shall not apply to recycled, reclaimed, or reprocessed antifreeze processed in Georgia which meets standards of suitability for automobile or other vehicle engine cooling systems, which has conspicuous labeling or notice of its nature as “recycled,” and which is dispensed in an approved manner in bulk or by replenishing during servicing. The department shall establish by regulation such standards, testing requirements, labeling and notice requirements, and manner of dispensing. Each sale or other dispersal of a product which fails to meet such standards, which does not have the proper labeling or on which adequate notice is not given, or which is dispensed in an unapproved manner shall constitute a separate violation of this Code section. (Code 1981, § 10-1-208.1, enacted by Ga. L. 1996, p. 1020, § 1.)

**10-1-209. Promulgation of rules and regulations.**

The Commissioner of Agriculture shall be authorized to promulgate rules and regulations to implement this part and to accomplish its purpose. (Ga. L. 1975, p. 706, § 10.)

**10-1-210. Enjoining violations.**

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy at law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court in the appropriate county; and such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction or ex parte restraining order enjoining or restraining any person from violating or continuing to violate any of this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part. (Ga. L. 1975, p. 706, § 11.)

**10-1-211. Penalty for violation of part or rules and regulations.**

Any person who violates any provision of this part or the rules and regulations promulgated hereunder shall be guilty of a misdemeanor. (Ga. L. 1975, p. 706, § 12.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 255. 42 Am. Jur. 2d, Inspection Laws, § 14.

**C.J.S.** — 2 C.J.S., Adulteration, § 14.

## ARTICLE 9

## GASOLINE MARKETING PRACTICES

**Cross references.** — Regulation of advertising by retail dealers of motor fuel, § 10-1-164.

## JUDICIAL DECISIONS

**Article not void for vagueness.** — Given the extreme tolerance with which a federal court must scrutinize a state law in a vagueness challenge, an attack on the imprecision of the language employed in this article cannot be sustained. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

Even with the imprecise language of this article, a gasoline distributor is well apprised of the contours of the prohibited activity so as to defeat a void for vagueness challenge. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Article not preempted by federal law.** — Article does not legislate in an interstate area reserved exclusively for Congress. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Article does not conflict with Robinson-Patman Act**, 15 U.S.C. §§ 13-13b, 21a. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), *aff'd sub nom. Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), *cert. denied*, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Cited** in *Stephens v. McClain*, 129 Ga. App. 634, 200 S.E.2d 511 (1973); *Walters v. Chevron U.S.A., Inc.*, 154 Ga. App. 636, 269 S.E.2d 495 (1980).

## RESEARCH REFERENCES

**ALR.** — Right of manufacturer, producer, or wholesaler to control resale price, 7 ALR 449; 19 ALR 925; 32 ALR 1087; 103 ALR 1331; 125 ALR 1335.

Public regulation or authorization of gas filling stations, 18 ALR 101; 29 ALR 450; 34 ALR 507; 42 ALR 978; 49 ALR 767; 55 ALR 256; 79 ALR 918; 96 ALR 1337.

Rights and remedies of parties in respect to lease of filling station, 126 ALR 1375.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 ALR3d 399.

What constitutes adequate compliance with notice requirements, under § 104 of Petroleum Marketing Practices Act (15 USCS § 2804), in connection with termination or nonrenewal of gasoline station franchise relationship, 101 ALR Fed. 813.

## 10-1-230. Short title.

This article shall be known and may be cited as the "Gasoline Marketing Practices Act." (Ga. L. 1973, p. 438, § 1.)

## 10-1-231. Legislative findings.

The General Assembly finds and declares that the distribution and sales through marketing agreements of gasoline in the State of Georgia vitally

affects the general economy of the state, the public interest, and public welfare and that it is necessary, therefore, in the public interest to define the relationships and responsibilities of the parties to such agreements. (Ga. L. 1973, p. 438, § 2.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 157, 173.

**C.J.S.** — 58 C.J.S., Mines and Minerals, §§ 334 et seq., 371, 372.

#### 10-1-232. Definitions.

As used in this article, the term:

(1) “Automotive gasoline” or “gasoline” means octane rated fuels made from petroleum products for use in the propulsion of motor vehicles.

(2) “Automotive gasoline dealer” or “gasoline dealer” means any person or firm engaged primarily in the retail sale of automotive gasoline and related products and services under a marketing agreement entered into with an automotive gasoline distributor.

(3) “Automotive gasoline distributor” or “gasoline distributor” means any person or firm engaged, whether as a jobber or supplier, in the sale, consignment, or distribution of gasoline to automotive gasoline dealers pursuant to marketing agreements.

(3.1) “Blended fuel” means a mixture composed of automotive gasoline and another liquid, other than a de minimis amount of a product such as carburetor detergent or oxidation inhibitor, that can be used as a fuel in a motor vehicle.

(3.2) “Blender” means a person or firm which produces blended fuel outside a terminal transfer system.

(3.3) “Fuel alcohol” means alcohol or fuel grade ethanol.

(3.4) “Gasohol” means a blended fuel composed of gasoline and fuel grade ethanol.

(3.5) “Jobber” means an automotive gasoline distributor which is not a supplier.

(4) “Marketing agreement” or “agreement” means a written agreement, including a franchise, and all related written agreements between an automotive gasoline distributor and an automotive gasoline dealer under which such dealer is supplied automotive gasoline for retail sale or an agreement between an automotive gasoline distributor and an automotive gasoline dealer under which the automotive gasoline dealer is granted the right to occupy premises owned, leased, or controlled by the

automotive gasoline distributor for the purpose of engaging in the retail sale of gasoline of the automotive gasoline distributor.

(4.1) "Position holder" means a person or firm which holds the inventory position in automotive gasoline in a terminal, as reflected on the records of the terminal operator. A person or firm holds the inventory position in automotive gasoline when that person or firm has a contract with the terminal operator for the use of storage facilities and terminaling services for gasoline at the terminal. The term includes a terminal operator which owns gasoline in the terminal.

(4.2) "Rack" means a mechanism for delivering automotive gasoline from a refinery, a terminal, or a bulk plant into a transport truck, a railroad tank car, or another means of transfer that is outside the terminal transfer system.

(4.3) "Refiner" means a person or firm which owns, operates, or controls a refinery, wherever located.

(4.4) "Refinery" means a facility used to process crude oil, unfinished oils, natural gas liquids, or other hydrocarbons into automotive gasoline and from which automotive gasoline may be removed by pipeline or vessel or at a rack. The term does not include a facility that produces only blended fuel or gasohol.

(4.5) "Removal" means a physical transfer other than by evaporation, loss, or destruction. A physical transfer to a transport truck or another means of conveyance outside a terminal transfer system is complete upon delivery into the means of conveyance.

(5) "Retail sale of automotive gasoline" means the sale thereof for consumption, and not for resale, at a retail outlet serving the motoring public.

(6) "Supplier" means:

(A) A position holder or a person or firm which receives automotive gasoline pursuant to a two-party exchange; or

(B) A refiner.

(7) "Terminal" means an automotive gasoline storage and distribution facility that has been assigned a terminal control number by the United States Internal Revenue Service, is supplied by pipeline or marine vessel, and from which automotive gasoline may be removed at a rack.

(8) "Terminal operator" means a person or firm which owns, operates, or otherwise controls a terminal.

(9) "Terminal transfer system" means an automotive gasoline distribution system consisting of refineries, pipelines, marine vessels, and



terminals. The term has the same meaning as “bulk transfer/terminal system” under 26 C.F.R. Section 48.4081-1.

(10) “Two-party exchange” means a transaction in which automotive gasoline is transferred from one licensed supplier to another licensed supplier pursuant to an exchange agreement under which the supplier that is the position holder agrees to deliver automotive gasoline to the other supplier or the other supplier’s customer at the rack of the terminal at which the delivering supplier is the position holder. (Ga. L. 1973, p. 438, § 3; Ga. L. 1978, p. 2249, §§ 1-3; Ga. L. 2009, p. 201, § 1/SB 30.)

**The 2009 amendment**, effective July 1, 2009, in paragraph (2), inserted “or ‘gasoline dealer’” and inserted “or firm”; in paragraph (3), inserted “or ‘gasoline distributor’” and substituted “or firm engaged, whether as a jobber or supplier,” for “, firm, or corporation who is engaged” near the

middle; added paragraphs (3.1) through (3.5); added paragraphs (4.1) through (4.5); and added paragraphs (6) through (10).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, “de minimis” was substituted for “de minimus” in paragraph (3.1).

### 10-1-233. Acts of distributor violating article.

It shall be a violation of this article for any gasoline distributor who has a marketing agreement with a gasoline dealer, directly or indirectly, through any officer, agent, or employee, to commit any of the following acts:

(1) To terminate or cancel such marketing agreement without good cause prior to the expiration date;

(2) To terminate or cancel an existing marketing agreement prior to this expiration date or to fail to enter into subsequent agreements without having first given written notice setting forth all the reasons for such action to the gasoline dealer at least 60 days in advance of such termination, cancellation, or expiration of the existing agreement; provided, however, that such notice shall not be required of a gasoline distributor acting with reasonable cause to believe the dealer is maliciously and willfully damaging the property rights of the gasoline distributor or if the dealer has voluntarily abandoned the marketing relationship or after five days’ notice has failed to pay his just debts when due to the distributor;

(3) By the use of coercion, intimidation, or threats, to force or induce such gasoline dealer to deal exclusively in products manufactured, distributed, or sponsored by the gasoline distributor or to participate in promotions. Hours of operation which are set in any written agreement in effect prior to July 1, 1978, can only be changed by mutual consent. It shall also be the duty of the distributor to advise the dealer in writing prior to execution of the agreement the projected potential gallonage and the dealer shall acknowledge same in writing prior to execution of the marketing agreement that he is willing to accept same;

(4) To engage in any acts which have the purpose, intent, or effect of fixing or maintaining prices or of forcing or inducing adherence to prices at which such gasoline distributor's products are to be resold by such gasoline dealers, provided that nothing in this paragraph shall be deemed to prohibit recommendation, suggestion, urging, or discussion;

(5) To require a gasoline dealer, at the time of entering into a marketing agreement, to assent to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability imposed by this article;

(6) To require or prohibit any change in management of any gasoline dealer unless such requirement or prohibition of change shall be for good cause, which cause shall be stated in writing by the gasoline distributor;

(7) To impose standards of performance upon the gasoline dealer other than those in the marketing agreement;

(8) To provide any term or condition in any marketing agreement, or other agreement ancillary or collateral thereto, which term or condition directly or indirectly violates this article;

(9) After July 1, 1978, to require operation in excess of a six-day week or in excess of a 12 hour day if the dealer can prove it results in substantially lessening the profits earned in his entire operation to the extent that it is not economically feasible to continue said operation; provided, however, that this paragraph shall in no way impair the obligation of contracts made prior to July 1, 1978; and provided, further, that this paragraph shall not impair the writing of a contract for hours in excess of the hours expressed in this paragraph or impair the right to enforce the hours contained in any contract until sufficient evidence is available to a dealer to exercise the rights provided in this article; and provided, further, that this paragraph shall not be applicable to dealers or distributors who operate a food or convenience store in conjunction with the retail sale of automotive gasoline and related products. (Ga. L. 1973, p. 438, § 4; Ga. L. 1978, p. 2249, §§ 4, 5; Ga. L. 1983, p. 3, § 8.)

### JUDICIAL DECISIONS

**Paragraph (6) of O.C.G.A. § 10-1-233 is unconstitutional** under the due process clause of the Georgia Constitution in that the paragraph purports to regulate an industry not affected with a public interest. *O'Brien v. Union Oil Co.*, 699 F. Supp. 1562 (N.D. Ga. 1988).

**Paragraph (6) of O.C.G.A. § 10-1-233 is contrary to public policy** in that the paragraph adversely impacts upon the rights of

gasoline distributors with respect to the individual personal service contracts between themselves and their retailers. *O'Brien v. Union Oil Co.*, 699 F. Supp. 1562 (N.D. Ga. 1988).

**Paragraphs (8) and (9) of this section are not preempted** by the federal Petroleum Marketing Practices Act, 15 U.S.C. § 2801 et seq. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979),

aff'd sub nom. Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Cited in** Gordon v. Crown Cent. Petro. Corp., 423 F. Supp. 58 (N.D. Ga. 1976).

**10-1-234. Selling controlled product to another distributor for retail sale; selling to other dealers at distress prices.**

It shall be an unlawful predatory and unfair business practice for an automotive gasoline distributor who controls a product supply, controls the price of that product and has the power to require the purchase of that product by another automotive gasoline distributor or an automotive gasoline dealer doing business in this state to sell said product at prevailing automotive gasoline distributor prices at any time to another automotive gasoline distributor for resale to automotive gasoline dealers with the purpose or intent that said product will be sold at retail by said automotive gasoline distributor and fails to offer its automotive gasoline dealers an opportunity to purchase an equal volume of product upon the same terms and conditions, excepting expenses for advertising, credit cards and other expenses relative to its automotive gasoline dealers, when said automotive gasoline distributor is selling said product at distress prices to other automotive gasoline dealers in the dealer's marketing area. As used in this Code section, the term "distress prices" shall not be construed to include or embrace a price established for the purpose of meeting competition. (Ga. L. 1978, p. 2249, § 6; Ga. L. 1984, p. 1679, § 1.)

**Editor's notes.** — Ga. L. 1984, p. 1679, § 2, not codified by the General Assembly, provided that that Act "shall not apply to or be deemed to affect any cause of action pending" on the effective date of the Act (April 6, 1984).

**Law reviews.** — For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

## JUDICIAL DECISIONS

**This section not void for vagueness.** — Parties are sufficiently apprised of proscribed conduct under this section so as not to be deprived of due process of law by its application, so this section is not void for vagueness. Exxon Corp. v. Georgia Ass'n of Petro. Retailers, 484 F. Supp. 1008 (N.D. Ga. 1979), aff'd sub nom. Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

O.C.G.A. § 10-1-234 is, while most assuredly not a model of clarity, at least amenable to some sensible construction; thus, it is constitutional because it does alert parties to character of proscribed conduct and does amount to something more than no rule at

all. Exxon Corp. v. Busbee, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**O.C.G.A. § 10-1-234 violates the due process clause** of Ga. Const. 1983, Art. 1, Sec. 1, Para. I, in that the statute seeks to regulate a business not affected with a public interest. Batton-Jackson Oil Co. v. Reeves, 255 Ga. 480, 340 S.E.2d 16 (1986).

**Constitutional evaluation.** — While the void-for-vagueness doctrine is most rigorously applied in the context of penal statutes and in the area of first amendment rights, the United States Supreme Court has recognized that vague laws in any area suffer a constitutional infirmity; thus, O.C.G.A. § 10-1-234 may not escape scrutiny simply



because the statute is a commercial regulatory statute. But, because this statute is not concerned with either the first amendment or the definition of criminal conduct a court must be lenient in evaluating the statute's constitutionality. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Standard for evaluating constitutionality of nonpenal, commercial regulatory statutes.** — Because O.C.G.A. § 10-1-234 is a nonpenal, commercial regulatory statute, the standard for evaluating the statute's constitutionality is whether the statute is so indefinite as to amount to no rule or standard at all. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Section must be substantially inapprehensible to be unconstitutional.** — For O.C.G.A. § 10-1-234 to constitute a deprivation of due process, the statute must be so vague and indefinite as really to be no rule or standard at all, that is, uncertainty in the

statute is not enough for the statute to be unconstitutionally vague; rather, the statute must be substantially incomprehensible. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Section does not conflict with federal Emergency Petroleum Allocation Act**, as amended, 15 U.S.C. § 751 et seq. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), aff'd sub nom. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

**Section does not conflict with Sherman Act.** — There presently exists no conflict with the Sherman Act, 15 U.S.C. §§ 1-7, sufficient to invalidate this section. *Exxon Corp. v. Georgia Ass'n of Petro. Retailers*, 484 F. Supp. 1008 (N.D. Ga. 1979), aff'd sub nom. *Exxon Corp. v. Busbee*, 644 F.2d 1030 (5th Cir.), cert. denied, 454 U.S. 932, 102 S. Ct. 430, 70 L. Ed. 2d 239 (1981).

#### **10-1-234.1. Suppliers may not inhibit gasoline distributors from being blenders.**

Regardless of other products offered, any supplier which, pursuant to a marketing agreement, supplies gasoline from a terminal in this state to a gasoline distributor shall offer to supply such party with gasoline that has not been blended with, but is suitable for blending with, fuel alcohol. No supplier shall prevent or inhibit a gasoline distributor in this state from being a blender or from qualifying for any federal or state tax credit due to blenders. If a supplier supplies gasoline to a gasoline distributor pursuant to this Code section which is then blended, the gasoline distributor shall indemnify and hold harmless such supplier against any losses or damages arising out of claims, costs, judgments, and expenses, including reasonable attorney's fees, or suits relating to or arising out of such blending. (Code 1981, § 10-1-234.1, enacted by Ga. L. 2009, p. 201, § 2/SB 30.)

**Effective date.** — This Code section became effective July 1, 2009.

#### **10-1-235. Action by dealer against distributor for violation of article authorized; nature of relief; attorneys' fees.**

(a) Any automotive gasoline dealer may bring an action against its automotive gasoline distributor for violation of this article in the superior court of the county where such distributor resides or, if the distributor is a corporation, in accordance with Title 14, to recover damages sustained by



reason of any violation of this article, provided that the dealer shall show as a prerequisite to recovery under this Code section that he has:

(1) Complied with the reasonable requirements of the marketing agreement; and

(2) Has acted in good faith in carrying out the terms of the marketing agreement.

(b) The court may grant such equitable relief as is proper, including declaratory judgment and injunctive relief.

(c) Attorneys' fees shall be controlled by Code Section 13-6-11. (Ga. L. 1973, p. 438, § 5; Ga. L. 1978, p. 2249, § 7.)

**10-1-236. Action by dealer against distributor for violation of article — Defense of termination of agreement.**

Reserved. Repealed by Ga. L. 1983, p. 3, § 8, effective January 25, 1983.

**The 2009 amendment**, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, designated this Code section as reserved.

**Editor's notes.** — This Code section was based on Ga. L. 1973, p. 438, § 7; Ga. L. 1978, p. 2249, §§ 8-10; and Ga. L. 1981, Ex. Sess., p. 8.

**10-1-237. Action by dealer against distributor for violation of article; notice of termination prior to expiration; when premises must be vacated.**

Upon receipt of notice to cancel or terminate an existing lease prior to expiration date, it shall be the duty of the dealer to notify the distributor within 30 days thereof of his intention to hold over and to set forth in writing to the distributor his reasons and justifications therefor and thereafter within ten days to file his complaint or application for injunction in the court of proper jurisdiction; and the judge of said court shall within 15 days conduct a hearing in said matter and thereafter within five days hand down a ruling based upon evidence presented as to the granting of a temporary injunction; and, upon the judge's failure to grant the injunction, the dealer shall vacate the premises all according to the lease agreement. (Ga. L. 1973, p. 438, § 8.)

**10-1-238. Action by distributor against dealer for breach of agreement; attorneys' fees.**

Any gasoline distributor may bring action against the dealer for failing to fulfill the marketing agreement. Attorneys' fees shall be controlled by Code Section 13-6-11. (Ga. L. 1973, p. 438, § 11; Ga. L. 1978, p. 2249, § 12; Ga. L. 1993, p. 91, § 10.)

**10-1-239. Limitation of actions.**

No action shall be brought under Code Section 10-1-235 or Code Section 10-1-238 unless commenced within two years after the cause of action shall have accrued. (Ga. L. 1973, p. 438, § 12.)

**RESEARCH REFERENCES**

**ALR.** — Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

**10-1-240. Marketing agreements subject to article.**

This article shall apply to all marketing agreements as defined in paragraph (4) of Code Section 10-1-232 that are granted, renewed, or amended to extend the lease period on or after July 1, 2009. (Ga. L. 1973, p. 438, §§ 6, 9; Ga. L. 1978, p. 2249, § 11; Ga. L. 2009, p. 201, § 3/SB 30.)

**The 2009 amendment**, effective July 1, 2009, substituted “that are granted, renewed, or amended to extend the lease period on or after July 1, 2009” for “, except that this article shall not apply to a marketing agreement granted prior to July 1, 1973;

provided, however, that a renewal of a marketing agreement or an amendment extending the lease period shall not be excluded from the application of this article” at the end.

**10-1-241. Sale of real property not affected.**

This article is not intended to alter or change the present law or regulations pertaining to the sale or transfer of title to real property, and the owner may at any time enter into a contract for the bona fide sale of his property. (Ga. L. 1973, p. 438, § 10.)

**ARTICLE 9A****BELOW COST SALES**

**Editor’s notes.** — Ga. L. 1985, p. 458, § 2, not codified by the General Assembly, provides: “All laws and parts of laws in conflict with this Act are repealed; provided, however, nothing contained in this Act shall be

construed to repeal any part of Article 9 of Chapter 1 of Title 10, it being the intent of the General Assembly that this Act shall be in addition to said Code sections.”

**10-1-250. Short title.**

This article may be cited as the “Below Cost Sales Act.” (Code 1981, § 10-1-250, enacted by Ga. L. 1985, p. 458, § 1.)

**10-1-251. Definitions.**

As used in this article, the term:

(1) “Person” means an individual, partnership, association, corporation, joint-stock company, or business trust.

(2) “Product” means octane or cetane rated fuels for use in the propulsion of motor vehicles.

(3) “Purchase” includes any acceptance or receipt of product by a person from a related entity.

(4) “Related entity” of a person means any person who, directly or through an affiliated person, holds more than 50 percent of the assets or voting securities of such person.

(5) “Sale” or “to sell” includes any transfer or delivery of product to a person from a related entity. (Code 1981, § 10-1-251, enacted by Ga. L. 1985, p. 458, § 1.)

**10-1-252. Reasonable transfer price.**

For the purposes of this article, a transfer price from a related entity to a person is reasonable (1) if it is the same or greater than the price that such related entity contemporaneously charges unrelated persons at the same level of distribution and in the same geographic area as the person for a similar volume of product of like grade and quality or (2) if it is arrived at by including all uniform costs imposed upon purchasers in the operation of the retail business as determined pursuant to generally accepted accounting principles. (Code 1981, § 10-1-252, enacted by Ga. L. 1985, p. 458, § 1.)

**10-1-253. Computation of cost.**

For the purposes of this article, “cost” shall be computed as follows:

(1)(A) When product is purchased by a person from an independent entity, the lowest invoice cost to the person from the independent entity for product of like grade and quality within 15 days prior to the date of resale of the product by the person; or

(B) When product is purchased by a person from a related entity, the lowest transfer price charged to the person for product of like grade and quality within 15 days prior to the date of resale of the product by the person, provided that the transfer price is reasonable; or

(C) If neither subparagraph (A) nor (B) of this paragraph applies, the lowest posted or published wholesale price of all sellers of product

of like grade and quality normally serving the geographic area in which the person is located during the 15 days prior to the date of resale of the product by the person; plus

(2) A reasonable cost of doing business as determined pursuant to generally accepted accounting principles; plus

(3) Freight charges and any credit against federal or state motor fuel or sales tax not already included in the invoice cost, transfer price, or lowest posted or published wholesale price of the product; less

(4) All trade discounts, allowances, or rebates actually granted to the person on the product; provided, however, such trade discounts, allowances, or rebates are received on proportionally equal terms by all other customers competing in the distribution of such products. (Code 1981, § 10-1-253, enacted by Ga. L. 1985, p. 458, § 1.)

**10-1-254. Prohibited acts in sale of octane or cetane fuels; burden of rebutting prima-facie case.**

(a) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, either directly or indirectly:

(1) To sell product below cost; or

(2) To discriminate in price between different purchasers of product of like grade and quality, where either or any of the purchases involved in such discrimination is in commerce in this state,

and where the effect of such below-cost sale or discrimination may be substantially to lessen competition or tend to create a monopoly, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such below-cost sale or discrimination, or with customers of either of them. Nothing contained in this Code section shall prevent differentials which make only a due allowance for differences in the cost of refining, sale, or delivery resulting from the differing methods or quantities in which such product is sold or delivered to such purchasers. Nothing contained in this Code section shall prevent persons from selecting their own customers in bona fide transactions and not in restraint of trade. Nothing contained in this Code section shall prevent price changes, from time to time, which are in response to changing conditions affecting the market for or the marketability of product of the grade and quality concerned, such as, but not limited to, imperfect or damaged product, obsolescence of product, distress sales under court process, or sales in good faith in discontinuance of business at a particular location or with respect to the product itself.

(b) Upon proof being made in any action to enforce this article that



there has been a below-cost sale or discrimination, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this article. Nothing contained in this article shall prevent a seller from rebutting the prima-facie case thus made by showing that such seller's below-cost sale or lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.

(c) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, to pay, grant, receive, or accept any thing of value as a commission or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of product, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf of or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is granted or paid.

(d) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state to pay or contract for the payment of any thing of value to or for the benefit of a customer of such person in the course of such sales as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of product refined, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such product.

(e) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, to discriminate in favor of one purchaser against another purchaser or purchasers of product bought for resale, with or without processing, by contracting to furnish, furnishing, or contributing to the furnishing of any services or facilities connected with the processing, handling, sale, or offering for sale of such product so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) It shall be unlawful for any person engaged in the sale of octane or cetane fuels in this state, in the course of such sales, knowingly to induce or receive a below-cost or discriminatory price which is prohibited by this article. (Code 1981, § 10-1-254, enacted by Ga. L. 1985, p. 458, § 1.)

### JUDICIAL DECISIONS

**Regulation of prices pursuant to O.C.G.A. § 10-1-254 is unconstitutional**, inasmuch as the statute engages in price-fixing and the

gasoline industry is not affected with a public interest. *Strickland v. Ports Petroleum Co.*, 256 Ga. 669, 353 S.E.2d 17 (1987).

## RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state statutory provisions prohibiting sale of gasoline below cost, 26 ALR6th 249. Meeting competition defense under § 2(b) of Clayton Act, as amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)), 164 ALR Fed. 633.

**10-1-255. Civil actions; effect of written tender of settlement; limitation of actions.**

(a) Any person who sustains or is threatened with competitive injury by reason of a violation of this article may maintain an action in any superior court of this state having jurisdiction over the defendant to enjoin such violation. A successful petitioner shall be entitled to recover reasonable attorneys' fees and costs of litigation.

(b) In addition to the action provided in subsection (a) of this Code section, any person who sustains a competitive injury by reason of a violation of this article may maintain an action in any court of this state having jurisdiction over the defendant to recover the actual, or special, damages sustained thereby including, but not limited to, reasonable attorneys' fees and costs of litigation. A successful claimant under this subsection shall be awarded punitive damages not to exceed \$1,000.00 for each day on which the defendant continued to commit the violation of this article resulting in competitive injury after having received from the plaintiff a written notice that the defendant was engaging in such violation. The maximum amount of such punitive damages which may be awarded to any one plaintiff from any one defendant, however, shall be \$200,000.00.

(c) A claim for damages for violation of this article may be asserted in an individual action only and may not be the subject of a class action under Code Section 9-11-23 or any other provisions of law. It is the intention of the General Assembly that this prohibition against class actions is an integral substantive provision of this article, and that its unenforceability for any reason in any action shall preclude the recovery of damages in such action.

(d) At any time subsequent to the filing of an action for damages under this article, and prior to any award of such damages, the defendant may make a written tender of settlement to the complaining person. If the complaining person is awarded no damages or less damages than the amount of the written tender of settlement, the complaining person shall under no circumstances be entitled to recover any costs of the litigation, including attorneys' fees, that were incurred after the date of the written tender of settlement. All written tenders of settlement that are made pursuant to this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(e) Any action brought under this article must be brought within two years of the date of the alleged violation. All other actions are forever

barred. (Code 1981, § 10-1-255, enacted by Ga. L. 1985, p. 458, § 1; Ga. L. 1986, p. 326, § 1; Ga. L. 1994, p. 97, § 10.)

### 10-1-256. Declaration of legislative intent in construing Code Section 10-1-254.

It is the intent of the General Assembly that, in construing Code Section 10-1-254, due consideration and great weight be given to the interpretation of the federal courts relating to Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. Sections 13(a)-(f). (Code 1981, § 10-1-256, enacted by Ga. L. 1985, p. 458, § 1.)

### RESEARCH REFERENCES

**ALR.** — Meeting competition defense under § 2(b) of Clayton Act, as amended by Robinson-Patman Act (15 U.S.C.A. § 13(b)), 164 ALR Fed. 633.

## ARTICLE 10

### SALE AND STORAGE OF LIQUEFIED PETROLEUM GAS

**Editor's notes.** — Ga. L. 1992, p. 2134, § 2, effective April 17, 1992, provides: "Article 10 of Chapter 1 of Title 10 as contained in the Official Code of Georgia Annotated published under authority of the state by the Michie Company in 1982 and contained in Volume 8 of such publication as amended by the text and numbering of Code Sections as contained in the 1991 supplements to the Official Code of Georgia Annotated pub-

lished under authority of the state in 1991 by the Michie Company is reenacted and shall have the effect of a statute enacted by the General Assembly of Georgia."

**Administrative rules and regulations.** — Liquefied Petroleum Gases, Official Compilation of the Rules and Regulations of the State of Georgia, Comptroller General, Safety Fire Commissioner, Chapter 120-3-16.

### JUDICIAL DECISIONS

**Provisions enacted for public benefit.** — Ga. L. 1949, p. 1128, § 1 and Ga. L. 1949, p. 1057, § 1 et seq. were passed for the public benefit and are statutes of public policy. *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**O.C.G.A. Art. 10, Ch. 1, T. 10 and O.C.G.A. §§ 25-2-1 through 25-2-39 construed together.** — To give effect to the intent of the General Assembly, Ga. L. 1949, p. 1128, § 1 and Ga. L. 1949, p. 1057, § 1 et seq. should be construed together, as both sought to remedy an evil which then existed, and the statutes prescribed a remedy for the public good. *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**Statute authorizing waiver of benefit of**

**law inapplicable to safety regulations.** — The exception in former Code 1933, § 102-106 that "a person may waive or renounce what the law has established in his favor when he does not thereby injure others or affect the public interest" had no application where the contract attempted to release a party from liability for acts violating liquefied gas safety regulations. *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**Distributor not released from liability for negligence.** — A liquefied petroleum distributor is without authority of law to release the distributor from liability by a contract or otherwise because of damage resulting from the negligence of such distributor. *Bishop v.*



Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**Gas company is not insurer of safety of customers** and their agents and invitees. *Womack v. Central Ga. Gas Co.*, 85 Ga. App. 799, 70 S.E.2d 398 (1952).

**Gas company is liable only for acts of negligence.** *Womack v. Central Ga. Gas Co.*, 85 Ga. App. 799, 70 S.E.2d 398 (1952).

**Cited in** *Liberty Homes, Inc. v. Stratton*, 90 Ga. App. 675, 83 S.E.2d 818 (1954).

#### RESEARCH REFERENCES

**ALR.** — Rights, under oil and gas lease, deed, or sales contract, to “distillate,” “condensate,” or “natural gasoline,” 38 ALR3d 983.

Liability of one selling or distributing liq-

uid or bottled fuel gas, for personal injury, death, or property damage, 41 ALR3d 782.

Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

#### 10-1-260. Short title.

This article may be cited and referred to as the “Liquefied Petroleum Safety Act of Georgia.” (Ga. L. 1949, p. 1128, § 1; Ga. L. 1992, p. 2134, § 2.)

#### 10-1-261. Legislative finding.

The General Assembly of Georgia finds, determines, and declares that this article is necessary for the immediate preservation of the public peace, health, and safety. (Ga. L. 1949, p. 1128, § 10; Ga. L. 1992, p. 2134, § 2.)

#### JUDICIAL DECISIONS

**Cited in** *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

#### 10-1-262. “Liquefied petroleum gas” defined.

As used in this article, the term “liquefied petroleum gas” means any material which is composed predominantly of any of the following hydrocarbons or mixtures of the same: propane, propylene, butanes (normal butane or isobutane), and butylenes. (Ga. L. 1949, p. 1128, § 2; Ga. L. 1992, p. 2134, § 2.)

#### JUDICIAL DECISIONS

**Cited in** *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 27A Am. Jur. 2d, Energy and Power Sources, § 18 et seq.

**C.J.S.** — 38A C.J.S., Gas, § 1 et seq.



**10-1-263. State fire marshal to enforce article.**

The state fire marshal, ex officio, shall be designated as the officer charged with the duty and authority of enforcing this article. (Ga. L. 1949, p. 1128, § 3; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

**10-1-264. Assistants and employees of state fire marshal.**

The state fire marshal is authorized to appoint and employ such assistants and employees, fix their salaries, and assign and delegate such duties and responsibilities as he may deem necessary to carry out this article in an efficient manner. (Ga. L. 1949, p. 1128, § 6; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

**10-1-265. Rules and regulations setting standards for liquefied petroleum gas equipment.**

(a) The state fire marshal shall make, promulgate, adopt, and enforce rules and regulations setting forth minimum general standards covering the design, construction, location, installation, and operation of equipment for storing, handling, transporting by tank truck or tank trailer, and utilizing liquefied petroleum gases and specifying the odorization of said gases and the degree thereof. Said rules and regulations shall be such as are reasonably necessary for the protection of the health, welfare, and safety of the public and persons using such materials and shall be based upon reasonable substantial conformity with the generally accepted standards of safety concerning the same subject matter.

(b) Rules and regulations promulgated by the state fire marshal based upon reasonable substantial conformity with the published standards of the National Board of Fire Underwriters for the design, installation, and construction of containers and pertinent equipment for the storage and handling of liquefied petroleum gases as recommended by the National Fire Protection Association shall be deemed to be in substantial conformity with the generally accepted standards of safety concerning the subject matter. (Ga. L. 1949, p. 1128, § 4; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

**JUDICIAL DECISIONS**

**Violation of rules is negligence per se. —** Violation of valid rules and regulations constitutes negligence per se, whether alleged as negligence per se or merely as negligence, and although a violation of such regulations could not be made the basis of criminal prosecution. *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**Filling tank contrary to regulations. —** Petitions stated a cause of action for alleged negligence of defendant, as a distributor of butane gas, in filling a gas tank beyond the capacity fixed by the rules and regulations of the state fire marshal promulgated by authority of this article, and in filling the tank at all when the tank was in an unsafe condi-

tion, namely, within less than ten feet of the residence, contrary to the rules and regulations of the fire marshal. *Harvey v. Zell*, 87 Ga. App. 280, 73 S.E.2d 605 (1952).

**Installation of gas appliances by one who is not an employee of the gas company** and without the company's permission, in viola-

tion of regulations issued under this article, is not negligence unless done in an improper manner. *Howell Gas of Athens, Inc. v. Coile*, 112 Ga. App. 732, 146 S.E.2d 145 (1965).

**Cited** in *Douglas v. Smith*, 578 F.2d 1169 (5th Cir. 1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 163, 171.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq.

58 C.J.S., Mines and Minerals, §§ 334, 336 et seq., 371, 372.

## 10-1-266. Issuance of licenses or permits; annual fees.

The state fire marshal is authorized and empowered to issue a license or permit to such person, firm, or corporation qualifying under the terms of this article and such rules and regulations as may be adopted by the state fire marshal. For such license or permit issued on or after July 1, 1990, a one-time fee of not less than \$100.00 nor more than \$500.00 shall be charged on a graduated capacity scale for each installation of such person, firm, or corporation doing business in Georgia. All fees, assessments, and collections made by the state fire marshal shall be paid into the general fund of the state treasury. The license or permit of any licensee or permittee who had paid an annual license or permit fee on or after January 1, 1990, but prior to July 1, 1990, shall be valid for the remainder of the period of time covered by such payment and, upon the expiration of such period of time, the licensee or permittee shall become subject to the one-time fee requirement provided in this Code section. (Ga. L. 1949, p. 1128, § 7; Ga. L. 1955, p. 221, § 2; Ga. L. 1990, p. 647, § 1; Ga. L. 1992, p. 2134, § 2.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1990, a comma was deleted following “charged” in the second

sentence and “Code section” was substituted for “subsection” at the end of the last sentence.

## JUDICIAL DECISIONS

**Authority of Safety Fire Commissioner.** — In the absence of the state fire marshal, the Safety Fire Commissioner was authorized to act on an application for a license to maintain a liquefied petroleum gas bulk distribution facility. *Safety Fire Comm'r v. U.S.A. Gas, Inc.*, 229 Ga. App. 807, 494 S.E.2d 706 (1997).

**Judicial intervention.** — Even if the pro-

cedures of the Safety Fire Commissioner in acting on an application for a license to maintain a liquefied petroleum gas bulk distribution facility were flawed, the superior court could not substitute the court's own judgment for that of the Commissioner. *Safety Fire Comm'r v. U.S.A. Gas, Inc.*, 229 Ga. App. 807, 494 S.E.2d 706 (1997).

### OPINIONS OF THE ATTORNEY GENERAL

**State fire marshal has no authority to require municipality to obtain license** for the municipality's liquefied petroleum plant as may be required of others under the provisions of this section. 1970 Op. Att'y Gen. No. 70-146.

**Invalid as conditioned air contractor license.** — Persons licensed pursuant to

O.C.G.A. § 10-1-266 are not exempt from the requirement of holder of license as a conditioned air contractor pursuant to the requirements of the State Construction Industry Licensing Board, Division of Conditioned Air Contractors, O.C.G.A. § 43-14-1 et seq. 1994 Op. Att'y Gen. No. 94-2.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 173.

**C.J.S.** — 58 C.J.S., Mines and Minerals, §§ 371, 372.

### 10-1-267. Insurance or bond requirements for license or permit holders.

The state fire marshal is authorized and empowered as a prerequisite to a license or permit to require the applicant for such license or permit to furnish insurance, surety bond, or a personal bond with security in such amounts and terms as the state fire marshal may deem advisable and expedient for the protection of the general public and to indemnify for losses and damages which proximately result from any act of negligence of the principal, his agents, or employees while he or they may be engaged in the performance of duties with reference to the liquefied petroleum business. The state fire marshal is also authorized to adopt and enforce reasonable rules and regulations governing such insurance and bonds. Such regulations shall be adopted by the state fire marshal only after a public hearing thereon. (Ga. L. 1949, p. 1128, § 4; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

### JUDICIAL DECISIONS

**Cited in** *Womack v. Central Ga. Gas Co.*, 85 Ga. App. 799, 70 S.E.2d 398 (1952); *Bishop v. Act-O-Lane Gas Serv. Co.*, 91 Ga. App. 154, 85 S.E.2d 169 (1954).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, §§ 163, 171.

58 C.J.S., Mines and Minerals, §§ 334, 336 et seq., 371, 372.

**C.J.S.** — 38A C.J.S., Gas, §§ 5, 6, 17 et seq.

### 10-1-268. Minimum storage facilities required.

(a) Every entity licensed to sell or distribute liquefied petroleum gas in this state shall have located within the State of Georgia storage capacity for a minimum of 30,000 water gallons of liquefied petroleum gas, except that entities initially licensed prior to July 1, 1990, may continue to operate with the previously approved 18,000 gallons minimum storage capacity. If the



30,000 gallons (water capacity) storage consists of more than one container, then no storage container used to meet this requirement shall be of a size less than 6,000 gallons (water capacity).

(b) The storage capacity required by subsection (a) of this Code section shall be within close proximity to the area serviced.

(c) The state fire marshal, in his discretion and in accordance with such rules and regulations as have been or may be duly promulgated and adopted under this article, may waive the minimum bulk storage facility requirement of subsection (a) of this Code section.

(d) If the storage capacity required by subsection (a) of this Code section is leased or rented, then such storage capacity must be dedicated to the exclusive use of the lessee and must include separate piping and loading/unloading facilities. (Ga. L. 1955, p. 221, § 1; Ga. L. 1960, p. 143, § 1; Ga. L. 1990, p. 1434, § 1; Ga. L. 1992, p. 2134, § 2.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 38 Am. Jur. 2d, Gas and Oil, § 171.

**ALR.** — Gasoline or other fuel storage tanks as nuisance, 50 ALR3d 209.

**C.J.S.** — 58 C.J.S., Mines and Minerals, § 334 et seq.

#### **10-1-269. Suspension or revocation of license or imposition of penalty by state fire marshal.**

The state fire marshal, upon ten days' written notice in the form of a show cause order to the licensee stating his contemplated action and in general the grounds therefor and after giving the licensee a reasonable opportunity to be heard, subject to the right to review provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," may, by order in writing, suspend or revoke any license issued under this article or, in lieu thereof, may assess a penalty against said licensee in an amount not to exceed \$1,000.00, if the state fire marshal shall find:

(1) That the licensee has failed to pay the license fee or any fee required under this article or any penalty imposed under the article; or

(2) That the licensee knowingly has violated any of the provisions of this article or any of the rules and regulations promulgated under this article; provided, however, that any such suspension or revocation or imposition of penalty shall not become final, pending and subject to the right of review provided in Chapter 13 of Title 50, but the court shall have and is granted power to enter such order as justice shall require pending hearing on the appeal; and provided, further, the court upon the appeal may tax the cost, including the cost of the hearing before the state fire marshal, against the losing party. (Ga. L. 1960, p. 143, § 2; Ga. L. 1990, p. 647, § 2; Ga. L. 1992, p. 2134, § 2.)



**10-1-270. Conflicting local ordinances or regulations prohibited.**

No municipality or other political subdivision of this state shall adopt or enforce any ordinance, rule, or regulation in conflict with this article or with the rules and regulations adopted and promulgated by the state fire marshal under the terms and authority of this article. (Ga. L. 1949, p. 1128, § 9; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

**JUDICIAL DECISIONS**

**Cited** in Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**10-1-271. Reciprocal agreements with other states.**

The state fire marshal is authorized to enter into reciprocal agreements with another state to effectuate the purposes of this article. (Ga. L. 1955, p. 221, § 3; Ga. L. 1992, p. 2134, § 2.)

**10-1-272. Penalty for violating article or rules and regulations.**

Any person, firm, association, or corporation violating this article or any of the rules and regulations of the state fire marshal made under this article shall be guilty of a misdemeanor. (Ga. L. 1949, p. 1128, § 8; Ga. L. 1955, p. 221, § 4; Ga. L. 1992, p. 2134, § 2.)

**JUDICIAL DECISIONS**

**Cited** in Bishop v. Act-O-Lane Gas Serv. Co., 91 Ga. App. 154, 85 S.E.2d 169 (1954).

**ARTICLE 11****BIDDING BY MOTION PICTURE EXHIBITORS****10-1-290. Short title.**

This article shall be known as the “Georgia Motion Picture Fair Competition Act.” (Ga. L. 1979, p. 427, § 2.)

**JUDICIAL DECISIONS**

**Constitutionality.** — O.C.G.A. Art. 11, Ch. 1, T. 10 is a valid exercise of a state’s regulatory power and violates neither the guarantee of free speech or due process contained in the Georgia Constitution. Paramount Pictures Corp. v. Busbee, 250 Ga. 252, 297 S.E.2d 250 (1982).

**10-1-291. Legislative intent.**

The intent of this article is to establish fair and open procedures for the bidding and negotiation for the right to exhibit motion pictures within the state in order to prevent unfair and deceptive acts or practices and unreasonable restraints of trade in the business of motion picture distribution within the state, to promote fair and effective competition in that business, and to ensure that exhibitors have the opportunity to view a motion picture and know its contents before committing themselves to exhibiting it in their municipalities or towns. (Ga. L. 1979, p. 427, § 1.)

**JUDICIAL DECISIONS**

**Cited** in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 27A Am. Jur. 2d, Entertainment and Sports Law, § 30 et seq.

**C.J.S.**, Entertainment and Amusement; Sports, § 11 et seq.

**C.J.S.** — 15 C.J.S., Commerce, § 95. 30A

**10-1-292. Definitions.**

As used in this article, the term:

(1) “Bid” means a written offer or proposal by an exhibitor to a distributor in response to an invitation to bid for the right to exhibit a motion picture, stating the terms under which the exhibitor will agree to exhibit a motion picture.

(2) “Blind bidding” means the bidding for, negotiating for, or offering or agreeing to terms for the licensing or exhibition of a motion picture at any time before the motion picture has either been trade screened within the state or before the motion picture, at the option of the distributor, otherwise has been made available for viewing within the state by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

(3) “Distributor” means any person engaged in the business of distributing or supplying motion pictures to exhibitors by rental, sale, or licensing.

(4) “Exhibit” or “exhibition” means showing a motion picture to the public for a charge.

(5) “Exhibitor” means any person engaged in the business of operating one or more theaters.

(6) "Invitation to bid" means a written or oral solicitation or invitation by a distributor to one or more exhibitors to bid for the right to exhibit a motion picture.

(7) "License agreement" means any contract, agreement, understanding, or condition between a distributor and an exhibitor relating to the licensing or exhibition of a motion picture by the exhibitor.

(8) "Person" means one or more individuals, partnerships, associations, societies, trusts, organizations, or corporations.

(9) "Run" means the continuous exhibition of a motion picture in a defined geographic area for a specified period of time. A "first run" is the first exhibition of a picture in the designated area; a "second run" is the second exhibition; and "subsequent runs" are subsequent exhibitions after the second run. "Exclusive run" is any run limited to a single theater in a defined geographic area, and a "nonexclusive run" is any run in more than one theater in a defined geographic area.

(10) "Theater" means any establishment in which motion pictures are exhibited to the public regularly for a charge.

(11) "Trade screening" means the showing of a motion picture by a distributor at the location of the film exchange that distributes his picture in Georgia, which is open to any exhibitor from whom the distributor intends to solicit bids or with whom the distributor intends to negotiate for the right to exhibit the motion picture. (Ga. L. 1979, p. 427, § 3.)

#### JUDICIAL DECISIONS

For discussion of history of "blind bidding" motion pictures, see *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982).

#### 10-1-293. Blind bidding prohibited; trade screening required; notice of screening; waivers void.

(a) Blind bidding is prohibited within the state. No bids shall be returnable, no negotiations for the exhibition or licensing of a motion picture shall take place, and no license agreement or any of its terms shall be agreed to, for the exhibition of any motion picture before the motion picture has either been trade screened or before the motion picture, at the option of the distributor, otherwise has been made available for viewing within the state by all exhibitors from whom the distributor is soliciting bids or with whom the distributor is negotiating for the right to exhibit the motion picture.

(b) A distributor shall provide reasonable and uniform notice of the trade screening of any motion picture to those exhibitors within the state from whom he intends to solicit bids or with whom he intends to negotiate for the right to exhibit that motion picture.

(c) Any purported waiver of the prohibition against blind bidding in this article shall be void and unenforceable. (Ga. L. 1979, p. 427, § 4.)

### JUDICIAL DECISIONS

**Cited** in *Paramount Pictures Corp. v. Busbee*, 250 Ga. 252, 297 S.E.2d 250 (1982).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 27A Am. Jur. 2d, Entertainment and Sports Law, § 30 et seq. **C.J.S.**, Entertainment and Amusement; Sports, § 11 et seq.  
**C.J.S.** — 15 C.J.S., Commerce, § 95. 30A

### 10-1-294. Enforcement by civil action; damages; attorneys' fees; injunctions.

In any civil action for damages against a person for violation of this article, the court may award damages to the prevailing party and reasonable attorneys' fees. This article may be enforced by injunction or any other available equitable or legal remedy. (Ga. L. 1979, p. 427, § 5.)

## ARTICLE 12

### TICKET SCALPING

#### 10-1-310 and 10-1-311.

Reserved. Repealed by Ga. L. 2001, p. 752, § 1, effective July 1, 2001.

**Editor's notes.** — This article consisted of Code Sections 10-1-310 and 10-1-311, relating to ticket scalping, and was based on Ga. L. 1966, p. 207, §§ 1, 3; Ga. L. 1970, p. 172, §§ 1, 2; Ga. L. 1973, p. 96, § 1; Ga. L. 1983, p. 1468, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1988, p. 324, § 1; Ga. L. 1994, p. 1368, § 1.

## ARTICLE 13

### BOOK, PERIODICAL, OR NEWSPAPER TIE-IN SALES

**Cross references.** — Contracts contravening public policy, § 13-8-2.

#### 10-1-330. Refusal to sell books, periodicals, or magazines to dealers refusing others not ordered.

It shall be unlawful for any distributor of any book, magazine, periodical, or newspaper to refuse to sell to any dealer for his subsequent sale at retail any book, magazine, periodical, or newspaper if the distributor predicates his refusal to sell the publications desired solely upon the dealer's refusal to purchase from the distributor other books, magazines, periodicals, or



newspapers not originally requested by the dealer. (Ga. L. 1968, p. 998, § 1.)

### 10-1-331. Penalty.

Any person, firm, or corporation violating this article shall be guilty of a misdemeanor. (Ga. L. 1968, p. 998, § 2.)

## ARTICLE 14

### SECONDARY METALS RECYCLERS

**Cross references.** — Regulation of business of junk dealers generally, Ch. 22, T. 43. Dealers in precious metals and gems, Ch. 37, T. 43.

**Editor's notes.** — Ga. L. 1992, p. 2452, § 1, effective April 20, 1992, repealed the Code sections formerly codified as this article and enacted the current article. The former article consisted of Code Sections 10-1-350 and 10-1-351 and was based on Ga.

L. 1967, p. 603, §§ 1-3; Ga. L. 1970, p. 693, § 1; and Ga. L. 1981, Ex. Sess., p. 8.

**Administrative rules and regulations.** — Dealers in used motor vehicle parts, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia State Board of Registration for Used Motor Vehicle Dismantlers, Rebuilders and Salvage Dealers, Chapters 685-1 through 685-7.

### 10-1-350. Definitions.

As used in this article, the term:

(1) "Ferrous metals" means any metals containing significant quantities of iron or steel.

(2) "Law enforcement officer" means any duly constituted peace officer of the State of Georgia or of any county, municipality, or political subdivision thereof.

(3) "Nonferrous metals" means stainless steel beer kegs and metals not containing significant quantities of iron or steel, including, without limitation, copper, brass, aluminum, bronze, lead, zinc, nickel, and alloys thereof.

(4) "Person" means an individual, partnership, corporation, joint venture, trust, association, and any other legal entity.

(5) "Personal identification card" means a current and unexpired driver's license or identification card issued by the Department of Driver Services or a similar card issued by another state, a military identification card, or an appropriate work authorization issued by the U.S. Citizenship and Immigration Services of the Department of Homeland Security, which shall contain the individual's name, address, and photograph.

(6) "Purchase transaction" means a transaction in which a secondary metals recycler gives consideration in exchange for regulated metal property.

(7) “Regulated metal property” means any item composed primarily of any nonferrous metals, but shall not include aluminum beverage containers, used beverage containers, or similar beverage containers.

(8) “Secondary metals recycler” means any person who is engaged, from a fixed location or otherwise, in the business of paying compensation for ferrous or nonferrous metals that have served their original economic purpose, whether or not engaged in the business of performing the manufacturing process by which ferrous metals or nonferrous metals are converted into raw material products consisting of prepared grades and having an existing or potential economic value. (Code 1981, § 10-1-350, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2002, p. 415, § 10; Ga. L. 2005, p. 334, § 4-1/HB 501; Ga. L. 2007, p. 650, § 1/SB 203; Ga. L. 2009, p. 731, § 1/SB 82.)

**The 2007 amendment**, effective July 1, 2007, inserted “stainless steel beer kegs and” near the beginning of paragraph (3).

**The 2009 amendment**, effective July 1, 2009, in paragraph (5), inserted “current

and unexpired” near the beginning, deleted “a passport,” preceding “or an appropriate” in the middle, and added “, which shall contain the individual’s name, address, and photograph” at the end.

### 10-1-351. Record of transactions.

(a) A secondary metals recycler shall maintain a legible record of all purchase transactions to which such secondary metals recycler is a party. Such record shall include the following information:

(1) The name and address of the secondary metals recycler;

(2) The date of the transaction;

(3) The weight, quantity, or volume and a description of the type of regulated metal property purchased in a purchase transaction. For purposes of this paragraph, the term “type of regulated metal property” shall include a general physical description, such as wire, tubing, extrusions, or castings;

(4) The amount of consideration given in a purchase transaction for the regulated metal property;

(5) A signed statement from the person receiving consideration in the purchase transaction stating that he or she is the rightful owner of the regulated metal property or is entitled to sell the regulated metal property being sold;

(6) A photocopy of a valid personal identification card of the person delivering the regulated metal property to the secondary metals recycler;

(7) The distinctive number from, and type of, the personal identification card of the person delivering the regulated metal property to the secondary metals recycler; and

(8) The vehicle license tag number, state of issue, and the type of vehicle, if available, used to deliver the regulated metal property to the secondary metals recycler. For purposes of this paragraph, the term “type of vehicle” shall mean an automobile, pickup truck, van, or truck.

(b) A secondary metals recycler shall maintain or cause to be maintained the information required by subsection (a) of this Code section for not less than two years from the date of the purchase transaction.

(c) When the metal being purchased is a motor vehicle, the person offering to sell the motor vehicle to a secondary metals recycler shall either provide the title to such motor vehicle or fully execute a cancellation of certificate of title for scrap vehicles form as promulgated by the Department of Revenue, Motor Vehicle Division, designated as MV-1SP, in accordance with Code Section 40-3-36. The secondary metals recycler shall forward the title or MV-1SP form to the Department of Revenue within 72 hours of receipt of the title or form. (Code 1981, § 10-1-351, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2009, p. 731, § 2/SB 82.)

**The 2009 amendment**, effective July 1, 2009, in paragraph (a)(6), substituted “A photocopy of a valid personal identification card” for “The name and address” at the beginning; and added subsection (c).

#### **10-1-352. Inspections by law enforcement officers.**

During the usual and customary business hours of a secondary metals recycler, a law enforcement officer shall, after properly identifying himself as a law enforcement officer, have the right to inspect:

(1) Any and all purchased regulated metal property in the possession of the secondary metals recycler; and

(2) Any and all records required to be maintained under Code Section 10-1-351. (Code 1981, § 10-1-352, enacted by Ga. L. 1992, p. 2452, § 1.)

#### **10-1-352.1. Payment by recyclers for copper property, catalytic converters, or aluminum property.**

(a) As used in this Code section, the terms:

(1) “Aluminum property” means aluminum forms designed to shape concrete.

(2) “Copper property” means any copper wire, copper tubing, copper pipe, or any item composed completely of copper.

(b) A secondary metals recycler may pay by check or by cash for any copper property, catalytic converter, or aluminum property as follows:

(1) Cash payments shall occur no earlier than 24 hours after the copper property, catalytic converter, or aluminum property is provided to the secondary metals recycler; and



(2) Checks shall be payable only to the person named who was recorded as delivering the copper property, catalytic converter, or aluminum property to the secondary metals recycler; provided, however, that if such person is delivering the copper property, catalytic converter, or aluminum property on behalf of a governmental entity or a nonprofit or for profit business, the check may be payable to such business or entity and may also be transmitted to such business or entity.

(c) The provisions of this Code section shall not apply to any transaction between business entities. (Code 1981, § 10-1-352.1, enacted by Ga. L. 2009, p. 731, § 3/SB 82.)

**Effective date.** — This Code section became effective July 1, 2009.

**10-1-353. Hold on regulated metal property believed to be stolen; notice; release of hold.**

(a) Whenever a law enforcement officer has reasonable cause to believe that any item of regulated metal property in the possession of a secondary metals recycler has been stolen, the law enforcement officer may issue a hold notice to the secondary metals recycler. The hold notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the notice issued in accordance with this Code section, the secondary metals recycler receiving the notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof, from the place of business of the secondary metals recycler for 15 calendar days after receipt of the notice by the secondary metals recycler, unless sooner released by a law enforcement officer.

(b) No later than the expiration of the 15 day period, a law enforcement officer may issue a second hold notice to the secondary metals recycler, which shall be an extended hold notice. The extended hold notice shall be in writing, shall be delivered to the secondary metals recycler, shall specifically identify those items of regulated metal property that are believed to have been stolen and that are subject to the extended hold notice, and shall inform the secondary metals recycler of the information contained in this Code section. Upon receipt of the extended hold notice issued in accordance with this Code section, the secondary metals recycler receiving the extended hold notice shall not process or remove the items of regulated metal property identified in the notice, or any portion thereof, from the place of business of the secondary metals recycler for 30 calendar days after receipt of the extended hold notice by the secondary metals recycler, unless sooner released by a law enforcement officer.



(c) At the expiration of the hold period or, if extended in accordance with this Code section, at the expiration of the extended hold period, the hold is automatically released and the secondary metals recycler may dispose of the regulated metal property unless other disposition has been ordered by a court of competent jurisdiction. (Code 1981, § 10-1-353, enacted by Ga. L. 1992, p. 2452, § 1.)

**10-1-354. Contesting identification or ownership of regulated metal property; action to recover property.**

(a) If the secondary metals recycler contests the identification or ownership of the regulated metal property, the party other than the secondary metals recycler claiming ownership of any regulated metal property in the possession of a secondary metals recycler may, provided that a timely report of the theft of the regulated metal property was made to the proper authorities, bring an action in the superior or state court of the county in which the secondary metals recycler is located. The petition for such action shall include a description of the means of identification of the regulated metal property utilized by the petitioner to determine ownership of the regulated metal property in the possession of the secondary metals recycler.

(b) When a lawful owner recovers stolen regulated metal property from a secondary metals recycler who has complied with the provisions of this article, and the person who sold the regulated metal property to the secondary metals recycler is convicted of theft by taking, theft by conversion, a violation of this article, theft by receiving stolen property, or criminal damage to property in the first degree, the court shall order the defendant to make full restitution, including, without limitation, attorneys' fees, court costs, and other expenses to the secondary metals recycler or lawful owner, as appropriate.

(c) When a lawful owner recovers stolen regulated metal property from a secondary metals recycler who has knowingly and intentionally not complied with the provisions of this article, and the secondary metals recycler is convicted of theft by taking, theft by conversion, theft by receiving stolen property, or a violation of this article, the court shall order the defendant to make full restitution, including, without limitation, attorneys' fees, court costs, and other expenses to the lawful owner. (Code 1981, § 10-1-354, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 1.1/SB 203.)

**The 2007 amendment**, effective July 1, 2007, substituted "shall" for "must" in the second sentence of subsection (a); in subsection (b), substituted "theft by taking, theft by conversion, a violation of this article, theft by receiving stolen property, or criminal

damage to property in the first degree," for "theft, a violation of this article, or theft by receiving stolen property," near the middle and added "or lawful owner, as appropriate" at the end; and added subsection (c).

**10-1-355. Purchases of regulated metal property exempted from application of article.**

This article shall not apply to purchases of regulated metal property from:

(1) Organizations, corporations, or associations registered with the state as charitable, philanthropic, religious, fraternal, civic, patriotic, social, or school-sponsored organizations or associations or from any nonprofit corporations or associations;

(2) A law enforcement officer acting in an official capacity;

(3) A trustee in bankruptcy, executor, administrator, or receiver who has presented proof of such status to the secondary metals recycler;

(4) Any public official acting under judicial process or authority who has presented proof of such status to the secondary metals recycler;

(5) A sale on the execution, or by virtue, of any process issued by a court if proof thereof has been presented to the secondary metals recycler; or

(6) A manufacturing, industrial, or other commercial vendor that generates or sells regulated metal property in the ordinary course of its business. (Code 1981, § 10-1-355, enacted by Ga. L. 1992, p. 2452, § 1.)

**10-1-356. Prohibited acts.**

It shall be unlawful for:

(1) A secondary metals recycler to engage in the purchase or sale of regulated metal property between the hours of 9:00 P.M. and 6:00 A.M.; and

(2) Any person to give a false statement of ownership or to give a false or altered identification or vehicle tag number and receive money or other consideration from a secondary metals recycler in return for regulated metal property. (Code 1981, § 10-1-356, enacted by Ga. L. 1992, p. 2452, § 1.)

**10-1-357. Penalties for violations.**

(a) Any person selling regulated metal property to a secondary metals recycler in violation of any provision of this article shall be guilty of a misdemeanor unless the value of the regulated metals property, in its original and undamaged condition, in addition to any costs which are, or would be, incurred in repairing or in the attempt to recover any property damaged in the theft or removal of such regulated metal property, is in an aggregate amount which exceeds \$500.00, in which case such person shall be guilty of a felony and, upon conviction, shall be punished by a fine of not more than \$5,000.00 or by imprisonment for not less than one nor more than five years, or both.

(b) Any secondary metals recycler knowingly and intentionally engaging in any practice which constitutes a violation of this article shall be guilty of a misdemeanor unless the value of the regulated metals property, in its original and undamaged condition, in addition to any costs which are, or would be, incurred in repairing or in the attempt to recover any property damaged in the theft or removal of such regulated metal property, is in an aggregate amount which exceeds \$500.00, such secondary metals recycler shall be guilty of a felony and, upon conviction, shall be punished by a fine of not more than \$5,000.00 or by imprisonment for not less than one nor more than five years, or both. (Code 1981, § 10-1-357, enacted by Ga. L. 1992, p. 2452, § 1; Ga. L. 2007, p. 650, § 2/SB 203.)

**The 2007 amendment**, effective July 1, 2007, in subsection (a), substituted “unless the value of the regulated metals property, in its original and undamaged condition, in addition to any costs which are, or would be, incurred in repairing or in the attempt to recover any property damaged in the theft or removal of such regulated metal property, is” for “unless the transaction or transactions in violation of this article are”; and, in subsection (b), substituted “unless the value of the regulated metals property, in its original and undamaged condition, in addition

to any costs which are, or would be, incurred in repairing or in the attempt to recover any property damaged in the theft or removal of such regulated metal property, is” for “, provided that if a secondary metals recycler knowingly and intentionally engages in a pattern of practices which constitute violations of this article and the transactions included in this pattern are”.

**Cross references.** — Penalty for theft of ferrous metals or regulated metal property, § 16-8-12.

### 10-1-358. Superseding nature of this article.

The General Assembly finds that this article is a matter of state-wide concern. This article supersedes and preempts all rules, regulations, codes, ordinances, and other laws adopted by any county, municipality, consolidated government, or other local governmental agency regarding the sale or purchase of regulated metal property. (Code 1981, § 10-1-358, enacted by Ga. L. 2007, p. 650, § 3/SB 203.)

**Effective date.** — This Code section became effective July 1, 2007.

## ARTICLE 14A

### FLEA MARKET VENDORS’ RECORD KEEPING

### 10-1-360. Definitions; records; penalties; applicability.

(a) As used in this Code section, the term:

(1)(A) “Flea market” means any event:

(i) At which two or more persons offer personal property for sale or exchange; and



(ii) At which a fee is charged for the privilege of offering or displaying personal property for sale or exchange; or

(iii) At which a fee is charged to prospective buyers for admission to the area where personal property is offered or displayed for sale or exchange; or

(iv) Regardless of the number of persons offering or displaying personal property or the absence of fees, at which used personal property is offered or displayed for sale or exchange if the event is held more than six times in any 12 month period.

(B) The term “flea market” is interchangeable with and applicable to “swap meet,” “indoor swap meet,” or other similar terms regardless of whether these events are held inside a building or outside in the open. The primary characteristic is that these activities involve a series of sales sufficient in number, scope, and character to constitute a regular course of business.

(C) The term “flea market” shall not mean and shall not apply to:

(i) An event which is organized for the exclusive benefit of any community chest, fund, foundation, association, or corporation organized and operated for religious, educational, or charitable purposes, provided that no part of any admission fee or parking fee charged vendors or prospective purchasers or the gross receipts or net earnings from the sale or exchange of personal property, whether in the form of a percentage of the receipts or earnings, as salary, or otherwise, inures to the benefit of any private shareholder or person participating in the organization or conduct of the event; or

(ii) Any event at which all of the personal property offered for sale or displayed is new, and all persons selling, exchanging, or offering or displaying personal property for sale or exchange are manufacturers or licensed retail or wholesale merchants.

(2) “Nonregistered vendor” means a person who, without a certificate of registration issued by the state revenue commissioner pursuant to Chapter 8 of Title 48, engages in the retail sale of personal property to the general public.

(3) “Used personal property” includes personal property which has previously been sold or delivered to a retailer prior to being acquired by a vendor when the vendor’s cost exceeds \$50.00 per item.

(4) “Vendor” means a person who engages in the retail sale of personal property at a flea market.

(b) Every nonregistered vendor and vendor shall maintain a permanent record book in which shall be entered in ink and in legible English at the time any property is acquired for the purpose of retail sale:



(1) The date of the transaction;

(2) The name, age, and address of the person, corporation, or entity from whom the property was acquired, a description of the general appearance of any such person, and the distinctive number from such person's driver's license or other similar identification card;

(3) An identification and description of the property acquired including, if reasonably available, the serial, model, or other number and all identifying marks inscribed thereon;

(4) The price paid for such property; and

(5) The signature of the seller.

All entries shall appear in ink and shall be in chronological order. No blank lines may be left between entries. No obliterations, alterations, or erasures may be made. Corrections shall be made by drawing a line of ink through the entry without destroying the legibility. Such record book shall be open to the inspection of any law enforcement officer during the ordinary hours of business or at any reasonable time.

(c) The record of each purchase transaction provided for in this Code section shall be maintained for a period of not less than two years and shall be kept by the nonregistered vendor or vendor and made available during any period at which such person is open for business or is offering property for sale.

(d) Any nonregistered vendor or vendor required to maintain a record book under the provisions of this Code section who shall:

(1) Fail to make an entry of any material matter in his or her permanent record book;

(2) Make any false entry therein;

(3) Falsify, obliterate, destroy, or remove such record book from his or her place of business during any time such record book is required to be present;

(4) Refuse to allow any law enforcement officer to inspect his or her permanent record book or any goods or property in his or her possession during the ordinary hours of business or at any reasonable time; or

(5) Fail to maintain the records required by this Code section for at least two years

shall be guilty of a misdemeanor.

(e) This Code section shall apply to property purchased or acquired on or after July 1, 1994. (Code 1981, § 10-1-360, enacted by Ga. L. 1994, p. 1915, § 1; Ga. L. 2000, p. 136, § 10.)

**10-1-361. Exemptions from article.**

This article shall not apply to the following:

- (1) The sale of a motor vehicle or trailer required to be registered or subject to a certificate of title law of this state;
- (2) The sale of food products, agricultural products, or forestry products;
- (3) Business conducted at any industry or association trade show;
- (4) The sale of arts or crafts by the person who produced such arts or crafts. (Code 1981, § 10-1-361, enacted by Ga. L. 1994, p. 1915, § 1.)

**10-1-362. Local ordinances or regulations.**

Nothing in this article shall prohibit ordinances or resolutions by counties and municipal corporations which provide regulations that are as stringent or more stringent than the requirements of this article. (Code 1981, § 10-1-362, enacted by Ga. L. 1994, p. 1915, § 1.)

**ARTICLE 15****DECEPTIVE OR UNFAIR PRACTICES**

**Cross references.** — Misidentification of onions as Vidalia onions, § 2-14-130, et seq. Restrictions on sale of goods manufactured by inmates of county correctional institutions, § 42-5-60.

**Law reviews.** — For note on 1995 amendments and enactments of sections in this article, see 12 Ga. St. U.L. Rev. 31 (1995).

**PART 1****UNIFORM DECEPTIVE TRADE PRACTICES ACT**

**Law reviews.** — For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law proposed in Georgia in 1973, see 10 Ga. St. B.J. 281 (1973). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article,

“Trademark Protection: Judicial Inconsistency in the Fifth Circuit,” see 32 Mercer L. Rev. 1167 (1981). For article, “Corporate Software Piracy: Is Your Client (or Your Firm) Liable?,” see 22 Ga. St. B.J. 30 (1985).

For note discussing the Uniform Deceptive Trade Practices Act and consumer protection, see 25 Emory L. J. 445 (1976).

**JUDICIAL DECISIONS**

**Crux of complaint based on this part** is likelihood of confusion between goods. Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc., 428 F. Supp. 689 (N.D. Ga. 1977);

Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252 (5th Cir.), cert. denied, 449 U.S. 899, 101 S. Ct. 268, 66 L. Ed. 2d 129 (1980). Consumer's failure to show plaintiff had

to establish a likelihood of damage to plaintiff by an automobile dealer's fraudulent practices made summary judgment denying plaintiff's claim under the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., proper. *Catrett v. Landmark Dodge, Inc.*, 253 Ga. App. 639, 560 S.E.2d 101 (2002).

**Requirements for injunctive relief** under O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10 are less stringent than under any other sections dealing with protection of trade names and trademarks. *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Standing.** — Patentee of a weight loss drug who had not produced or marketed a weight control product, and was not a person likely to be damaged by the practices of alleged competitors, lacked standing to bring suit under the Uniform Deceptive Trade Practice Act, O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10.

*Friedlander v. HMS-PEP Prods., Inc.*, 226 Ga. App. 123, 485 S.E.2d 240 (1997).

**No basis for claim.** — See *Yarway Corp. v. Eur-Control USA, Inc.*, 775 F.2d 268 (Fed. Cir. 1985).

The Uniform Deceptive Trade Practices Act, O.C.G.A. Pt. 1, Art. 15, Ch. 1, T. 10, did not apply to an action by students against schools and student loan guarantors based on allegations that the schools recruited the students, induced the students to sign up for federally guaranteed student loans, and then failed to provide the promised quality of education or job placement. *Bartels v. Alabama Com. Coll.*, 918 F. Supp. 1565 (S.D. Ga. 1995), aff'd in part and rev'd in part, 189 F.3d 483 (11th Cir. 1999), cert. denied, 528 U.S. 1074, 120 S. Ct. 787, 145 L. Ed. 2d 664 (2000).

**Cited** in *Stone Container Corp. v. Owens-Illinois, Inc.*, 528 F. Supp. 794 (N.D. Ga. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1152, 1154.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 380.

**ALR.** — Right to protection against simulation of physical appearance or arrangement of place of business or vehicle, 17 ALR 784; 28 ALR 114.

Application of principles of unfair competition to artistic or library property, 19 ALR 949.

Seller's advertisements as affecting rights of parties to sale of personal property, 28 ALR 991; 158 ALR 1413.

Former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use his knowledge of customer lists acquired in earlier employment, 28 ALR3d 7.

Unfair competition: geographical extent of protection of word or symbol under doctrine of secondary meaning, 41 ALR3d 434.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 ALR3d 1008.

Validity of express statutory grant of power to state to seek, or to court to grant, restitution of fruits of consumer fraud, 59 ALR3d 1222.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 ALR3d 399.

Trade dress simulation of cosmetic products as unfair competition, 86 ALR3d 505.

Unfair competition by imitation in sign or design of business place, 86 ALR3d 884.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 ALR3d 449.

When statute of limitations commences to run on action under state deceptive trade practice or consumer protection acts, 18 ALR4th 1340.

Award of attorneys' fees in actions under state deceptive trade practice and consumer protection acts, 35 ALR4th 12.

Implied warranty coverage for service transactions under state consumer protection and deceptive trade statutes, 72 ALR4th 282.

Coverage of leases under state consumer protection statutes, 89 ALR4th 854.



**10-1-370. Short title.**

This part may be cited as the “Uniform Deceptive Trade Practices Act.” (Ga. L. 1968, p. 337, § 6.)

**JUDICIAL DECISIONS**

**Analogy with Lanham Act.** — In an action by a manufacturer against a competitor under the Lanham Act (15 U.S.C. § 1125(a)) for trade dress infringement, it was error to apply the statute of limitations in the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. 10-1-370 et seq., is the proper analogous statute to apply for such purpose. *Kason Indus. v. Component Hdwe. Group*, 120 F.3d 1199 (11th Cir. 1997).

**Statute of limitations.** — The four-year period of O.C.G.A. § 9-3-31 was applicable for purposes of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. 10-1-370 et seq., not the 20-year period of O.C.G.A. § 9-3-22. *Kason Indus. v. Component Hdwe. Group*, 120 F.3d 1199 (11th Cir. 1997).

**No valid claim.** — When an employee resigned while in the process of trying to obtain certain business for the employer, and the employee formed a company, which later obtained this business, the employer did not show that the employee violated the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because the employer did not show that the employee caused any confusion as to the source, sponsorship, approval, or certification of goods or services. *Looney v. M-Squared, Inc.*, 262 Ga. App. 499, 586 S.E.2d 44 (2003).

**Standing.** — Company’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through Fed. R. Bankr. P. 7012, was denied because nothing in the language of Georgia’s Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the “consumer” issue was irrelevant to standing under the UDTPA. *Johnston Indus. Ala., Inc. v. Nat’l Contract Assocs.* (In re *Johnston Indus.*), 300 B.R. 821 (Bankr. M.D. Ga. 2003).

**Amended complaint alleging violation of Georgia Deceptive Trade Practices Act granted.** — In an action in which an

interexchange carrier asserted the carrier was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, an amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court’s denial of summary judgment on the local carrier’s counterclaims. *ITC Deltacom Communs. v. US LEC Corp.*,

F. Supp. 2d , 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

**Unfair insurance practices not subject to Georgia’s Uniform Deceptive Trade Practices Act.** — Pursuant to O.C.G.A. § 10-1-374(a)(1), insurance transactions are exempt from Georgia’s Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq. Claims of unfair trade practices in insurance transactions are instead governed by the Georgia Insurance Code. *Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc.*, Ga. App. , S.E.2d , 2009 Ga. App. LEXIS 350 (Mar. 26, 2009).

**Cited in** *Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc.*, 168 Ga. App. 932, 311 S.E.2d 216 (1983); *Coin Call, Inc. v. Southern Bell Tel. & Tel. Co.*, 636 F. Supp. 608 (N.D. Ga. 1986); *Moister v. Vickers*, 176 Bankr. 287 (Bankr. N.D. Ga. 1994); *Computer Currents Publishing Corp. v. Jaye Communications, Inc.*, 968 F. Supp. 684 (N.D. Ga. 1997); *Bd. of Regents of Univ. Sys. of Ga. v. Buzas Baseball, Inc.*, 176 F. Supp. 2d 1338 (N.D. Ga. 2001); *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006); *Med S. Health Plans, LLC v. Life of the S. Ins. Co.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).



## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — False Advertising Under Lanham Act § 43(a)(1)(B), 44 POF3d 1.

**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 6.

**ALR.** — Right to private action under state consumer protection act — Equitable relief available, 115 ALR5th 709.

## 10-1-371. Definitions.

As used in this part, the term:

(1) “Article” means a product as distinguished from its trademark, label, or distinctive dress in packaging.

(2) “Certification mark” means a mark used in connection with the goods or services of a person other than the certifier to indicate geographic origin, material, mode of manufacture, quality, accuracy, or other characteristics of the goods or services or to indicate that the work or labor on the goods or services was performed by members of a union or other organization.

(3) “Collective mark” means a mark used by members of a cooperative, association, or other collective group or organization to identify goods or services and distinguish them from those of others or to indicate membership in the collective group or organization.

(4) “Mark” means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement.

(5) “Person” means an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, unincorporated association, two or more of any of the foregoing having a joint or common interest, or any other legal or commercial entity.

(6) “Service mark” means a mark used by a person to identify services and to distinguish them from the services of others.

(7) “Trademark” means a mark used by a person to identify goods and to distinguish them from the goods of others.

(8) “Trade name” means a word, name, symbol, device, or any combination of the foregoing in any form or arrangement used by a person to identify his business, vocation, or occupation and distinguish it from the business, vocation, or occupation of others. (Ga. L. 1968, p. 337, § 1.)

**Law reviews.** — For article, “A Patent and Trademark Primer,” see 15 Ga. St. B.J. 58 (1978). For article, “Trademark Litigation,”

a brief overview of the subject, see 17 Ga. St. B.J. 158 (1981).

## JUDICIAL DECISIONS

**Cited in** Original Appalachian Artworks, Inc. v. Toy Loft, Inc., 489 F. Supp. 174 (N.D. Ga. 1980); Reis v. Ralls, 250 Ga. 721, 301 S.E.2d 40 (1983); Diedrich v. Miller & Meier & Assocs., 254 Ga. 734, 334 S.E.2d 308 (1985); Johnston Indus. Ala., Inc. v. Nat'l Contract Assocs. (In re Johnston Indus.), 300 B.R. 821 (Bankr. M.D. Ga. 2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 1 et seq.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1, 14, 98, 90 C.J.S., Trusts, § 261.

**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 1.

**ALR.** — Who is a “consumer” entitled to protection of state deceptive trade practice and consumer protection acts, 63 ALR5th 1.

**10-1-372. When trade practices are deceptive; common-law and other remedies unaffected.**

(a) A person engages in a deceptive trade practice when, in the course of his business, vocation, or occupation, he:

(1) Passes off goods or services as those of another;

(2) Causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with or certification by another;

(4) Uses deceptive representations or designations of geographic origin in connection with goods or services;

(5) Represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he does not have;

(6) Represents that goods are original or new if they are deteriorated, altered, reconditioned, reclaimed, used, or secondhand;

(7) Represents that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparages the goods, services, or business of another by false or misleading representation of fact;

(9) Advertises goods or services with intent not to sell them as advertised;

(10) Advertises goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Makes false or misleading statements of fact concerning the reasons for, existence of, or amounts of price reductions; or

(12) Engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

(b) In order to prevail in an action under this part, a complainant need not prove competition between the parties or actual confusion or misunderstanding.

(c) This Code section does not affect unfair trade practices otherwise actionable at common law or under other statutes of this state. (Ga. L. 1968, p. 337, § 2.)

**Cross references.** — Criminal penalties for unauthorized reproduction and sale of recorded materials, § 16-8-60. Criminal penalty for deceptive business practices, § 16-9-50. Fraud generally, § 23-2-50 et seq. Misbranding of food generally, § 26-2-28. Labeling of meat, §§ 26-2-107, 26-2-111, 26-2-112. Misbranding

of drugs, § 26-3-8. Misbranding and false advertisement of cosmetics, § 26-3-12 et seq. Time-share program sales, deceptive practices, §§ 44-3-185 through 44-3-187.

**Law reviews.** — For comment, “The Georgia Fair Business Practices Act: Business As Usual”, see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Standing.** — Company’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through Fed. R. Bankr. P. 7012 was denied because nothing in the language of Georgia’s Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the “consumer” issue was irrelevant to standing under the UDTPA. *Johnston Indus. Ala., Inc. v. Nat’l Contract Assocs.* (In re Johnston Indus.), 300 B.R. 821 (Bankr. M.D. Ga. 2003).

**Injunctive relief is sole remedy.** — Sole remedy provided for a violation of O.C.G.A. § 10-1-372 is injunctive relief. *Lauria v. Ford Motor Co.*, 169 Ga. App. 203, 312 S.E.2d 190 (1983).

**Injunctive relief and damages available for infringement of trade name.** — If the right to protection of a trade name exists, the injured party may seek both injunctive relief and damages. *Diedrich v. Miller & Meier & Assocs.*, 254 Ga. 734, 334 S.E.2d 308 (1985).

**Injunctive relief was denied to plaintiff business association** pursuant to Georgia’s Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because the association failed to show that the actions taken by a federal advisory committee in adopting

more stringent threshold limit values for certain chemicals appeared unrelated to the course of a person’s business, vocation, or occupation. *Int’l Brominated Solvents Ass’n v. Am. Conf. of Governmental Indus. Hygienists, Inc.*, F. Supp. 2d , 2004 U.S. Dist. LEXIS 27605 (M.D. Ga. Nov. 26, 2004).

**Monetary relief not available.** — A count alleging violation of the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., could not provide a basis for relief because the remedy sought in the complaint, i.e., monetary relief, is not available under the Act. *Taylor Auto Group, Inc. v. Jessie*, 241 Ga. App. 602, 527 S.E.2d 256 (1999).

**Use of existing trademark.** — Corporate poultry producer and marketer, by adopting and using the trademark GOLDEN MEDALLION on its frozen poultry products, infringed poultry cooperative’s existing MEDALLION trademark and engaged in unfair competition and deceptive trade practices. *Gold Kist, Inc. v. ConAgra, Inc.*, 708 F. Supp. 1291 (N.D. Ga. 1989).

**Descriptive mark without acquired distinctiveness.** — Genuine fact issues existed under § 43(a) of the Lanham Act and the Georgia Unfair Trade Practices Act, O.C.G.A. § 10-1-372(a)(1)-(2), (12), as to whether a corporation’s unique coating



numbering system, which it accused a competitor of usurping in order to sell surface coating services to mutual clients, was merely a descriptive mark that had not acquired distinctiveness through secondary meaning. *Impreglon, Inc. v. Newco Enters.*, 508 F. Supp. 2d 1222 (N.D. Ga. Mar. 30, 2007).

**Failure to register or otherwise protect name.** — The Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., does not require a party seeking relief thereunder to have registered the relevant trade or service mark or name. To the extent this court ruled otherwise in *Elite Personnel, Inc. v. Elite Personnel Services, Inc.*, that opinion is hereby overruled. *Future Professionals, Inc. v. Darby*, 266 Ga. 690, 470 S.E.2d 644 (1996).

**Failure to authorize use of name.** — Customer sufficiently pleaded a counterclaim for false endorsement under the Lanham Act, 15 U.S.C. § 1125(a)(1)(A) and the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because there was evidence in the record that the customer did not authorize a copyright owner's use of the customer's name and quote when the owner initially displayed the material on its website and the owner continued to display the material after the customer expressly withdrew any authorization. *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

In a suit by owner of a registered mark that consisted of the name of a well-known racehorse against companies that filmed a fictionalized movie of the horse's career, further discovery under Fed. R. Civ. P. 56(f) was allowed as to owner's state law claim of false endorsement under O.C.G.A. § 10-1-372 because consumers might have been confused by marketing that stated that the film was a true story, even though it lacked endorsement of the horse's well-known trainer and jockey, who were portrayed by actors in the film. *Thoroughbred Legends, LLC v. Walt Disney Co.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 19960 (N.D. Ga. Feb. 12, 2008).

**Protection despite failure to register.** — Because a sole proprietor's use of "ATG" had acquired secondary meaning as a trade name, the proprietor was entitled to enjoin a corporation from using the same name since it was shown that the corporation's use caused confusion and misunderstanding on the part of

the public. *Eckles v. Atlanta Tech. Group, Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997).

**Jurisdiction of issue involving similar names.** — A claim under the Deceptive Practices Act, O.C.G.A. § 10-1-370 et seq., involving deceptively similar business logos was a claim for equitable relief and was not within the jurisdiction of the court of appeals. *Akron Pest Control v. Radar Exterminating Co.*, 216 Ga. App. 495, 455 S.E.2d 601 (1995).

**Confusingly similar names.** — Claims for service mark infringement under the federal Lanham Act, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., and the Georgia law of unfair competition turn on the same question — confusion of similar names. *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983).

This part authorizes injunction restraining use of family name previously appropriated by another as a trade name, where under all the circumstances, such as the other descriptive words of the trade name, the type of business carried on, the geographical area in which the trade name has acquired a meaning, and other distinguishing factors, there remains a likelihood of confusion and misunderstanding among the general public. *Baker Realty Co. v. Baker*, 228 Ga. 766, 187 S.E.2d 850 (1972); *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

Plaintiffs made requisite showing for injunction that trade name reacquired upon foreclosure of their security interest had acquired a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar name, which had in fact confused plaintiffs' former customers. *Reis v. Ralls*, 250 Ga. 721, 301 S.E.2d 40 (1983).

Showing that, on more than one occasion, customers misdirected their inquiries and that legal documents were misinterpreted was evidence that corporation's use of plaintiff's trade name caused confusion and misunderstanding on the part of the public entitling plaintiff to injunctive relief. *Eckles v. Atlanta Tech. Group, Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997).

Doctor's claims alleging that defendants initiated a peer review process for the purpose of driving the doctor's competing dialysis center out of business were not actionable under O.C.G.A. § 10-1-372(a)(2) of the



Georgia Uniform Deceptive Trade Practices Act because nothing in the complaint suggested that defendants used a trade name to cause confusion with the doctor's business. *Wood v. Archbold Med. Ctr.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 44292 (M.D. Ga. June 28, 2006).

Copyright owner sufficiently stated a claim of violation of the Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, because the customer's employees who received a manual and training materials created by the customer copied in part from an owner's copyrighted manual qualified as members of the public and the limited distribution did not foreclose such a claim. *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

**Disparaging remarks actionable.** — Dismissal of a claim under O.C.G.A. § 10-1-372(a)(2) was ordered where that section was deemed to prohibit confusion of trade names, of which there were no allegations in a complaint by a dialysis center against its former medical directors arising from breaches of a non-competition clause; however, there were sufficient statements to deny dismissal of a claim under O.C.G.A. § 10-1-372(a)(8) where it was alleged that disparaging and damaging comments were made about the services at the center, which were entirely untrue, and which were made with the intent to convey the impression that the center's facilities were inferior to other competing facilities. *Davita Inc. v. Nephrology Assocs., P.C.*, 253 F. Supp. 2d 1370 (S.D. Ga. 2003).

**Disparaging remarks not actionable.** — Doctor's claims alleging that defendants initiated a peer review process for the purpose of driving the doctor's competing dialysis center out of business were not actionable under O.C.G.A. § 10-1-372(a)(8) of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., because none of defendants' alleged conduct, including the solicitation of the doctor's patients and the refusal to make community-donated blood available to the doctor, involved false or misleading statements of fact. *Wood v. Archbold Med. Ctr.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 44292 (M.D. Ga. June 28, 2006).

Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was inapplicable to a national trade group's suit

alleging that a nonprofit professional association disparaged the association's members by forming and disseminating the association's opinion about acceptable workplace-safety exposure levels for chemicals because the association was not a consumer or engaged in trade. *Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. May 2, 2008).

**Presumption against a likelihood of confusion** is raised if marks have coexisted in the marketplace over a significant period of time with no evidence of actual confusion. However, the presumption may be rebutted by evidence of other factors tending to support a finding of a likelihood of confusion. *Ackerman Sec. Sys. v. Design Sec. Sys.*, 201 Ga. App. 805, 412 S.E.2d 588 (1991).

**Use of balloons, costumes, and names of comic book characters** by singing telegram company created confusion. *DC Comics Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984).

**Liability of telephone directory company for copying directory.** — As a result of the special treatment of directories in copyright law, a telephone directory company's copying of the telephone company's compilation was infringement, and the use of a confusing solicitation made the directory company liable for both unfair competition and deceptive trade act violations. *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985).

**Use of "mutual" in name and advertisement of insurance company.** — Use of the word "mutual" in the name and advertising of defendant insurance company and defendant's statement, which plaintiffs claimed gave false impression, in promotional materials that it would pass along to policy holders any savings resulting from efficient operations did not constitute a violation of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., given the clear statements and the company's policy that plaintiff is entitled to share the company's earnings and savings only to the extent dividends were declared by the board in the board's discretion. A name or promotion violates that Act only if it is misleading or confusing to those using reasonable care. *Boynton v. State Farm Mut. Auto. Ins. Co.*, 207 Ga. App. 756, 429 S.E.2d 304 (1993).

**False impression not given.** — Hotel franchisor's use of its name and the term "airport" for a hotel in competition with a franchisee did not violate O.C.G.A. § 10-1-372, since the designation was accurate and did not create a false impression. *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 130 F.3d 1009 (11th Cir. 1997), modified on other grounds, 139 F.3d 1396 (11th Cir. 1998).

Supplier's claims of unfair competition under § 43(a) of the Lanham Act, 15 U.S.C. § 1125(a), and under the Georgia Uniform Deceptive Trade Practices Act, specifically O.C.G.A. § 10-1-372(a), failed on summary judgment because there was no evidence that a distributor substituted its product on store shelves while suggesting that the source was a supplier or that the distributor's product was manufactured by anyone other than the distributor; further, the supplier failed to allege evidence to support a claim of passing off at the level of retail stores. *Optimum Techs., Inc. v. Henkel Consumer Adhesives, Inc.*, 496 F.3d 1231 (11th Cir. 2007).

**Opening office near competitor.** — The defendant did not engage in a deceptive trade practice when the defendant leased an office in the same building as the plaintiff, with which it competed, since the defendant used its own name and a different telephone number and there was no evidence that it attempted to pass itself as the plaintiff. *Wolff v. Protege Sys.*, 234 Ga. App. 251, 506 S.E.2d 429 (1998).

**Privilege and lack of malice bars recovery.** — Because the defendant's direct testimony was that the defendant was motivated to report the defendant's concerns about the level of emergency room care solely out of a sense of duty and concern for patient safety and that the defendant bore no animus against plaintiff, because there was no other evidence of ill will, and because there was a showing of privilege in the disclosure of patient information, plaintiff's failure to show express malice made summary judgment against plaintiff proper for failure to state a claim under O.C.G.A. § 10-1-372. *Dominy v. Shumpert*, 235 Ga. App. 500, 510 S.E.2d 81 (1998).

**Claims against hospital dismissed.** — Court dismissed, without prejudice, an uninsured patient's Georgia Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq.,

claims against a non-profit hospital and an affiliated health company because: (1) the patient alleged that the defendants violated state and federal law with regard to the defendant's billing practices for uninsured and/or indigent patients and the patient should not have to pay the treatment costs because the hospital was a non-profit hospital; and (2) I.R.S. § 501(c)(3) did not confer subject matter jurisdiction on the court over the patient's trade practice claims because the claims were based on the theory that § 501(c)(3) created an enforceable trust between the hospital and the federal government, and no such trust was created under federal law. *Ellis v. Phoebe Putney Health Sys.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 19935 (M.D. Ga. Apr. 8, 2005).

Because the uninsured patients failed to allege that a non-profit hospital made false or misleading statements with respect to price reductions, but merely alleged that the hospital's disparate pricing was confusing and likely to create a misunderstanding, it failed to adequately state a claim under O.C.G.A. § 10-1-372. *Cox v. Athens Reg'l Med. Ctr., Inc.*, 279 Ga. App. 586, 631 S.E.2d 792 (2006).

**Claims against health provider dismissed.** — Mere fact that the "chargemaster" rates for medical care charged to two uninsured patients pursuant to their contracts with a health care provider exceeded the rates the provider normally charged for medical care covered by insurance and Medicare/Medicaid benefits, even assuming the patients were unaware of the pricing difference, did not establish a violation of the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq. *Morrell v. Wellstar Health Sys., Inc.*, 280 Ga. App. 1, 633 S.E.2d 68 (2006).

**Cancellation of agreement to sell insurance and surgical products.** — Insurer's verbal cancellation of a written contract with a marketer to sell health, medical, and surgical insurance products did not constitute the type of deceptive trade practice covered by Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because its actions were not directed at misleading the general public in connection with one of its products. *Med S. Health Plans, LLC v. Life of the S. Ins. Co.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).

**Association issuing opinion on safety standards not misrepresentation.** — Georgia's



Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a)(8), did not bar a nonprofit professional association from issuing an opinion on workplace safety standards for chemicals because the opinion did not constitute a misleading representation of fact. *Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. May 2, 2008).

**Amended complaint alleging violation of Georgia Deceptive Trade Practices Act granted.** — In an action in which an interexchange carrier asserted it was not obligated to pay fees to a local carrier for misrepresented toll-free cell calls, its amendment to add claims alleging violations under the Georgia RICO Act, O.C.G.A. § 16-14-1 et seq., common law fraud, and the Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., was not futile given the court's denial of summary judgment on the local carrier's counterclaims. *ITC Deltacom Communs. v. US LEC Corp.*, F. Supp. 2d , 2004 U.S. Dist. LEXIS 27557 (N.D. Ga. Mar. 15, 2004).

**Laches.** — Color trademark owner's infringement claim under 15 U.S.C. § 1114 was not barred by laches because the four year limitations period of the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-372, applied and the relevant time period for purposes of laches was the date that the competitors began selling their tennis racquet overgrips that were similar in color to the owner's color mark, which was less than four years prior. *Unique Sports Prods., Inc. v. Babolat VS*, 403 F. Supp. 2d 1229 (N.D. Ga. 2005).

Claims of trademark infringement and false advertising under 15 U.S.C. § 1125, and violation of the Uniform Deceptive Trade Prac-

tices Act (UDTPA), O.C.G.A. § 10-1-372, were not barred under the doctrine of estoppel by laches, because even though the plaintiff did not take action for over two decades of the parties' coexistence using the disputed mark, the claims did not ripen until the plaintiff learned that the defendant intended to open an office inside the plaintiff's territory, at which time incidents of actual confusion began to occur. *Angel Flight of Ga., Inc. v. Angel Flight Southeast, Inc.*, 424 F. Supp. 2d 1366 (N.D. Ga. 2006).

**Applicability.** — Georgia's Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a)(7), does not apply to an entity's formation and dissemination of opinions on workplace safety if the entity is not engaged in the business practices it is evaluating. *Int'l Brominated Solvents Ass'n v. Am. Conf. of Governmental Indus. Hygienists*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 36901 (M.D. Ga. May 2, 2008).

**Cited in** *Tri-State Culvert Mfg., Inc. v. Tri-State Drainage Prods., Inc.*, 236 Ga. 157, 223 S.E.2d 202 (1976); *Scientific Applications, Inc. v. Energy Conservation Corp.* of Am., 436 F. Supp. 354 (N.D. Ga. 1977); *Robert B. Vance & Assocs. v. Baronet Corp.*, 487 F. Supp. 790 (N.D. Ga. 1979); *Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981); *Pendigrass v. Edmonds*, 247 Ga. 508, 277 S.E.2d 247 (1981); *Ford v. Rollins Protective Servs. Co.*, 171 Ga. App. 882, 322 S.E.2d 62 (1984); *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984); *Original Appalachian Artworks, Inc. v. Schlaifer Nance & Co.*, 679 F. Supp. 1564 (N.D. Ga. 1987); *Sweeney v. Athens Regional Medical Ctr.*, 709 F. Supp. 1563 (M.D. Ga. 1989); *DeCelles v. Morgan Cleaners & Laundry, Inc.*, 261 Ga. App. 690, 583 S.E.2d 462 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1107 et seq., 1155 et seq. 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 83, 86, 89.

**Am. Jur. Proof of Facts.** — False Advertising Under Lanham Act, § 43 (a)(1)(B), 44 POF3d 1.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names and Unfair Competition, §§ 98, 108, 109, 380 et seq.

**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 2.

**ALR.** — Right to protection against appropriation of advertising matter or methods, 17 ALR 760; 30 ALR 615; 5 ALR Fed. 625.

Statute or ordinance in relation to advertising as interference with interstate commerce, 57 ALR 105; 115 ALR 952.

Right of producer or distributor to protection against use of his containers, 60 ALR 285.

Opportunity of buyer of personal property to ascertain facts as affecting claim of fraud on part of seller in misrepresenting property, 61 ALR 492.

Protection of business or trading corporation against use of same or similar name by another corporation, 66 ALR 948; 72 ALR3d 8; 115 ALR 1241.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Damages recoverable for wrongful registration of trademark, 26 ALR2d 1184.

Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 ALR3d 760.

Rights and remedies with respect to another's use of a deceptively similar advertising slogan, 2 ALR3d 748.

Former employee's duty, in absence of express contract, not to solicit former employer's customers or otherwise use his

knowledge of customer lists acquired in earlier employment, 28 ALR3d 7.

Unfair competition by direct reproduction of literary, artistic, or musical property, 40 ALR3d 566.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 ALR3d 1008.

Validity of pyramid distribution plan, 54 ALR3d 217.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 ALR4th 1257.

Health provider's agreement as to patient's copayment liability after award by professional service insurer as unfair trade practice under state law, 49 ALR4th 1240.

What goods or property are "used," "secondhand," or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 ALR4th 1192.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 ALR5th 1.

Copyright, Under Federal Copyright Act (17 USCS §§ 1 et seq.), in Advertising Materials, Catalogs, and Price Lists, 5 ALR Fed. 625.

### **10-1-373. Enjoining deceptive trade practices; costs and attorney's fees; relief cumulative.**

(a) A person likely to be damaged by a deceptive trade practice of another may be granted an injunction against it under the principles of equity and on terms that the court considers reasonable. Proof of monetary damage, loss of profits, or intent to deceive is not required. Relief granted for the copying of an article shall be limited to the prevention of confusion or misunderstanding as to source.

(b) Costs shall be allowed to the prevailing party unless the court otherwise directs. The court, in its discretion, may award attorney's fees to the prevailing party if:

(1) The party complaining of a deceptive trade practice has brought an action which he knew to be groundless; or

(2) The party charged with a deceptive trade practice has willfully engaged in the trade practice knowing it to be deceptive.

(c) The relief provided in this Code section is in addition to remedies otherwise available against the same conduct under the common law or other statutes of this state. (Ga. L. 1968, p. 337, § 3.)



**Law reviews.** — For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Consumer.** — Company’s motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) made applicable in bankruptcy through Fed. R. Bankr. P. 7012, was denied because nothing in the language of Georgia’s Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq., required the debtor to be a consumer or required a consumer to be injured; therefore, the “consumer” issue was irrelevant to standing under the UDTPA. *Johnston Indus. Ala., Inc. v. Nat’l Contract Assocs. (In re Johnston Indus.)*, 300 B.R. 821 (Bankr. M.D. Ga. 2003).

**Injunction is sole remedy.** — Sole remedy provided under O.C.G.A. § 10-1-373 is injunctive relief. *Lauria v. Ford Motor Co.*, 169 Ga. App. 203, 312 S.E.2d 190 (1983).

The sole remedy available under the statute was injunctive relief; however, a plaintiff had to establish a likelihood of damage to plaintiff by a deceptive trade practice of another. *Moore-Davis Motors, Inc. v. Joyner*, 252 Ga. App. 617, 556 S.E.2d 137 (2001).

Because a marketer did not seek injunctive relief, an insurer’s verbal cancellation of a written contract with the marketer to sell health, medical, and surgical insurance products did not give rise to a cause of action under Georgia’s Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., specifically O.C.G.A. § 10-1-372(a), because an injunction was the sole remedy available under O.C.G.A. § 10-1-373. *Med S. Health Plans, LLC v. Life of the S. Ins. Co.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 40223 (M.D. Ga. May 19, 2008).

**Proof of neither direct competition nor actual confusion is required** to obtain relief under O.C.G.A. § 10-1-373. All that is required is that use of name cause confusion to others using reasonable care. *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Proof of falsity** is sufficient to sustain a finding of irreparable injury for purposes of a preliminary injunction. *Energy Four, Inc. v. Dornier Medical Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991).

**Proof of lost sales.** — A plaintiff who can prove actual lost sales is entitled to an injunc-

tion even though the decline in the plaintiff’s sales is mostly attributable to factors other than the plaintiff’s competitor’s allegedly false or misleading representations. Because detailed proof of individual lost sales goes to the issue of damages, it is not a prerequisite for equitable relief. *Energy Four, Inc. v. Dornier Medical Sys.*, 765 F. Supp. 724 (N.D. Ga. 1991).

**Proof of monetary damages** may not be necessary to sustain every cause of action based on plaintiff’s disparagement claim, but a showing that some customer’s buying decision was adversely affected is a threshold requirement for each. *Servicetrends, Inc. v. Siemens Medical Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994).

**Confusingly similar names.** — This part authorizes injunctions restraining use of a family name previously appropriated by another as a trade name, where under all the circumstances, such as the other descriptive words of the trade name, the type of business carried on, the geographical area in which the trade name has acquired a meaning, and other distinguishing factors, there remains a likelihood of confusion and misunderstanding among the general public. *Baker Realty Co. v. Baker*, 228 Ga. 766, 187 S.E.2d 850 (1972).

**Infringement of trade names.** — If the right to protection of a trade name exists, the injured party may seek both injunctive relief and damages. *Diedrich v. Miller & Meier & Assocs.*, 254 Ga. 734, 334 S.E.2d 308 (1985).

Chapter 11 debtor was entitled to a preliminary injunction under the Lanham Act, 11 U.S.C. § 1125(a), and O.C.G.A. §§ 10-1-373 and 10-1-451, against a competing user of its trade name “Reliable Heating and Air” because the debtor clearly demonstrated a substantial likelihood of success on the merits of its claims and demonstrated that it would suffer irreparable harm if an injunction were not issued. *Reliable Air, Inc. v. Jape (In re Reliable Air, Inc.)*, Bankr. , 2007 Bankr. LEXIS 3711 (Bankr. N.D. Ga. Sept. 14, 2007).

**Denial of interlocutory injunction reversed only for abuse of discretion.** — The denial of an interlocutory injunction against alleged deceptive trade practices will not be reversed unless it appears that the trial court has abused the court's discretion. *Baker Realty Co. v. Baker*, 228 Ga. 766, 187 S.E.2d 850 (1972).

**Cited in** *Tri-State Culvert Mfg., Inc. v. Tri-State Drainage Prods., Inc.*, 236 Ga. 157, 223 S.E.2d 202 (1976); *Rolls-Royce Motors,*

*Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977); *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985); *Sweeney v. Athens Regional Medical Ctr.*, 709 F. Supp. 1563 (M.D. Ga. 1989); *Intown Enters., Inc. v. Barnes*, 721 F. Supp. 1263 (N.D. Ga. 1989); *Eckles v. Atlanta Tech. Group, Inc.*, 267 Ga. 801, 485 S.E.2d 22 (1997).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1127. 74 Am. Jur. 2d, Trade-Marks and Tradenames, § 130.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names and Unfair Competition, §§ 292 et seq., 331, 380, 404.

**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 3.

**ALR.** — Right to protection against appropriation of advertising matter or methods, 17 ALR 760; 30 ALR 615; 5 ALR Fed. 625.

Right of producer or distributor to protection against use of his containers, 60 ALR 285.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Punitive or exemplary damages as recoverable for trademark infringement or unfair competition, 47 ALR2d 1117.

Rights and remedies with respect to another's use of a deceptively similar advertising slogan, 2 ALR3d 748.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 ALR3d 277.

Right to private action under state consumer protection Act, 62 ALR3d 169.

Failure to deliver ordered merchandise to customer on date promised as unfair or deceptive trade practice, 7 ALR4th 1257.

Right to private action under state consumer protection act — Equitable relief available, 115 ALR5th 709.

Copyright, Under Federal Copyright Act (17 USCS §§ 1 et seq.), in Advertising Materials, Catalogs, and Price Lists, 5 ALR Fed. 625.

## 10-1-374. Exemptions from part.

(a) This part does not apply to:

(1) Conduct in compliance with the orders or rules of or a statute administered by a federal, state, or local governmental agency;

(2) Publishers, broadcasters, printers, or other persons engaged in the dissemination of information or reproduction of printed or pictorial matters who publish, broadcast, or reproduce material without knowledge of its deceptive character; or

(3) Actions or appeals pending on March 19, 1968.

(b) Paragraphs (2) and (3) of subsection (a) of Code Section 10-1-372 do not apply to the use of a service mark, trademark, certification mark, collective mark, trade name, or other trade identification that was used and

not abandoned before March 19, 1968, if the use was in good faith and is otherwise lawful except for this part. (Ga. L. 1968, p. 337, § 4.)

JUDICIAL DECISIONS

**Unfair insurance practices not subject to Georgia's Uniform Deceptive Trade Practices Act.** — Pursuant to O.C.G.A. § 10-1-374(a)(1), insurance transactions are exempt from Georgia's Uniform Deceptive Trade Practices Act (UDTPA), O.C.G.A. § 10-1-370 et seq. Claims of unfair trade

practices in insurance transactions are instead governed by the Georgia Insurance Code. *Northeast Ga. Cancer Care, LLC v. Blue Cross & Blue Shield of Ga., Inc.*, Ga. App. , S.E.2d , 2009 Ga. App. LEXIS 350 (Mar. 26, 2009).

RESEARCH REFERENCES

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names and Unfair Competition, §§ 98 et seq., 121 et seq., 380.  
**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 4.

**ALR.** — Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 ALR3d 760.

10-1-375. Uniform construction of part.

This part shall be construed to effectuate its general purpose to make uniform the law of those states which enact it. (Ga. L. 1968, p. 337, § 5.)

JUDICIAL DECISIONS

**Cited** in *Johnston Indus. Ala., Inc. v. Nat'l Contract Assocs.* (In re *Johnston Indus.*), 300 B.R. 821 (Bankr. M.D. Ga. 2003).

RESEARCH REFERENCES

**C.J.S.** — 82 C.J.S., Statutes, § 306 et seq.  
**U.L.A.** — Uniform Deceptive Trade Practices Act (1966 Revision) (U.L.A.) § 5.

PART 1A

ADMINISTRATIVE RESOLUTION

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1997, this part, enacted as Part 0.5, Code Sections 10-1-365 through 10-1-367, was redesignated as Part 1A and renumbered as Code Sections

10-1-380 through 10-1-382, and internal references were redesignated to reflect the renumbering.  
**Cross references.** — Charitable gift annuities, Ch. 58, T. 33.

10-1-380. Administrator defined.

As used in this article, the term “administrator” means the person appointed by the Governor pursuant to Code Section 10-1-395 or his or her



designee. (Code 1981, § 10-1-380, enacted by Ga. L. 1997, p. 1511, § 1; Ga. L. 1998, p. 128, § 10.)

**10-1-381. Final order; collection of judgment; disbursement of funds, consumer preventive education plan.**

(a) The administrator may file in the superior court of the county in which a person under order resides, or in the county in which the violation occurred, or, if the person is a corporation, in the county in which the corporation maintains its principal place of business, a certified copy of a final order issued pursuant to this article by the administrator which is unappealed from or a final order of an administrative law judge issued pursuant to this article which is unappealed from or a final order of an administrative law judge issued pursuant to this article which is affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court.

(b) The administrator may file in the superior court of the county in which the person obligated to pay funds over to the administrator resides, or in the county in which the violation or alleged violation occurred, or, if the person is a corporation, in the county in which the corporation maintains its principal place of business, a certified copy of any document under which funds are due to the administrator based on obligations created in the administration of this article, whether obtained through official action, compromise, settlement, assurance of voluntary compliance, or otherwise, and are delinquent according to the terms of the document creating the obligation, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court.

(c) The court shall specify that any funds to be collected under the judgment shall be disbursed by the administrator in accordance with the terms of the original order or in accordance with the terms of the original document creating the obligation, subject to the provisions of Code Section 10-1-382. Such funds may have been designated in the original order or in the original document to be applied to consumer restitution, to reimbursement of funds from which investigative expenses were paid, to civil penalties to be disbursed into the consumer preventive education plan, to civil penalties to be disbursed into the state general fund, or any combination thereof.

(d) In original orders or original documents the administrator may designate that civil penalties shall be applied to the consumer preventive education plan; in that event, such funds shall not be applied in an

aggregate amount which is any greater than the amount of funds appropriated for the consumer preventive education plan. Any amount of civil penalties which exceeds the appropriation for the consumer preventive education plan shall be disbursed into the state general fund.

(e) All judgments obtained pursuant to this Code section shall be considered delinquent if unpaid 30 calendar days after the judgment is rendered.

(f) The administrator is authorized to establish a consumer preventive education plan. (Code 1981, § 10-1-381, enacted by Ga. L. 1997, p. 1511, § 1; Ga. L. 1998, p. 128, § 10.)

#### **10-1-382. Collection fees; reports.**

(a) In addition to any amount owed under a judgment rendered under Code Section 10-1-381, a delinquent party shall be responsible by operation of law for a collection fee equal to 40 percent of the amount of the judgment as if such collection fee had been included as part of the judgment. The amount of the judgment together with the 40 percent collection fee shall be designated as the amount due. The administrator shall have the authority to contract with private collection agencies to collect any amount due. In the event that such collection agencies are unable to collect any part of such amounts due, the administrator may request that the Attorney General contract with attorneys to collect all or any remaining part of such amounts due. Such collection attorneys shall be paid in the same manner as collection agencies.

(b) All funds collected by the collection agency or by the collection attorneys shall be remitted to the administrator for disbursement. In no event shall the collection agency or attorney be entitled to any compensation in an amount greater than the 40 percent collection fee.

(c) The administrator shall remit to the collection agency or to the collection attorney a fee of 10 percent of any amount actually collected by that collection agency or that attorney.

(d) After the 10 percent of the funds collected to date has been remitted to the appropriate collection agency or collection attorney, as specified in subsection (c) of this Code section, and up until such time as 100 percent of the judgment has been disbursed in the manner called for in the judgment, the administrator shall disburse the remaining 90 percent of the funds collected to date as designated in the judgment.

(e) After 100 percent of the funds have been disbursed as designated in the judgment and the collector has also received the collection fee equal to 10 percent of such collected funds, the administrator shall remit to the collection agency or to the collection attorney any of the remaining funds which were actually collected by that collection agency or by that collection attorney; provided, however, in no event shall the total of collection fees

disbursed in connection with the collection of the judgment exceed an amount equal to 40 percent of the judgment.

(f) The administrator shall render semiannual reports to the Governor on the amounts collected and disbursed. Such reports shall be due on the tenth day of January and the tenth day of July of each year. (Code 1981, § 10-1-382, enacted by Ga. L. 1997, p. 1511, § 1.)

## PART 2

### FAIR BUSINESS PRACTICES ACT

**Cross references.** — Restrictions on sale or advertising of used motor vehicles displayed or parked, 40-2-39.1.

**Administrative rules and regulations.** — Negative Option Plans, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Consumer Affairs, Chapter 122-4.

Preservation of Consumers' Claims and Defenses, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Consumer Affairs, Chapter 122-5.

**Law reviews.** — For article explaining the

Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, see 10 Ga. St. B.J. 409 (1974). For article surveying Georgia cases dealing with commercial law from June 1977 through May 1978, see 30 Mercer L. Rev. 15 (1978). For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable?," see 22 Ga. St. B.J. 30 (1985).

For note, "Consumer Protection in Georgia: The Fair Business Practices Act of 1975," see 25 Emory L. J. 445 (1976).

### JUDICIAL DECISIONS

**O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 is cumulative of other laws and is not exclusive.** *Pendigrass v. Edmonds*, 247 Ga. 508, 277 S.E.2d 247 (1981).

**Claim under part not adjudicated by dismissal of federal suit.** — Where an accord and satisfaction agreed to between the parties was expressly limited to certain truth-in-lending claims under 15 U.S.C. § 1601 et seq. and 12 C.F.R. § 226.1 et seq. between the parties, the dismissal of the suit brought under that federal Act did not operate as an adjudication of a cause of action under this part, since the two statutes are predicated upon different goals and remedies. *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979) (see O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10).

**"Intentionally deceiving" buyer not required.** — A car dealer violated this part where, although the dealer had allegedly not "intentionally deceived" a buyer, the dealer had ample reason to know the dealer had misrepresented to the buyer the actual mile-

age of a car. When the dealer had purchased the vehicle, the dealer received an odometer disclosure statement, signed by the dealer's employee, indicating the vehicle had been driven in excess of 20,000 miles, but furnished the buyer with a statement showing the vehicle's mileage as 4,172 miles, and later informed the state that this mileage figure was inaccurate. *Crown Ford, Inc. v. Crawford*, 221 Ga. App. 881, 473 S.E.2d 554 (1996).

**Cited in** *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *DeLoach v. Foremost Ins. Co.*, 147 Ga. App. 124, 248 S.E.2d 193 (1978); *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. 379, 262 S.E.2d 820 (1979); *Armstrong Cork Co. v. World Carpets, Inc.*, 597 F.2d 496 (5th Cir. 1979); *Greenbriar Dodge, Inc. v. May*, 155 Ga. App. 892, 273 S.E.2d 186 (1980); *Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981); *Remler v. Shiver*, 200 Ga. App. 391, 408 S.E.2d 139 (1991).



## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Violation of the Truth-In-Lending Act and Regulation Z, 73 POF3d 275.

**ALR.** — Consumer picketing to protest products, prices, or services, 62 ALR3d 227.

Scope and exceptions of state deceptive trade practice and consumer protection Acts, 85 ALR3d 399.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 ALR3d 449.

Implied warranty coverage for service

transactions under state consumer protection and deceptive trade statutes, 72 ALR4th 282.

Coverage of leases under state consumer protection statutes, 89 ALR4th 854.

What constitutes Truth in Lending Act violation which “was not intentional and resulted from bona fide error notwithstanding maintenance of procedures reasonably adapted to avoid any such error” within meaning of § 130(c) of Act (15 USCA § 1640(c)), 153 ALR Fed. 193.

## 10-1-390. Short title.

This part shall be known and may be cited as the “Fair Business Practices Act of 1975.” (Ga. L. 1975, p. 376, § 1.)

**Cross references.** — Violations of requirement to place security freeze on consumer credit report, § 10-1-914. Violation of this Act for selling or holding cigarettes to which tax stamp is illegally affixed, § 48-11-23.1.

**Law reviews.** — Consumer Disclosure in the 1990s, see 9 Ga. St. U.L. Rev. 777 (1993). Multiple Sources of Consumer Law and Enforcement (Or: “Still in Search of a Uniform Policy”), see 9 Ga. St. U.L. Rev. 881 (1993). For article, “Problems Arising Out of the

Use of ‘WWW.Trademark.Com’: The Application of Principles of Trademark Law to Internet Domain Name Disputes,” see 13 Ga. St. U.L. Rev. 455 (1997). For annual survey of construction law, see 56 Mercer L. Rev. 109 (2004). For annual survey of trial practice and procedure, see 57 Mercer L. Rev. 381 (2005).

For review of 1996 commerce and trade legislation, see 13 Ga. St. U.L. Rev. 33 (1996).

## JUDICIAL DECISIONS

**Applicability to natural persons.** — The 1996 amendment of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., negates any legislative intent that the act apply to business entities. It applies to natural persons. *Blue Cross & Blue Shield of Ga., Inc. v. Kell*, 227 Ga. App. 266, 488 S.E.2d 735 (1997).

**Federal preemption.** — Consumer’s claim under Georgia’s Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq., was preempted by the Fair Credit Reporting Act, 15 U.S.C. § 1681 et seq., because the consumer alleged that defendants, a business, a debt collector, and a creditor, violated Georgia’s act through the use of unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade and commerce.

*Russell-Allgood v. Resurgent Capital Servs., L.P.*, 515 F. Supp. 2d 1307 (N.D. Ga. 2007).

**Residential mortgage transactions not covered.** — Mortgagor’s apparent claims under the Georgia Fair Business Practices Act (GFBPA), O.C.G.A. § 10-1-390 et seq., were dismissed because the mortgagor did not identify what the alleged misrepresentations were or the damages; the GFBPA did not apply to residential mortgage transactions that did not affect the consuming public generally. *Zinn v. GMAC Mortg.*, F. Supp. 2d , 2006 U.S. Dist. LEXIS 8202 (N.D. Ga. Feb. 21, 2006).

**Lanham Act not analogous.** — In an action by a manufacturer against a competitor under the Lanham Act (15 U.S.C. § 1125(a)) for trade dress infringement, it was error to apply the statute of limitations in the Geor-

gia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., is the proper analogous statute to apply for such purpose. *Kason Indus. v. Component Hdwe. Group*, 120 F.3d 1199 (11th Cir. 1997).

**Construction with Federal Arbitration Act.** — Boilerplate, mandatory arbitration clause in a cable television subscription contract was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2, which preempted the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the contract's class action waiver clause was not unconscionable under Georgia law. *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

**Effect of failure to specify unfair and deceptive act.** — Individual's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., counterclaim failed as the individual failed to specify the unfair and deceptive act that constituted a violation of the Act. *Alexander v. A. Atlanta Autosave, Inc.*, 272 Ga. App. 73, 611 S.E.2d 754 (2005).

**Summary judgment.** — Because pool installers failed to respond to a pool purchaser's request for admissions, pursuant to O.C.G.A. § 9-11-36(a), those admissions were deemed admitted and were sufficient to establish the purchaser's claims of fraud and conspiracy to defraud, and accordingly, summary judgment was properly granted to the purchaser on those claims; however, summary judgment to the purchaser was error on the claim that the installers violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as there was no evidence that the actions by the installers were introduced into the stream of commerce or were reasonably intended to impact on any market other than on the purchaser, and the commensurate awards of attorney fees and treble damages, pursuant to O.C.G.A. § 10-1-399(c) and (d), were vacated. *Brown v. Morton*, 274 Ga. App. 208, 617 S.E.2d 198 (2005).

**Terms of warranty not proved.** — Summary judgment should have been granted to a store, pursuant to O.C.G.A. § 9-11-56(c), in an action by a dissatisfied customer which asserted causes of action for breach of an express warranty and a violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390

et seq., as the customer failed to offer evidence of the terms of the warranty, which made both claims lack any foundation; the alleged warranty was based on a store employee's notation on the customer's receipt that the kitchen cabinets which the customer purchased had a "10-year warranty," but there was no indication of any further terms, so there was no enforceable warranty proven. *Home Depot U. S. A., Inc. v. Miller*, 268 Ga. App. 742, 603 S.E.2d 80 (2004).

**Measure of damages.** — Award for general damages under the Fair Business Practices Act (Act), O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by an actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2 are not applicable; furthermore, claims under the Act for equitable relief, exemplary damages, treble damages, and attorney's fees are dependent on actual injury or damage resulting from a violation of the Act. *Tiismann v. Linda Martin Homes Corp.*, 279 Ga. 137, 610 S.E.2d 68 (2005).

**Attorney fees.** — O.C.G.A. § 10-1-835 adopts the private remedies available under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., which includes awards of reasonable attorney fees and litigation expenses under O.C.G.A. § 10-1-399(d). *Galaridi v. Steele-Inman*, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

**Treble damages properly awarded.** — When punitive damages of \$500,000 was awarded in a homeowner's suit against a construction company for failing to remedy a defect in the homeowner's house, in which the homeowner was awarded \$100,000 as compensatory damages, and that award was reduced, pursuant to the statutory cap in O.C.G.A. § 51-12-5.1(g), to \$250,000, and, under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., treble damages could be awarded for similar conduct, the award did not exceed constitutional limitations. *Bowen & Bowen Constr. Co. v. Fowler*, 265 Ga. App. 274, 593 S.E.2d 668 (2004).

**Cited in** *Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc.*, 168 Ga. App. 932, 311 S.E.2d 216 (1983); *Griffith v. Stovall Tire & Marine, Inc.*, 169 Ga. App. 461, 313 S.E.2d 156 (1984); *Credithrift of Am., Inc. v. Whitley*, 190 Ga. App. 833, 380 S.E.2d 489 (1989); *Great Am. Bldrs., Inc. v. Howard*, 207 Ga. App. 236, 427 S.E.2d 588 (1993); *Geor-*

gia ex rel. Adm'r of Fair Bus. Practices Act v. Family Vending, Inc., 171 Bankr. 907 (Bankr. N.D. Ga. 1994); Baranco, Inc. v. Bradshaw, 217 Ga. App. 169, 456 S.E.2d 592 (1995); Eason Publications, Inc. v. Nationsbank, 217 Ga. App. 726, 458 S.E.2d 899 (1995); Wingate v. Ridgeview Inst., Inc., 233 Ga.

App. 649, 504 S.E.2d 714 (1998); Touchton v. Amway Corp., 247 Ga. App. 269, 543 S.E.2d 782 (2000); Campbell v. Beak, 256 Ga. App. 493, 568 S.E.2d 801 (2002); Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779 (2008).

## RESEARCH REFERENCES

**Am. Jur. Trials.** — Defense of a Domain Name Dispute, 87 Am. Jur. Trials 75.

**ALR.** — Right to private action under

state consumer protection act — Preconditions to action, 117 ALR5th 155.

### 10-1-391. Purpose and construction of part.

(a) The purpose of this part shall be to protect consumers and legitimate business enterprises from unfair or deceptive practices in the conduct of any trade or commerce in part or wholly in the state. It is the intent of the General Assembly that such practices be swiftly stopped, and this part shall be liberally construed and applied to promote its underlying purposes and policies.

(b) It is the intent of the General Assembly that this part be interpreted and construed consistently with interpretations given by the Federal Trade Commission in the federal courts pursuant to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended. (Ga. L. 1975, p. 376, § 1.)

**Cross references.** — Applicability of Art. 2, T. 11, to laws regulating sales to consumers, § 11-2-102.

**Law reviews.** — For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their

Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Purpose.** — Objective of part is elimination of deceptive acts and practices in "consumer marketplace." Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Liberal construction.** — This part is to be liberally construed and applied to promote its underlying purposes and policies, which are to protect consumers. Standish v. Hub Motor Co., 149 Ga. App. 365, 254 S.E.2d 416 (1979).

**Part applies to consumers market.** — Legislature intended to limit scope of O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 to consumer market. Its coverage is limited to activities in the conduct of consumer transactions and consumer acts or practices in trade or com-

merce. Larson v. Tandy Corp., 187 Ga. App. 893, 371 S.E.2d 663 (1988).

**Part applied to debt collection.** — A debtor who was provided medical services could recover against a collection agency under the Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq. A consumer transaction occurred when the debtor was provided medical services, and collecting a debt incurred by a consumer for medical services could harm the general consuming public if conducted deceptively; moreover, the trial court found that the agency violated the Fair Debt Collection Practices Act (FDCPA), under 15 U.S.C. § 16921(a), a violation of the FDCPA was a



violation of the Federal Trade Commission Act (FTCA), and the FBPA was to be construed consistently with interpretations of the FTCA. 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

To be subject to this part, the allegedly offensive activity must have taken place "in the conduct of ... consumer acts or practices," i.e., within the context of consumer marketplace. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff'd sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Any act or practice which is outside the context of the public consumer marketplace, no matter how unfair or deceptive, is not directly regulated by O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10. *O'Brien v. Union Oil Co.*, 699 F. Supp. 1562 (N.D. Ga. 1988).

**Part applied to banks.** — After plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest-to-smallest" transaction posting policy, unqualified by time limits or other restrictions, the plaintiff stated claims under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

**Consumers' lack of diligence not protected.** — It is not the intent of this part to protect consumers from their own lack of diligence and to render every written and ostensibly final sale of a product a potential source of liability for the seller. *Heidt v. Potamkin Chrysler-Plymouth, Inc.*, 181 Ga. App. 903, 354 S.E.2d 440 (1987).

**Part inapplicable to actions based on violation of HUD regulations.** — Violation of Department of Housing and Urban Development (HUD) regulations by a mortgagee would not support a private action by the mortgagor against the mortgagee under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Krell v. National Mtg. Co.*, 214 Ga. App. 503, 448 S.E.2d 248 (1994).

**Federal Trade Commission Act standards apply.** — Federal Trade Commission Act, 15 U.S.C. § 45, is expressly made the appropriate standard by which purpose and intent of this part is to be effectuated, implemented, and construed. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Consumer contract not void or voidable.** — The purpose of this part is to protect consumers from unfair or deceptive practices in conduct of any trade or commerce, but it does not declare a consumer contract which violates it to be void or voidable so as to rescind the contract or otherwise set it aside. *Little v. Paco Collection Servs., Inc.*, 156 Ga. App. 175, 274 S.E.2d 147 (1980).

**Not every breach of contract deemed violation of part.** — This part is no panacea for the congenital ills of the marketplace and does not instantly convert every alleged breach of contract into a violation. *DeLoach v. Foremost Ins. Co.*, 147 Ga. App. 124, 248 S.E.2d 193 (1978).

**Unfair act or deceptive practice is prerequisite.** — A prerequisite to stating a claim for relief under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is the commission of some unfair act or deceptive practice from which the Act is designed to protect the public. *Castellana v. Conyers Toyota, Inc.*, 200 Ga. App. 161, 407 S.E.2d 64 (1991).

**Private transactions.** — O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 does not encompass suits based upon allegedly deceptive or unfair acts or practices which occur in an essentially private transaction. *Waller v. Scheer*, 175 Ga. App. 1, 332 S.E.2d 293 (1985); *Rivergate Corp. v. McIntosh*, 205 Ga. App. 189, 421 S.E.2d 737, cert. denied, 205 Ga. App. 901, 421 S.E.2d 737 (1992); *Chancellor v. Gateway Lincoln-Mercury, Inc.*, 233 Ga. App. 38, 502 S.E.2d 799 (1998).

**Medium used and market impacted are determinative.** — In analyzing whether defendant's allegedly wrongful activities are in violation of this part to protect the public or an "isolated" incident not covered under this part two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Businessman and consumer in underlying transaction required.** — For there to be a

“consumer marketplace,” the underlying transaction must involve a businessman as well as a consumer. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Potential harm to consumer public required.** — Unless it can be said that defendant’s actions had or have potential harm for consumer public, the act or practice cannot be said to have “impact” on consumer marketplace, and any act or practice which is outside that context, no matter how unfair or deceptive, is not directly regulated by this part. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Though plaintiff may be a “consumer” with regard to the transaction, if deceptive or unfair act or practice had or has no potential for harm to general consuming public, the allegedly wrongful act of defendant was not made in the context of the consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Misrepresentation as to single parcel.** — It is arguable that in order to trigger the applicability of this part, misrepresentation concerning a single parcel of real property must be made either in the context of a public medium addressed to the general public or, if not made “public,” be made in the context of an overall development of a larger tract of which an individual parcel is a part. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Private suit must implement part’s purpose.** — Purpose and intent of Ga. L. 1975, p. 376, § 1 et seq. is protection of public, and a private suit under Ga. L. 1975, p. 376, § 10 may be brought only if it implements that underlying purpose and intent. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Notice under Fair Business Practices Act.** — A trial court erred in granting summary judgment to an auto dealership in a purchaser’s suit asserting fraud and violations of Georgia’s Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser’s certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the

more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesman since that provision directly contradicted the express provisions of the Act. *Johnson v. GAPVT Motors, Inc.*, 292 Ga. App. 79, 663 S.E.2d 779 (2008).

**No remedy for private wrongs not affecting consumer public.** — Stated intent of this part is to protect public from acts and practices which are injurious to consumers, not to provide additional remedy for private wrongs which do not and could not affect consuming public generally. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Ga. L. 1975, p. 376, § 10, providing for private right of action, was enacted to give effect to intent of General Assembly that such practices be swiftly stopped and is part of the enforcement and regulatory scheme underlying public protection policy of this part, and as such it does not create an additional remedy for redress of private wrongs occurring outside context of public consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Direct-suit wrongdoer must have used channels of consumer commerce.** — The legislature has evidenced a clear intent to limit scope of this part to consumer market, and to be subject to direct suit under this part an alleged offender must have done some volitional act to avail himself of channels of consumer commerce. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff’d sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Cited in** *Attaway v. Tom’s Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740 (1978); *DeLoach v. Foremost Ins. Co.*, 147 Ga. App. 124, 248 S.E.2d 193 (1978); *White v. First Fed. Sav. & Loan Ass’n*, 158 Ga. App. 373, 280 S.E.2d 398 (1981); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Griffith v. Stovall Tire & Marine, Inc.*, 169 Ga. App. 461, 313 S.E.2d 156 (1984); *Paces Ferry Dodge, Inc. v. Thomas*, 174 Ga. App. 642, 331 S.E.2d 4 (1985); *Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

### OPINIONS OF THE ATTORNEY GENERAL

**Enforcement of Olympic Price Gouging Act.** — The Office of Consumer Affairs has jurisdiction under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to address violations of the former Olympic

Price Gouging Act, former O.C.G.A. § 43-21-16, arising out of direct transactions between “hotel operators” and consumers. 1995 Op. Att’y Gen. No. 95-32.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 1131, 1152.

**Trade-Names, and Unfair Competition,** §§ 340, 341, 380.

**C.J.S.** — 87 C.J.S., Trade-Marks,

**ALR.** — Criminal liability for misappropriation of trade secret, 84 ALR3d 967.

### 10-1-392. Definitions; when intentional violation occurs.

(a) As used in this part, the term:

(1) “Administrator” means the administrator appointed pursuant to subsection (a) of Code Section 10-1-395 or his or her delegate.

(2) “Campground membership” means any arrangement under which a purchaser has the right to use, occupy, or enjoy a campground membership facility.

(3) “Campground membership facility” means any campground facility at which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased the right periodically to use the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(4) “Career consulting firm” means any person providing services to an individual in conjunction with a career search and consulting program for the individual, including, but not limited to, counseling as to the individual’s career potential, counseling as to interview techniques, and the identification of prospective employers. A “career consulting firm” shall not guarantee actual job placement as one of its services. A “career consulting firm” shall not include any person who provides these services without charging a fee to applicants for those services or any employment agent or agency regulated under Chapter 10 of Title 34.

(5) “Child support enforcement” means the action, conduct, or practice of enforcing a child support order issued by a court or other tribunal.

(6) “Consumer” means a natural person.

(7) “Consumer acts or practices” means acts or practices intended to encourage consumer transactions.



(8) “Consumer report” means any written or other communication of any information by a consumer reporting agency bearing on a consumer’s creditworthiness, credit standing, or credit capacity which is used or intended to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for:

(A) Credit or insurance to be used primarily for personal, family, or household purposes; or

(B) Employment consideration.

(9) “Consumer reporting agency” or “agency” means any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties.

(10) “Consumer transactions” means the sale, purchase, lease, or rental of goods, services, or property, real or personal, primarily for personal, family, or household purposes.

(11) “Department” means the Department of Human Services.

(12) “Documentary material” means the original or a copy, whether printed, filmed, or otherwise preserved or reproduced, by whatever process, including electronic data storage and retrieval systems, of any book, record, report, memorandum, paper, communication, tabulation, map, chart, photograph, mechanical transcription, or other tangible document or record wherever situate.

(13) “Examination” of documentary material means inspection, study, or copying of any such material and the taking of testimony under oath or acknowledgment with respect to any such documentary material.

(14) “File” means, when used in connection with information on any consumer, all of the information on that consumer recorded or retained by a consumer reporting agency regardless of how the information is stored.

(15) “Going-out-of-business sale” means any offer to sell to the public or sale to the public of goods, wares, or merchandise on the implied or direct representation that such sale is in anticipation of the termination of a business at its present location or that the sale is being held other than in the ordinary course of business and includes, without being limited to, any sale advertised either specifically or in substance to be a sale because the person is going out of business, liquidating, selling his or her entire stock or 50 percent or more of his or her stock, selling out to the bare walls, selling because the person has lost his or her lease, selling out his or her interest in the business, or selling because everything in the business must be sold or that the sale is a trustee’s sale, bankruptcy sale, save us from bankruptcy sale, insolvency sale, assignee’s sale, must vacate

sale, quitting business sale, receiver's sale, loss of lease sale, forced out of business sale, removal sale, liquidation sale, executor's sale, administrator's sale, warehouse removal sale, branch store discontinuance sale, creditor's sale, adjustment sale, or defunct business sale.

(16) "Health spa" means an establishment which provides, as one of its primary purposes, services or facilities which are purported to assist patrons to improve their physical condition or appearance through change in weight, weight control, treatment, dieting, or exercise. The term includes an establishment designated as a "reducing salon," "health spa," "spa," "exercise gym," "health studio," "health club," or by other terms of similar import. A health spa shall not include any of the following:

(A) Any nonprofit organization;

(B) Any facility wholly owned and operated by a licensed physician or physicians at which such physician or physicians are engaged in the actual practice of medicine; or

(C) Any such establishment operated by a health care facility, hospital, intermediate care facility, or skilled nursing care facility.

(17) "Marine membership" means any arrangement under which a purchaser has a right to use, occupy, or enjoy a marine membership facility.

(18) "Marine membership facility" means any boat, houseboat, yacht, ship, or other floating facility upon which the use, occupation, or enjoyment of the facility is primarily limited to those purchasers, along with their guests, who have purchased a right to make reservations at future times to use the facility or who have purchased a right to use periodically, occupy, or enjoy the facility at fixed times or intervals in the future, but shall not include any such arrangement which is regulated under Article 5 of Chapter 3 of Title 44.

(19) "Obligee" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as the payee to whom an obligor owes child support.

(20) "Obligor" means a resident of this state who is identified in an order for child support issued by a court or other tribunal as required to make child support payments.

(21) "Office" means any place where business is transacted, where any service is supplied by any person, or where any farm is operated.

(22) "Office supplier" means any person who sells, rents, leases, or ships, or offers to sell, lease, rent, or ship, goods, services, or property to any person to be used in the operation of any office or of any farm.

(23) "Office supply transactions" means the sale, lease, rental, or shipment of, or offer to sell, lease, rent, or ship, goods, services, or

property to any person to be used in the operation of any office or of any farm but shall not include transactions in which the goods, services, or property is purchased, leased, or rented by the office or farm for purposes of reselling them to other persons.

(24) “Person” means a natural person, corporation, trust, partnership, incorporated or unincorporated association, or any other legal entity.

(25) “Private child support collector” means an individual or nongovernmental entity that solicits and contracts directly with obligees to provide child support collection services for a fee or other compensation but shall not include attorneys licensed to practice law in this state unless such attorney is employed by a private child support collector.

(26) “Prize” means a gift, award, or other item intended to be distributed or actually distributed in a promotion.

(27) “Promotion” means any scheme or procedure for the promotion of consumer transactions whereby one or more prizes are distributed among persons who are required to be present at the place of business or are required to participate in a seminar, sales presentation, or any other presentation, by whatever name denominated, in order to receive the prize or to determine which, if any, prize they will receive. Promotions shall not include any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote if such condition is clearly and conspicuously disclosed in the promotional advertising and literature and the receipt of the prize does not involve an element of chance. Any procedure where the receipt of the prize is conditioned upon the purchase of the item which the seller is trying to promote or upon the payment of money and where the receipt of that prize involves an element of chance shall be deemed to be a lottery under Code Section 16-12-20; provided, however, that nothing in this definition shall be construed to include a lottery operated by the State of Georgia or the Georgia Lottery Corporation as authorized by law; provided, further, that any deposit made in connection with an activity described by subparagraph (b)(22)(B) of Code Section 10-1-393 shall not constitute the payment of money.

(28) “Trade” and “commerce” mean the advertising, distribution, sale, lease, or offering for distribution, sale, or lease of any goods, services, or any property, tangible or intangible, real, personal, or mixed, or any other article, commodity, or thing of value wherever situate and shall include any trade or commerce directly or indirectly affecting the people of this state.

(b) An “intentional violation” occurs when the person committing the act or practice knew that his or her conduct was in violation of this part. Maintenance of an act or practice specifically designated as unlawful in subsection (b) of Code Section 10-1-393 after the administrator gives notice



that the act or practice is in violation of the part shall be prima-facie evidence of intentional violation. For the purposes of this subsection, the administrator gives notice that an act or practice is in violation of this part by the adoption of specific rules promulgated pursuant to subsection (a) of Code Section 10-1-394 and by notice in writing to the alleged violator of a violation, if such written notice may be reasonably given without substantially or materially altering the purposes of this part; provided, however, that no presumption of intention shall arise in the case of an alleged violator who maintains a place of business within the jurisdiction of this state with sufficient assets to respond to a judgment under this part, unless such alleged violator has received written notice. The burden of showing no reasonable opportunity to give written notice shall be upon the administrator. (Ga. L. 1975, p. 376, § 2; Ga. L. 1978, p. 2001, § 1; Ga. L. 1982, p. 1689, §§ 1, 2A, 3; Ga. L. 1984, p. 22, § 10; Ga. L. 1985, p. 938, § 1; Ga. L. 1986, p. 405, § 1; Ga. L. 1986, p. 1046, § 1; Ga. L. 1986, p. 1313, § 1; Ga. L. 1987, p. 794, § 1; Ga. L. 1987, p. 1386, § 1; Ga. L. 1988, p. 13, § 10; Ga. L. 1989, p. 560, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 2001, p. 1245, § 1; Ga. L. 2009, p. 1001, § 2/HB 189.)

**The 2009 amendment**, effective July 1, 2009, in subsection (a), redesignated former paragraphs (a)(1.1) through (a)(1.3) as present paragraphs (a)(2) through (a)(4), respectively, added paragraph (a)(5), redesignated former paragraphs (a)(2), (a)(2.1) through (a)(2.3) and (a)(3) as present paragraphs (a)(6) through (a)(10), respectively, added paragraph (a)(11), redesignated former paragraphs (a)(4), (a)(5), (a)(5.1), (a)(5.2), (a)(6), (a)(6.1), and (a)(6.2) as present paragraphs (a)(12) through (a)(18), substituted “with respect to” for “in respect of” near the end of paragraph (a)(13), in the middle of paragraph (a)(15), substituted “bankruptcy” for “bankrupt” and substituted “insolvency” for “insolvent”, added paragraphs (a)(19) and (a)(20), redesignated former paragraphs (a)(6.3) through (a)(6.5) and (a)(7) as present paragraphs (a)(21) through (a)(24), respectively; added paragraph (a)(25), redesignated former paragraphs (a)(7.1), (a)(8), and (a)(9) as present paragraphs (a)(26) through (a)(28), respectively, and substituted “this state” for “the state” at the end of paragraph (a)(28). See the Editor’s note for applicability.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1986, the definitions in subsection (a) were arranged in alphabetical order.

Pursuant to Code Section 28-9-5, in 1989, “Going-out-of-business” was substituted for “Going out of business” in paragraph (a)(5.1) (now paragraph (a)(5.2)).

Pursuant to Code Section 28-9-5, in 2009, “Department of Human Services” was substituted for “Department of Human Resources” in paragraph (a)(11).

**Editor’s notes.** — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 150 (1989).

For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Suit alleging fraudulent breach of employment contract did not involve “consumer transaction.”** Employment is not a consumer

item. *Larson v. Tandy Corp.*, 187 Ga. App. 893, 371 S.E.2d 663 (1988).

**Consumer acts not found.** — Georgia Fair

Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim failed as the nurses' false notations in a decedent's medical records, and presumably in others' records, that a treatment was performed pursuant to a doctor's orders, were made in confidential records that were not revealed to the public; the notations had no effect on the general consuming public and could not constitute consumer acts within the meaning of O.C.G.A. § 10-1-392(a)(2.1). *Henderson v. Gandy*, 270 Ga. App. 827, 608 S.E.2d 248 (2004), *aff'd*, 280 Ga. 95, 623 S.E.2d 465 (2005).

**Actions not within consumer marketplace.** — Allegation, that the nurses' false notations in a decedent's medical records, and presumably in others' records, that treatment was performed pursuant to a doctor's orders and was based on a medical practice's gen-

eral policy, did not bring a wife's claim within the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as the actions did not occur within the public consumer marketplace. *Henderson v. Gandy*, 270 Ga. App. 827, 608 S.E.2d 248 (2004), *aff'd*, 280 Ga. 95, 623 S.E.2d 465 (2005).

**"Intentional violation"** as contemplated by this part is a volitional act constituting an unfair or deceptive act or practice conjoined with culpable knowledge of the nature, but not necessarily the illegality, of the act. *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 262 S.E.2d 820 (1979).

**Cited** in *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15 (1978); *Atlanta Gas Light Co. v. Semaphore Adv., Inc.*, 747 F. Supp. 715 (S.D. Ga. 1990).

### 10-1-393. Unfair or deceptive practices in consumer transactions unlawful; examples.

(a) Unfair or deceptive acts or practices in the conduct of consumer transactions and consumer acts or practices in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Causing actual confusion or actual misunderstanding as to the source, sponsorship, approval, or certification of goods or services;

(3) Causing actual confusion or actual misunderstanding as to affiliation, connection, or association with or certification by another;

(4)(A) Using deceptive representations or designations of geographic origin in connection with goods or services. Without limiting the generality of the foregoing, it is specifically declared to be unlawful:

(i) For any nonlocal business to publish in any local telephone classified advertising directory any advertisement containing a local telephone number for the business unless the advertisement clearly states the nonlocal location of the business; or

(ii) For any nonlocal business to cause to be listed in any nonclassified advertising local telephone directory a local telephone number for the business if calls to the number are routinely forwarded or otherwise transferred to the nonlocal business location that is outside the calling area covered by such local telephone

directory and the listing fails to state clearly the principal place of business of the nonlocal business.

(B) For purposes of this paragraph, the term:

(i) “Local” or “local area” refers to the area in which any particular telephone directory is distributed free of charge to some or all telephone service subscribers.

(ii) “Local telephone classified advertising directory” refers to any telephone classified advertising directory which is distributed free of charge to some or all telephone subscribers in any area of the state and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(iii) “Local telephone number” refers to any telephone number which is not clearly identifiable as a long-distance telephone number and which has a three-number prefix typically used by the local telephone service company for telephones physically located within the local area.

(iv) “Nonclassified advertising local telephone directory” refers to any telephone directory which is distributed free of charge to some or all telephone subscribers in any area of the state and which does not contain classified advertising and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(v) “Nonlocal business” refers to any business which does not have within the local area a physical place of business providing the goods or services which are the subject of the advertisement or listing in question;

(5) Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that he or she does not have;

(6) Representing that goods are original or new if they are deteriorated, reconditioned, reclaimed, used, or secondhand;

(7) Representing that goods or services are of a particular standard, quality, or grade or that goods are of a particular style or model, if they are of another;

(8) Disparaging goods, services, or business of another by false or misleading representation;

(9) Advertising goods or services with intent not to sell them as advertised;



(10) Advertising goods or services with intent not to supply reasonably expectable public demand, unless the advertisement discloses a limitation of quantity;

(11) Making false or misleading statements concerning the reasons for, existence of, or amounts of price reductions;

(12) Failing to comply with the provisions of Code Section 10-1-393.2 concerning health spas;

(13) Failure to comply with the following provisions concerning career consulting firms:

(A) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution which shows the date of the transaction and the name and address of the career consulting firm;

(B) The contract or an attachment thereto shall contain a statement in boldface type which complies substantially with the following:

“The provisions of this agreement have been fully explained to me and I understand that the services to be provided under this agreement by the seller do not include actual job placement.”

The statement shall be signed by both the consumer and the authorized representative of the seller;

(C) Any advertising offering the services of a career consulting firm shall contain a statement which contains the following language: “A career consulting firm does not guarantee actual job placement as one of its services.”;

(14) Failure of a hospital or long-term care facility to deliver to an inpatient who has been discharged or to his or her legal representative, not later than six business days after the date of such discharge, an itemized statement of all charges for which the patient or third-party payor is being billed;

(15) Any violation of 49 U.S.C. Sections 32702 through 32704 and any violation of regulations prescribed under 49 U.S.C. Section 32705. Notwithstanding anything in this part to the contrary, all such actions in violation of such federal statutes or regulations shall be consumer transactions and consumer acts or practices in trade or commerce;

(16) Failure to comply with the following provisions concerning promotions:

(A) For purposes of this paragraph, the term:

(i) “Conspicuously,” when referring to type size, means either a larger or bolder type than the adjacent and surrounding material.

(ii) "In conjunction with and in immediate proximity to," when referring to a listing of verifiable retail value and odds for each prize, means that such value and odds must be adjacent to that particular prize with no other printed or pictorial matter between the value and odds and that listed prize.

(iii) "Notice" means a communication of the disclosures required by this paragraph to be given to a consumer that has been selected, or has purportedly been selected, to participate in a promotion. If the original notice is in writing, it shall include all of the disclosures required by this paragraph. If the original notice is oral, it shall include all of the disclosures required by this paragraph and shall be followed by a written notice to the consumer of the same disclosures. In all cases, written notice shall be received by the consumer before any agreement or other arrangement is entered into which obligates the consumer in any manner.

(iv) "Participant" means a person who is offered an opportunity to participate in a promotion.

(v) "Promoter" means the person conducting the promotion.

(vi) "Sponsor" means the person on whose behalf the promotion is conducted in order to promote or advertise the goods, services, or property of that person.

(vii) "Verifiable retail value," when referring to a prize, means:

(I) The price at which the promoter or sponsor can substantiate that a substantial number of those prizes have been sold at retail by someone other than the promoter or sponsor; or

(II) In the event that substantiation as described in subdivision (I) of this division is not readily available to the promoter or sponsor, no more than three times the amount which the promoter or sponsor has actually paid for the prize.

(A.1) Persons who are offered an opportunity to participate in a promotion must be given a notice as required by this paragraph. The written notice must be given to the participant either prior to the person's traveling to the place of business or, if no travel by the participant is necessary, prior to any seminar, sales presentation, or other presentation, by whatever name denominated. Written notices may be delivered by hand, by mail, by newspaper, or by periodical. Any offer to participate made through any other medium must be preceded by or followed by the required notice at the required time. It is the intent of this paragraph that full, clear, and meaningful disclosure shall be made to the participant in a manner such that the participant can fully study and understand the disclosure prior to deciding whether to travel to the place of participation or whether to allow a presentation

to be made in the participant's home; and that this paragraph be liberally construed to effect this purpose. The notice requirements of this paragraph shall be applicable to any promotion offer made by any person in the State of Georgia or any promotion offer made to any person in the State of Georgia;

(B) The promotion must be an advertising and promotional undertaking, in good faith, solely for the purpose of advertising the goods, services, or property, real or personal, of the sponsor. The notice shall contain the name and address of the promoter and of the sponsor, as applicable. The promoter and the sponsor may be held liable for any failure to comply with the provisions of this paragraph;

(C) A promotion shall be a violation of this paragraph if a person is required to pay any money including, but not limited to, payments for service fees, mailing fees, or handling fees payable to the sponsor or seller or furnish any consideration for the prize, other than the consideration of traveling to the place of business or to the presentation or of allowing the presentation to be made in the participant's home, in order to receive any prize; provided, however, that the payment of any deposit made in connection with an activity described in subparagraph (B) of paragraph (22) of this subsection shall not constitute a requirement to pay any money under this subparagraph;

(D) Each notice must state the verifiable retail value of each prize which the participant has a chance of receiving. Each notice must state the odds of the participant's receiving each prize if there is an element of chance involved. The odds must be clearly identified as "odds." Odds must be stated as the total number of that particular prize which will be given and of the total number of notices. The total number of notices shall include all notices in which that prize may be given, regardless of whether it includes notices for other sponsors. If the odds of winning a particular prize would not be accurately stated on the basis of the number of notices, then the odds may be stated in another manner, but must be clearly stated in a manner which will not deceive or mislead the participant regarding the participant's chance of receiving the prize. The verifiable retail value and odds for each prize must be stated in conjunction and in immediate proximity with each listing of the prize in each place where it appears on the written notice and must be listed in the same size type and same boldness as the prize. Odds and verifiable retail values may not be listed in any manner which requires the participant to refer from one place in the written notice to another place in the written notice to determine the odds and verifiable retail value of the particular prize. Verifiable retail values shall be stated in Arabic numerals;

(E) Upon arriving at the place of business or upon allowing the sponsor to enter the participant's home, the participant must be



immediately informed which, if any, prize the participant will receive prior to any seminar, sales presentation, or other presentation; and the prize, or any voucher, certificate, or other evidence of obligation in lieu of the prize, must be given to the participant at the time the participant is so informed;

(F) No participant shall be required or invited to view, hear, or attend any sales presentation, by whatever name denominated, unless such requirement or invitation has been conspicuously disclosed to the participant in the written notice in at least ten-point boldface type;

(G) Except in relation to an activity described in subparagraph (B) of paragraph (22) of this subsection, in no event shall any prize be offered or given which will require the participant to purchase additional goods or services, including shipping fees, handling fees, or any other charge by whatever name denominated, from any person in order to make the prize conform to what it reasonably appears to be in the mailing or delivery, unless such requirement and the additional cost to the participant is clearly disclosed in each place where the prize is listed in the written notice using a statement in the same size type and boldness as the prize listed;

(H) Any limitation on eligibility of participants must be clearly disclosed in the notice;

(I) Substitutes of prizes shall not be made. In the event the represented prize is unavailable, the participant shall be presented with a certificate which the sponsor shall honor within 30 days by shipping the prize, as represented in the notice, to the participant at no cost to the participant. In the event a certificate cannot be honored within 30 days, the sponsor shall mail to the participant a valid check or money order for the verifiable retail value which was represented in the notice;

(J) In the event the participant is presented with a voucher, certificate, or other evidence of obligation as the participant's prize, or in lieu of the participant's prize, it shall be the responsibility of the sponsor to honor the voucher, certificate, or other evidence of obligation, as represented in the notice, if the person who is named as being responsible for honoring the voucher, certificate, or other evidence of obligation fails to honor it as represented in the notice;

(K) The geographic area covered by the notice must be clearly stated. If any of the prizes may be awarded to persons outside of the listed geographical area or to participants in promotions for other sponsors, these facts must be clearly stated, with a corresponding explanation that every prize may not be given away by that particular sponsor. If prizes will not be awarded or given if the winning ticket, token, number, lot, or other device used to determine winners in that particular promotion is not presented to the promoter or sponsor, this fact must be clearly disclosed;

(L) Upon request of the administrator, the sponsor or promoter must within ten days furnish to the administrator the names, addresses, and telephone numbers of persons who have received any prize;

(M) A list of all winning tickets, tokens, numbers, lots, or other devices used to determine winners in promotions involving an element of chance must be prominently posted at the place of business or distributed to all participants if the seminar, sales presentation, or other presentation is made at a place other than the place of business. A copy of such list shall be furnished to each participant who so requests;

(N) Any promotion involving an element of chance which does not conform with the provisions of this paragraph shall be considered an unlawful lottery as defined in Code Section 16-12-20. The administrator may seek and shall receive the assistance of the prosecuting attorneys of this state in the commencement and prosecution of persons who promote and sponsor promotions which constitute an unlawful lottery;

(O) Any person who participates in a promotion and does not receive an item which conforms with what that person, exercising ordinary diligence, reasonably believed that person should have received based upon the representations made to that person may bring the private action provided for in Code Section 10-1-399 and, if that person prevails, shall be awarded, in addition to any other recovery provided under this part, a sum which will allow that person to purchase an item at retail which reasonably conforms to the prize which that person, exercising ordinary diligence, reasonably believed that person would receive; and

(P) In addition to any other remedy provided under this part, where a contract is entered into while participating in a promotion which does not conform with this paragraph, the contract shall be voidable by the participant for ten business days following the date of the participant's receipt of the prize. In order to void the contract, the participant must notify the sponsor in writing within ten business days following the participant's receipt of the prize;

(17) Failure to furnish to the buyer of any campground membership or marine membership at the time of purchase a notice to the buyer allowing the buyer seven days to cancel the purchase. The notice shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

**“Notice to the Buyer**

Please read this form completely and carefully. It contains valuable cancellation rights.

The buyer or buyers may cancel this transaction at any time prior to 5:00 P.M. of the seventh day following receipt of this notice.

This cancellation right cannot be waived in any manner by the buyer or buyers.

Any money paid by the buyer or buyers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and mail by certified mail or statutory overnight delivery, return receipt requested, by 5:00 P.M. of the seventh day following the transaction. Be sure to keep a photocopy of the signed form and your post office receipt.

---

Seller's Name

---

Address to which cancellation is to be mailed

---

I (we) hereby cancel this transaction.

---

Buyer's Signature

---

Buyer's Signature

---

Date

---

Printed Name(s) of Buyer(s)

---

Street Address

---

City, State, ZIP Code"

(18) Failure of the seller of a campground membership or marine membership to fill in the seller's name and the address to which cancellation notices should be mailed on the form specified in paragraph (17) of this subsection;

(19) Failure of the seller of a campground membership or marine membership to cancel according to the terms specified in the form described in paragraph (17) of this subsection;



(20)(A) Representing that moneys provided to or on behalf of a debtor, as defined in Code Section 44-14-162.1 in connection with property used as a dwelling place by said debtor, are a loan if in fact they are used to purchase said property and any such misrepresentation upon which is based the execution of a quitclaim deed or warranty deed by that debtor shall authorize that debtor to bring an action to reform such deed into a deed to secure debt in addition to any other right such debtor may have to cancel the deed pursuant to Code Section 23-2-2, 23-2-60, or any other applicable provision of law.

(B) Advertising to assist debtors whose loan for property the debtors use as a dwelling place is in default with intent not to assist them as advertised or making false or misleading representations to such a debtor about assisting the debtor in connection with said property.

(C) Failing to comply with the following provisions in connection with the purchase of property used as a dwelling place by a debtor whose loan for said property is in default and who remains in possession of this property after said purchase:

(i) A written contract shall be employed by the buyer which shall summarize and incorporate the entire agreement between the parties, a fully completed copy of which shall be furnished to the debtor at the time of its execution. Said contract shall show the date of the transaction and the name and address of the parties; shall state, in plain and bold language, that the subject transaction is a sale; and shall indicate the amount of cash proceeds and the amount of any other financial benefits that the debtor will receive;

(ii) This contract shall contain a statement in boldface type which complies substantially with the following:

“The provisions of this agreement have been fully explained to me. I understand that under this agreement I am selling my house to the other undersigned party.”

This statement shall be signed by the debtor and the buyer;

(iii) If a lease or rental agreement is executed in connection with said sale, it shall set forth the amount of monthly rent and shall state, in plain and bold language, that the debtor may be evicted for failure to pay said rent. Should an option to purchase be included in this lease, it shall state, in plain and bold language, the conditions that must be fulfilled in order to exercise it; and

(iv) The buyer shall furnish to the seller at the time of closing a notice to the seller allowing the seller ten days to cancel the purchase. This right to cancel shall not limit or otherwise affect the seller's right to cancel pursuant to Code Section 23-2-2, 23-2-60, or

any other applicable provision of law. The notice shall serve as the cover sheet to the closing documents. It shall be on a separate sheet of paper with no other written or pictorial material, in at least ten-point boldface type, double spaced, and shall read as follows:

“Notice to the Seller

Please read this form completely and carefully. It contains valuable cancellation rights.

The seller or sellers may cancel this transaction at any time prior to 5:00 P.M. of the tenth day following receipt of this notice.

This cancellation right cannot be waived in any manner by the seller or sellers.

Any money paid to the seller or sellers must be returned by the seller within 30 days of cancellation.

To cancel, sign this form, and return it to the buyer by 5:00 P.M. of the tenth day following the transaction. It is best to mail it by certified mail or statutory overnight delivery, return receipt requested, and to keep a photocopy of the signed form and your post office receipt.

---

Buyer's Name

---

Address to which cancellation

---

is to be returned

I (we) hereby cancel this transaction.

---

Seller's Signature

---

Seller's Signature

---

Date

---

Printed Name(s) of Seller(s)

---

Street Address

---

City, State, ZIP Code”

(D) The provisions of subparagraph (C) of this paragraph shall only apply where all three of the following conditions are present:

- (i) A loan on the property used as a dwelling place is in default;
- (ii) The debtor transfers the title to the property by quitclaim deed, limited warranty deed, or general warranty deed; and
- (iii) The debtor remains in possession of the property under a lease or as a tenant at will;

(21) Advertising a telephone number the prefix of which is 976 and which when called automatically imposes a per-call charge or cost to the consumer, other than a regular charge imposed for long-distance telephone service, unless the advertisement contains the name, address, and telephone number of the person responsible for the advertisement and unless the person's telephone number and the per-call charge is printed in type of the same size as that of the number being advertised;

(22) Representing, in connection with a vacation, holiday, or an item described by terms of similar meaning, or implying that:

(A) A person is a winner, has been selected or approved, or is in any other manner involved in a select or special group for receipt of an opportunity or prize, or that a person is entering a contest, sweepstakes, drawing, or other competitive enterprise from which a winner or select group will receive an opportunity or prize, when in fact the enterprise is designed to make contact with prospective customers, or in which all or a substantial number of those entering such competitive enterprise receive the same prize or opportunity; or

(B) In connection with the types of representations referred to in subparagraph (A) of this paragraph, representing that a vacation, holiday, or an item described by other terms of similar meaning, is being offered, given, awarded, or otherwise distributed unless:

- (i) The item represented includes all transportation, meals, and lodging;
- (ii) The representation specifically describes any transportation, meals, or lodging which is not included; or
- (iii) The representation discloses that a deposit is required to secure a reservation, if that is the case.

The provisions of this paragraph shall not apply where the party making the representations is in compliance with paragraph (16) of this subsection;

(23) Except in relation to an activity which is in compliance with paragraph (16) or (22) of this subsection, stating, in writing or by telephone, that a person has won, is the winner of, or will win or receive



anything of value, unless the person will receive the prize without obligation;

(24)(A) Conducting a going-out-of-business sale for more than 90 days.

(B) After the 90 day time limit in subparagraph (A) of this paragraph has expired, continuing to do business in any manner contrary to any representations which were made regarding the nature of the going-out-of-business sale.

(C) The prohibitions of this paragraph shall not extend to any of the following:

(i) Sales for the estate of a decedent by the personal representative or the personal representative's agent, according to law or by the provisions of the will;

(ii) Sales of property conveyed by security deed, deed of trust, mortgage, or judgment or ordered to be sold according to the deed, mortgage, judgment, or order;

(iii) Sales of all agricultural produce and livestock arising from the labor of the seller or other labor under the seller's control on or belonging to the seller's real or personal estate and not purchased or sold for speculation;

(iv) All sales under legal process;

(v) Sales by a pawnbroker or loan company which is selling or offering for sale unredeemed pledges of chattels as provided by law; or

(vi) Sales of automobiles by an auctioneer licensed under the laws of the State of Georgia;

(25) The issuance of a check or draft by a lender in connection with a real estate transaction in violation of Code Section 44-14-13;

(26) With respect to any individual or facility providing personal care services:

(A) Any person or entity not duly licensed or registered as a personal care home formally or informally offering, advertising to, or soliciting the public for residents or referrals;

(B) Any personal care home, as defined in subsection (a) of Code Section 31-7-12, offering, advertising, or soliciting the public to provide services:

(i) Which are outside the scope of personal care services; and

(ii) For which it has not been specifically authorized.

Nothing in this subparagraph prohibits advertising by a personal care home for services authorized by the Department of Community Health under a waiver or variance pursuant to subsection (b) of Code Section 31-2-9;

(C) For purposes of this paragraph, “personal care” means protective care and watchful oversight of a resident who needs a watchful environment but who does not have an illness, injury, or disability which requires chronic or convalescent care including medical and nursing services.

The provisions of this paragraph shall be enforced following consultation with the Department of Community Health which shall retain primary responsibility for issues relating to licensure of any individual or facility providing personal care services;

(27) Mailing any notice, notification, or similar statement to any consumer regarding winning or receiving any prize in a promotion, and the envelope or other enclosure for the notice fails to conspicuously identify on its face that the contents of the envelope or other enclosure is a commercial solicitation and, if there is an element of chance in winning a prize, the odds of winning as “odds”;

(28) Any violation of the rules and regulations promulgated by the Department of Driver Services pursuant to subsection (e) of Code Section 40-5-83 which relates to the consumer transactions and business practices of DUI Alcohol or Drug Use Risk Reduction Programs, except that the Department of Driver Services shall retain primary jurisdiction over such complaints;

(29) With respect to any consumer reporting agency:

(A) Any person who knowingly and willfully obtains information relative to a consumer from a consumer reporting agency under false pretenses shall be guilty of a misdemeanor;

(B) Any officer or employee of a consumer reporting agency who knowingly and willfully provides information concerning an individual from the agency’s files to a person not authorized to receive that information shall be guilty of a misdemeanor; and

(C) Each consumer reporting agency which compiles and maintains files on consumers on a nation-wide basis shall furnish to any consumer who has provided appropriate verification of his or her identity two complete consumer reports per calendar year, upon request and without charge;

(29.1) With respect to any credit card issuer:

(A) A credit card issuer who mails an unsolicited offer or solicitation to apply for a credit card and who receives by mail a completed

application in response to the solicitation which lists an address that is not substantially the same as the address on the solicitation may not issue a credit card based on that application until steps have been taken to verify the applicant's valid address to the same extent required by regulations prescribed pursuant to subsection (l) of 31 U.S.C. Section 5318. Any person who violates this paragraph commits an unlawful practice within the meaning of this Code section; and

(B) Notwithstanding subparagraph (A) of this paragraph, a credit card issuer, upon receiving an application, may issue a credit card to a consumer or commercial customer with whom it already has a business relationship provided the address to which the card is mailed is a valid address based upon information in the records of the credit card issuer or its affiliates;

(30) With respect to any individual or facility providing home health services:

(A) For any person or entity not duly licensed by the Department of Community Health as a home health agency to regularly hold itself out as a home health agency; or

(B) For any person or entity not duly licensed by the Department of Community Health as a home health agency to utilize the words "home health" or "home health services" in any manner including but not limited to advertisements, brochures, or letters. Unless otherwise prohibited by law, nothing in this subparagraph shall be construed to prohibit persons or entities from using the words "home health" or "home health services" in conjunction with the words "equipment," "durable medical equipment," "pharmacy," "pharmaceutical services," "prescription medications," "infusion therapy," or "supplies" in any manner including but not limited to advertisements, brochures, or letters. An unlicensed person or entity may advertise under the category "home health services" in any advertising publication which divides its advertisements into categories, provided that:

(i) The advertisement is not placed in the category with the intent to mislead or deceive;

(ii) The use of the advertisement in the category is not part of an unfair or deceptive practice; and

(iii) The advertisement is not otherwise unfair, deceptive, or misleading.

For purposes of this paragraph, the term "home health agency" shall have the same definition as contained in Code Section 31-7-150, as now or hereafter amended. The provisions of this paragraph shall be enforced by the administrator in consultation with the Department of Community Health; provided, however, that the administrator shall not have any



responsibility for matters or functions related to the licensure of home health agencies;

(30.1) Failing to comply with the following provisions in connection with a contract for health care services between a physician and an insurer which offers a health benefit plan under which such physician provides health care services to enrollees:

(A) As used in this paragraph, the term:

(i) “Enrollee” means an individual who has elected to contract for or participate in a health benefit plan for that individual or for that individual and that individual’s eligible dependents and includes that enrollee’s eligible dependents.

(ii) “Health benefit plan” means any hospital or medical insurance policy or certificate, health care plan contract or certificate, qualified higher deductible health plan, health maintenance organization subscriber contract, any health benefit plan established pursuant to Article 1 of Chapter 18 of Title 45, or any managed care plan.

(iii) “Insurer” means a corporation or other entity which is licensed or otherwise authorized to offer a health benefit plan in this state.

(iv) “Patient” means a person who seeks or receives health care services under a health benefit plan.

(v) “Physician” means a person licensed to practice medicine under Article 2 of Chapter 34 of Title 43.

(B) Every contract between a physician and an insurer which offers a health benefit plan under which that physician provides health care services shall be in writing and shall state the obligations of the parties with respect to charges and fees for services covered under that plan when provided by that physician to enrollees under that plan. Neither the insurer which provides that plan nor the enrollee under that plan shall be liable for any amount which exceeds the obligations so established for such covered services.

(C) Neither the physician nor a representative thereof shall intentionally collect or attempt to collect from an enrollee any obligations with respect to charges and fees for which the enrollee is not liable and neither such physician nor a representative thereof may maintain any action at law against such enrollee to collect any such obligations.

(D) The provisions of this paragraph shall not apply to the amount of any deductible or copayment which is not covered by the health benefit plan.

(E) This paragraph shall apply to only such health benefit plan contracts issued, delivered, issued for delivery, or renewed in this state on or after July 2, 2001;

(31) With respect to telemarketing sales:

(A) For any seller or telemarketer to use any part of an electronic record to attempt to induce payment or attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber. Nothing in this paragraph shall be construed to:

(i) Prohibit the seller or telemarketer from introducing, as evidence in any court proceeding to attempt collection of any payment that the seller or telemarketer claims is due and owing to it pursuant to a telephone conversation or series of telephone conversations with a residential subscriber, an electronic record of the entirety of such telephone conversation or series of telephone conversations; or

(ii) Expand the permissible use of an electronic record made pursuant to 16 C.F.R. Part 310.3(a)(3), the Federal Telemarketing Sales Rule.

(B) For purposes of this paragraph, the term:

(i) "Covered communication" means any unsolicited telephone call or telephone call arising from an unsolicited telephone call.

(ii) "Electronic record" means any recording by electronic device of, in part or in its entirety, a telephone conversation or series of telephone conversations with a residential subscriber that is initiated by a seller or telemarketer in order to induce the purchase of goods, services, or property. This term shall include, without limitation, any subsequent telephone conversations in which the seller or telemarketer attempts to verify any alleged agreement in a previous conversation or previous conversations.

(iii) "Residential subscriber" means any person who has subscribed to residential phone service from a local exchange company or the other persons living or residing with such person.

(iv) "Seller or telemarketer" means any person or entity making a covered communication to a residential subscriber for the purpose of inducing the purchase of goods, services, or property by such subscriber. This term shall include, without limitation, any agent of the seller or telemarketer, whether for purposes of conducting calls to induce the purchase, for purposes of verifying any calls to induce the purchase, or for purposes of attempting to collect on any payment under the purchase;

(32) Selling, marketing, promoting, advertising, providing, or distributing any card or other purchasing mechanism or device that is not insurance or evidence of insurance coverage and that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same or making any representation or statement that purports to offer or provide discounts or access to discounts on purchases of health care goods or services from providers of the same, when:

(A) Such card or other purchasing mechanism or device does not contain a notice expressly and prominently providing in boldface type that such discounts are not insurance; or

(B) Such discounts or access to such discounts are not specifically authorized under a separate contract with a provider of health care goods or services to which such discounts are purported to be applicable;

(33)(A) For any person, firm, partnership, association, or corporation to issue a gift certificate, store gift card, or general use gift card without:

(i) Including the terms of the gift certificate, store gift card, or general use gift card in the packaging which accompanies the certificate or card at the time of purchase, as well as making such terms available upon request; and

(ii) Conspicuously printing the expiration date, if applicable, on the certificate or card and conspicuously printing the amount of any dormancy or nonuse fees on:

(I) The certificate or card; or

(II) A sticker affixed to the certificate or card.

A gift certificate, store gift card, or general use gift card shall be valid in accordance with its terms in exchange for merchandise or services.

(B) As used in this paragraph, the term:

(i) “General use gift card” means a plastic card or other electronic payment device which is usable at multiple, unaffiliated merchants or service providers; is issued in an amount which amount may or may not be, at the option of the issuer, increased in value or reloaded if requested by the holder; is purchased or loaded on a prepaid basis by a consumer; and is honored upon presentation by merchants for goods or services.

(ii) “Gift certificate” means a written promise that is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and



cannot be increased in value on the face thereof; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo.

(iii) "Store gift card" means a plastic card or other electronic payment device which is usable at a single merchant or an affiliated group of merchants that share the same name, mark, or logo; is issued in a specified amount and may or may not be increased in value or reloaded; is purchased on a prepaid basis by a consumer in exchange for payment; and is honored upon presentation for goods or services by such single merchant or affiliated group of merchants that share the same name, mark, or logo; and

(34) For any person, firm, partnership, business, association, or corporation to willfully and knowingly accept or use an individual taxpayer identification number issued by the Internal Revenue Service for fraudulent purposes and in violation of federal law.

(c) A seller may not by contract, agreement, or otherwise limit the operation of this part notwithstanding any other provision of law.

(d) Notwithstanding any other provision of the law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive acts or practices shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the administrator or administrator's employees. Nothing contained in this subsection shall be construed to prevent the subject of the complaint, or any other person to whom disclosure to the complainant's identity may aid in resolution of the complaint, from being informed of the identity of the complainant, to prohibit any valid discovery under the relevant discovery rules, or to prohibit the lawful subpoena of such information. (Ga. L. 1975, p. 376, § 3; Ga. L. 1978, p. 2001, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 1982, p. 1689, §§ 2, 4; Ga. L. 1983, p. 1298, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 463, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1985, p. 938, § 2; Ga. L. 1985, p. 1183, § 1; Ga. L. 1986, p. 405, § 2; Ga. L. 1986, p. 1313, § 2; Ga. L. 1987, p. 794, § 2; Ga. L. 1987, p. 1386, § 2; Ga. L. 1988, p. 13, § 10; Ga. L. 1988, p. 399, §§ 1-3; Ga. L. 1988, p. 983, § 1; Ga. L. 1988, p. 1657, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 560, § 3; Ga. L. 1989, p. 1606, § 1; Ga. L. 1990, p. 1653, § 2; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 1129, § 1; Ga. L. 1992, p. 2139, § 1; Ga. L. 1993, p. 91, § 10; Ga. L. 1993, p. 1076, §§ 1, 2; Ga. L. 1993, p. 1676, § 1; Ga. L. 1995, p. 729, § 1; Ga. L. 1996, p. 1030, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1997, p. 1507, § 1; Ga. L. 1998, p. 643, § 1; Ga. L. 2000, p. 557, § 1; Ga. L. 2000, p. 1181, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1170, § 2; Ga. L. 2004, p. 149,

§ 1; Ga. L. 2005, p. 334, § 4-2/HB 501; Ga. L. 2005, p. 1183, § 2/SB 13; Ga. L. 2009, p. 86, § 18/HB 141; Ga. L. 2009, p. 453, §§ 1-4, 1-11/HB 228.)

**The 2009 amendments.** — The first 2009 amendment, effective July 1, 2009, added paragraph (b)(34). The second 2009 amendment, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in the undesignated language following division (b)(26)(B)(ii), in the undesignated language at the end of paragraph (b)(26), in subparagraph (b)(30)(A), in the first sentence of subparagraph (b)(30)(B), and in the undesignated language following paragraph (b)(30), and substituted “Code Section 31-2-9” for “Code Section 31-2-4” at the end of the undesignated language of subparagraph (b)(26)(B).

**Cross references.** — Criminal penalties for unauthorized reproduction and sale of recorded materials, § 16-8-60. Criminal penalty for deceptive business practices, § 16-9-50. Fraud generally, § 23-2-50 et seq. Misbranding of food generally, § 26-2-28. Labeling of meat, §§ 26-2-107, 26-2-111, 26-2-112. Misbranding of drugs, § 26-3-8. Misbranding and false advertisement of cosmetics, § 26-3-12 et seq. Time-share program sales, deceptive practices, § 44-3-185 et seq.

**Code Commission notes.** — Owing to the duplication in paragraph designations, paragraphs (16), (17), and (18) added to subsection (b) by Ga. L. 1986, p. 405, § 2, were redesignated paragraphs (17), (18), and (19), respectively, in 1986, pursuant to Code Section 28-9-5. In accordance with this revision, in subsection (b), punctuation was revised, “or” was deleted at the end of paragraph (15), and the references in paragraphs (18) and (19) were adjusted accordingly.

Three 1988 Acts amended this Code section, two of which added a paragraph (21) to subsection (b). Pursuant to Code Section 28-9-5, in 1988, the paragraph enacted by Ga. L. 1988, p. 399 has retained the (b)(21) designation but paragraph (21) enacted by Ga. L. 1988, p. 1657 and paragraph (22) also enacted by Ga. L. 1988, p. 1657 have been redesignated as paragraphs (22) and (23) of subsection (b), respectively.

Pursuant to Code Section 28-9-5, in 1988, semi-colons were substituted for periods at

the end of paragraphs (20) and (21) of subsection (b).

Pursuant to Code Section 28-9-5, in 1989, “spas;” was substituted for “spas.” in paragraph (12) of subsection (b) and “going-out-of-business” was substituted for “going out of business” in subparagraphs (b)(24)(A) and (b)(24)(B).

Pursuant to Code Section 28-9-5, in 1993, in subsection (b), a semicolon was substituted for the period at the end of paragraph (25), a semicolon was substituted for a period at the end of paragraph (26), the word “or” was stricken at the end of paragraph (27), “; or” was substituted for a period at the end of paragraph (28), and paragraph (27) as added by Ga. L. 1993, p. 1676, § 1, was redesignated as paragraph (29).

Pursuant to Code Section 28-9-5, in 2004, “Code section; and” was substituted for “Act.” in subparagraph (b)(29.1)(A).

Pursuant to Code Section 28-9-5, in 2009, a semicolon was substituted for a period at the end of subparagraph (b)(30.1)(E), “or” was deleted at the end of paragraph (b)(32), and “; and” was substituted for a period at the end of paragraph (b)(33).

**Editor’s notes.** — Ga. L. 1985, p. 938 contained a § 2 which amended this Code section and a second § 2, not codified by the General Assembly, which contained a standard repeal provision.

Ga. L. 1989, p. 14, § 10 which amended paragraph (12) of subsection (b) was superseded by Ga. L. 1989, p. 1606, § 1.

Ga. L. 1990, p. 1653, § 3, not codified by the General Assembly, provides that the Act shall not be construed to repeal or modify any provisions of law relative to the utterance or delivery of a worthless check and the provisions of the Act shall be cumulative of such other provisions.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the 2000 amendment by that Act is applicable with respect to notices delivered on or after July 1, 2000.

Ga. L. 2001, p. 1170, § 1, not codified by the General Assembly, provides: “The General Assembly finds that managed health care has benefited consumers by negotiating contracts with physicians which prohibit

such physicians from billing consumers for fees above and beyond the amount paid by the managed care plan. In order to ensure that the consumers of this state continue to receive such benefits, it is imperative that physicians adhere to their contractual obligations to charge only those fees contractually agreed to and not attempt to pass additional or hidden costs along to consumers. The purpose of Section 2 of this Act is to ensure that consumers are not charged fees above and beyond those already contracted for between their physician and their health benefit plans."

Ga. L. 2004, p. 149, § 1, which amended this Code section, did not specify which subsection was amended but actually amended subsection (b).

Ga. L. 2005, p. 1183, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Gift Card Integrity Act of 2005.'"

Ga. L. 2005, p. 1183, § 3, not codified by the General Assembly, provides that the sec-

ond 2005 amendment applies to any gift certificates, store gift cards, or general use gift cards sold on or after October 1, 2005.

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U. L. Rev. 29 (1997). For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U. L. Rev. 9 (1998). For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 150 (1989). For note on 1992 amendment of this Code section, see 9 Ga. St. U.L. Rev. 265 (1992). For note on the 2001 amendment to this Code section, see 18 Ga. St. U. L. Rev. 241 (2001).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### AUTOMOBILES

##### REAL PROPERTY

##### TRADEMARKS, NAMES

### General Consideration

**Purpose.** — Objective of part is elimination of deceptive acts and practices in "consumer marketplace". For there to be a "consumer marketplace," the underlying transaction must involve a businessman as well as a consumer. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Test as to whether activities covered.** — In analyzing whether defendant's allegedly wrongful activities are in violation of this part to protect the public or an "isolated" incident not covered under this part, two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Transaction must be part of ongoing, public business.** — This section requires that alleged wrongful act in "consumer transac-

tion" occur in context of ongoing business in which defendant holds oneself out to the public. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**No impact on general consuming public and beyond reach of FBPA.** — Although the department store deviated from the store's credit fraud policy by not promptly investigating plaintiff's claim after plaintiff sent the information requesting the store to correct plaintiff's account, there was no evidence of other instances in which the store failed to follow the store's policy, and any deviation this time was viewed as a isolated event that had no impact on the general consuming public and is therefore beyond the reach of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Davis v. Rich's Dep't Stores, Inc.*, 248 Ga. App. 116, 545 S.E.2d 661 (2001).

**Activity must be in context of consumer marketplace.** — To be subject to direct suit



under this part, an alleged offender must perform some volitional act to avail the offender of the channels of consumer commerce and the allegedly offensive activity must take place within the context of the consumer marketplace. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff'd sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Any act or practice which is outside the context of the public consumer marketplace, no matter how unfair or deceptive, is not directly regulated by O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10. *O'Brien v. Union Oil Co.*, 699 F. Supp. 1562 (N.D. Ga. 1988).

Since a bank's commercial checking accounts were not offered to consumers, the bank's practices concerning those accounts were outside the consumer market place and the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., did not apply to an action against the bank based on misrepresentation of the "standard, quality, or grade" of the bank's services. *Eason Publications, Inc. v. Nationsbank*, 217 Ga. App. 726, 458 S.E.2d 899 (1995).

Claim against a private school after a student was dismissed from the school due to misbehavior was properly denied since the school's alleged acts and conduct did not arise in the context of the consumer marketplace. *Pryor v. CCEC, Inc.*, 257 Ga. App. 450, 571 S.E.2d 454 (2002).

**Nonconsumers do not have a cause of action** under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., when nonconsumers allege an injury due to a competitor's misrepresentations to the general public. *Friedlander v. PDK Labs, Inc.*, 266 Ga. 180, 465 S.E.2d 670 (1996).

**Action under § 40-1-5.** — The court properly granted the plaintiff's motion for partial summary judgment on plaintiff's Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim because the undisputed facts established a violation of O.C.G.A. § 40-1-5, and thus a per se violation of the FBPA. *Neal Pope, Inc. v. Garlington*, 245 Ga. App. 49, 537 S.E.2d 179 (2000).

**Part applied to banks.** — After plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of

transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest-to-smallest" transaction posting policy, unqualified by time limits or other restrictions, the plaintiffs stated claims under the Georgia Fair Business Practices Act. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

**Private transactions not covered.** — Even though a single instance of an unfair or deceptive act can be a sufficient basis for a claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., the Act does not apply to suits based upon deceptive practices which occur in transactions that are essentially private. *Borden v. Pope Jeep-Eagle, Inc.*, 200 Ga. App. 176, 407 S.E.2d 128 (1991).

The trial court properly concluded that the defendants were entitled to summary judgment on the plaintiff's claim for a violation of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., since the sale of the farm to the plaintiffs, and any representations preceding the sale, involved a private transaction which would not affect the consuming public generally. *Condon v. Kunse*, 208 Ga. App. 856, 432 S.E.2d 266 (1993).

The fraudulent failure to furnish an ample supply of yarn was a matter strictly between private business parties, who are nonconsumers, and therefore does not give rise to the application of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Benchmark Carpet Mills, Inc. v. Fiber Indus., Inc.*, 168 Ga. App. 932, 311 S.E.2d 216 (1983); *Medley v. Boomershine Pontiac-GMC Truck, Inc.*, 214 Ga. App. 795, 449 S.E.2d 128 (1994).

Touchstone for a legally sufficient Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., claim against a health care provider is an allegation that an entrepreneurial or business aspect of the provision of services aside from medical competence is implicated, or aside from medical malpractice based on the adequacy of staffing, training, equipment or support personnel, so medical malpractice claims recast as FBPA claims cannot form the basis for an FBPA violation. *Henderson v. Gandy*, 280 Ga. 95, 623 S.E.2d 465 (2005).

**General Consideration (Cont'd)**

When a widow sued a physician for allowing nurses to manage the care of the deceased husband's pressure sore, and for allegedly falsifying medical records to reflect that the care was done pursuant to the physician's orders, when the care was not, this did not state a claim involving the entrepreneurial, commercial, or business aspects of the physician's practice, and did not state a claim within the contemplation of the Fair Business Practices Act of 1975, O.C.G.A. § 10-1-390 et seq. *Henderson v. Gandy*, 280 Ga. 95, 623 S.E.2d 465 (2005).

**Application to medical profession.** — It was the Georgia legislature's stated intent that the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., be interpreted and construed consistently with interpretations given by the Federal Trade Commission in federal court pursuant to 15 U.S.C.S. § 45(a)(1) of the Federal Trade Commission Act, 15 U.S.C.S. § 41 et seq., pursuant to O.C.G.A. § 10-1-391(b), and federal courts had determined that the Federal Trade Commission Act, 15 U.S.C.S. § 41 et seq., applied to the commercial aspects of the medical profession. *Henderson v. Gandy*, 280 Ga. 95, 623 S.E.2d 465 (2005).

**Contract provision that it is "absolutely noncancellable".** — If the contract on the contract's face fails to state clearly "the cancellation and refund policies of seller" and states that the contract "is absolutely noncancellable," the contract is violative of this part in attempting to limit operation of the statute. *Little v. Paco Collection Servs., Inc.*, 156 Ga. App. 175, 274 S.E.2d 147 (1980).

**Failure of consumer to exercise requisite diligence.** — There was no violation of subsection (c) of O.C.G.A. § 10-1-393 in precluding the introduction of testimony as to an alleged oral misrepresentation because the proffered evidence was inadmissible to vary the terms of the written contract, where the nonviability of the purchaser's claim was not the result of defendant's contractual limitation of the applicability of O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 but was the result of the purchaser's own failure to exercise the requisite diligence to read the contract that the purchaser signed. *Heidt v. Potamkin Chrysler-Plymouth, Inc.*, 181 Ga. App. 903, 354 S.E.2d 440 (1987).

**Physician's statements about nurse-midwife.** — Physician's allegedly disparaging statements about a nurse-midwife, which were made during a conversation between the two at a hospital nurses' station, took place outside the context of consumer commerce and therefore did not fall within the regulatory authority of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Sweeney v. Athens Regional Medical Ctr.*, 709 F. Supp. 1563 (M.D. Ga. 1989).

**Damages.** — Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., authorized punitive damages in addition to mandating treble damages for intentional violations. *Conseco Fin. Servicing Corp. v. Hill*, 252 Ga. App. 774, 556 S.E.2d 468 (2001).

**Cited in** *Lancaster v. Eberhardt*, 141 Ga. App. 534, 233 S.E.2d 880 (1977); *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740 (1978); *Atlanta Auto Auction v. Ryles*, 148 Ga. App. 20, 251 S.E.2d 28 (1978); *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979); *Greenbriar Dodge, Inc. v. May*, 155 Ga. App. 892, 273 S.E.2d 186 (1980); *Plaza Pontiac, Inc. v. Shaw*, 158 Ga. App. 799, 282 S.E.2d 383 (1981); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Stafford v. Fitness for Life*, 171 Ga. App. 422, 319 S.E.2d 891 (1984); *Paces Ferry Dodge, Inc. v. Thomas*, 174 Ga. App. 642, 331 S.E.2d 4 (1985); *Atlanta Gas Light Co. v. Semaphore Adv., Inc.*, 747 F. Supp. 715 (S.D. Ga. 1990).

**Automobiles**

**Sale between two non-businessmen.** — Sale of motor vehicle in the course of private negotiations between two individual parties, neither of whom was a businessman, did not constitute a transaction "in the conduct of any trade or commerce." *Reilly v. Mosley*, 165 Ga. App. 479, 301 S.E.2d 649 (1983).

**Transaction between auto dealer and finance company.** — After a dealer paid a discount to a finance company to take the assignment of an auto buyer's retail installment sales contract, the transaction was essentially private and outside the protection of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Chancellor v. Gateway Lincoln-Mercury, Inc.*, 233 Ga. App. 38, 502 S.E.2d 799 (1998).

**Seller's claims as to condition of car.** — Trial court properly granted summary judg-



ment as to a car buyer's claims based on the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., after the seller's claims as to the condition of the car, which were relied on by the buyer to support the buyer's claim of fraud, were mere sales puffing. *Hill v. Jay Pontiac, Inc.*, 191 Ga. App. 258, 381 S.E.2d 417 (1989).

Misrepresentation by car dealer's salesperson that used vehicle was a demonstrator was within the scope of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Catrett v. Landmark Dodge, Inc.*, 253 Ga. App. 639, 560 S.E.2d 101 (2002).

**When purchaser offered evidence of violation of Act, summary judgment to seller was not proper.** — Trial court erred in granting summary judgment to a truck seller on a claim by the purchaser alleging a violation of the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., specifically O.C.G.A. § 10-1-393(b)(5)-(7) because the purchaser presented evidence that the seller committed a statutory violation, as well as evidence that selling the truck to the purchaser as new rather than as used resulted in a reduced value of the vehicle. *Scott v. Team Toyota*, 276 Ga. App. 257, 622 S.E.2d 925 (2005).

**Pre-sale notice to seller of defects in title to merchandise.** — It would constitute an unfair business practice if, before merchandise is sold in the consumer marketplace, a seller is placed on reasonable notice that the seller's claim of title to the merchandise could be legally defective and thereafter in blatant disregard of the rights of innocent purchasers fails to take reasonable measures to ascertain the true state of facts concerning title before consummating the sale. *Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

**Seller's knowledge of discrepancy in vehicle identification number.** — It was not error, in an action alleging violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., to refuse to grant summary judgment in favor of the defendant automobile seller, since the truck sold to the plaintiff buyer was confiscated as a stolen vehicle, and the evidence was that the seller's agent was timely notified of a model number discrepancy on the vehicle identification number plate. *Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

**Failure of manufacturer to notice defective door** and the manufacturer's refusal to give the buyers, upon the buyer's refusal to allow the manufacturer to attempt to repair the vehicle, a new car, are not by themselves an unfair or deceptive practice affecting the consuming public. *DeLoach v. General Motors*, 187 Ga. App. 159, 369 S.E.2d 484 (1988).

**Lease of "used demo" automobile.** — Automobile leased by plaintiffs from defendant dealer as a "used demo" was a "new" car, not a "used" car, and the fact that the car was previously titled to the dealer's son-in-law did not create an issue of fraud in violation of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Toirkens v. Willett Toyota, Inc.*, 192 Ga. App. 109, 384 S.E.2d 218 (1989).

**Fraud involving representing vehicle as more valuable model, which vehicle was not.** — A trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser's certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesman since that provision directly contradicted the express provisions of the Act. *Johnson v. GAPVT Motors, Inc.*, 292 Ga. App. 79, 663 S.E.2d 779 (2008).

**Advertisement offering option between lease and financed sale.** — Automobile dealer's advertisement offering either an annual finance rate of 7.7 percent or a 48-month lease was not misleading or deceptive, where, although the customer may have misunderstood the distinction between the various offers made in the advertisement, the consumer admitted the consumer understood the difference between a financed sale and a lease. *Blum v. GMAC*, 185 Ga. App. 714, 365 S.E.2d 474 (1988).

**Negligent repair of individual vehicle.** — O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 does not



**Automobiles (Cont'd)**

apply to negligent repair of individual vehicle when the damaged vehicle's owner brings the vehicle to a body shop and enters into a repair agreement and the body shop represents only that the vehicle has been repaired when the vehicle has not. *Burdakin v. Hub Motor Co.*, 183 Ga. App. 90, 357 S.E.2d 839, cert. denied, 183 Ga. App. 905, 357 S.E.2d 839 (1987).

**Real Property**

**Misrepresentation by homeowner selling own house** is not likely recurring "consumer" threat and, therefore, has no potential "impact" on general consuming public. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Any misrepresentation made by seller in context of selling the seller's own home is not made "in the conduct of any trade or business" but rather in course or private negotiations between two individual parties who have countervailing rights and liabilities established under common-law principles of contract, tort, and property law. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Misrepresentation by real estate broker.** — Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., incorporates the "reliance" element of the common law tort of misrepresentation into the 'causation' element of an FBPA claim; thus, a claim by purchasers against a real estate broker and sales associates for a violation of FBPA was barred for failure to show reasonable or justifiable reliance on the broker's representations. *Allen v. Remax N. Atlanta, Inc.*, 213 Ga. App. 644, 445 S.E.2d 774 (1994).

**Single misrepresentation by business in isolated sale.** — Single oral misrepresenta-

tion made by real estate business in context of isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Misrepresentation made to public or in connection with larger development.** — It is arguable that in order to trigger the applicability of this part, misrepresentation concerning a single parcel of real property must be made either in the context of a public medium addressed to the general public or, if not made "public," be made in context of an overall development of a larger tract of which an individual parcel is a part. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Landlord's failure to repair fuse box.** — Evidence that a landlord failed to repair a fuse box which malfunctioned in the tenant's trailer did not establish a prima facie cause of action under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Simpson v. Yonts*, 197 Ga. App. 311, 398 S.E.2d 407 (1990).

**Trademarks, Names**

**Use of existing trademark.** — Corporate poultry producer and marketer, by adopting and using the trademark GOLDEN MEDALLION on its frozen poultry products, infringed poultry cooperative's existing MEDALLION trademark and engaged in unfair competition and deceptive trade practices. *Gold Kist, Inc. v. ConAgra, Inc.*, 708 F. Supp. 1291 (N.D. Ga. 1989).

**Use of balloons, costumes, and names of comic book characters** by singing telegram company created confusion. *DC Comics Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984).

**OPINIONS OF THE ATTORNEY GENERAL**

**Fingerprinting of offenders.** — A violation of paragraph (b)(29) of O.C.G.A. § 10-1-393 is an offense for which those charged with a

violation are to be fingerprinted. 1996 Op. Att'y Gen. No. 96-17.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade

Practices, §§ 1168, 1169, 1178, 1182 et seq., 1190 et seq., 1216.

**Am. Jur. Trials.** — Misrepresentation in Automobile Sales, 13 Am. Jur. Trials 253.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 381 et seq.

**ALR.** — Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 ALR 784; 28 ALR 114.

Application of principles of unfair competition to artistic or literary property, 19 ALR 949.

Protection of business or trading corporation against use of same or similar name by another corporation, 66 ALR 948; 72 ALR3d 8.

Right of manufacturer to question reasonableness of regulation by individual or private corporation which excludes use of manufacturer's products, 81 ALR 1422.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 ALR 1241.

Unfair competition in use of geographical trade name by persons carrying on business elsewhere, 174 ALR 496.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156; 72 ALR3d 8.

Construction and effect of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 54 ALR2d 1187.

Criminal responsibility for fraud or false pretenses in connection with home repairs or installations, 99 ALR2d 925.

Commercial competitor's truthful denomination of his goods as copies of designs of another, using designer's name, as trademark infringement, unfair competition, or the like, 1 ALR3d 760.

Unfair competition by direct reproduction of literary, artistic, or musical property, 40 ALR3d 566.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 ALR3d 1008.

Right of state, public official, or governmental entity to seek, or power of court to allow, restitution of fruits of consumer fraud, without specific statutory authorization, 55 ALR3d 198.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

Trade dress simulation of cosmetic products as unfair competition, 86 ALR3d 505.

Unfair competition by imitation in sign or design of business place, 86 ALR3d 884.

Validity, construction, and application of state statute forbidding unfair trade practice or competition by discriminatory allowance of rebates, commissions, discounts, or the like, 41 ALR4th 675.

Private contests and lotteries: entrants' rights and remedies, 64 ALR4th 1021.

Right to private action under state consumer protection act — Preconditions to action, 117 ALR5th 155.

### **10-1-393.1. Office supply transactions; solicitations for telephone directory listings.**

(a) Unfair or deceptive acts or practices by an office supplier in the conduct of office supply transactions in trade or commerce are declared unlawful.

(b) By way of illustration only and without limiting the scope of subsection (a) of this Code section, the following practices by office suppliers in the conduct of office supply transactions are declared unlawful:

(1) Passing off goods or services as those of another;

(2) Falsely representing to any person that the office supplier is the usual supplier of goods, services, or property purchased by that person;

(3) Falsely representing to any person that the goods, services, or property sold, leased, rented, or shipped by the office supplier are the same brand as that person usually uses;

(4) Misrepresenting in any manner, including the use of a confusingly similar name, the manufacturer, supplier, or seller of the goods, services, or property;

(5) Representing that the prices an office supplier charges are less than a person usually pays for goods, services, or property, unless the goods, services, or property compared are identical and the representation is true;

(6) Shipping or supplying an amount or quantity of goods, services, or property to a person which is substantially greater than the amount or quantity which the person actually orders;

(7) Misrepresenting in any manner, including but not limited to failure to disclose material facts regarding the value of, any gift, prize, or award which will be given by an office supplier in conjunction with any office supply transaction;

(8) Falsely representing that there is an imminent price increase;

(9) Substituting any brand or quality of goods, services, or property for that actually ordered without prior approval of such substitution from the person ordering; or

(10)(A) Solicitation for inclusion in the listing of a telephone classified advertising directory unless such solicitation form has prominently printed therein at least one inch apart from any other text on the form and in type size and boldness equal to or greater than any other type size and boldness on the form the words:

“THIS IS NOT A BILL. THIS IS A SOLICITATION.”

(B) For the purposes of this paragraph, the term “telephone classified advertising directory” refers to any telephone classified advertising directory which is distributed to some or all telephone subscribers in any area of the state and includes such directories distributed by telephone service companies as well as such directories distributed by other parties.

(c) An office supplier may not by contract, agreement, or otherwise limit the operation of this part, notwithstanding any other provision of law. (Code 1981, § 10-1-393.1, enacted by Ga. L. 1986, p. 1046, § 2; Ga. L. 1995, p. 733, § 1.)

**Law reviews.** — For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

### 10-1-393.2. Requirements for health spas.

(a) Health spas shall comply with the provisions of this Code section.



(b) A written contract shall be employed which shall constitute the entire agreement between the parties, a fully completed copy of which shall be furnished to the consumer at the time of its execution and which shall show the date of the transaction and the name and address of the seller; provided, however, that no contract shall be valid which has a term in excess of 36 months. Contracts may be renewable at the end of each 36 month period of time at the option of both parties to the contract.

(c) The contract or an attachment thereto shall state clearly any rules and regulations of the seller which are applicable to the consumer's use of the facilities or receipt of its services.

(d) The contract shall state clearly on its face the cancellation and refund policies of the seller.

(e) The health spa member shall have the right to cancel the contract within seven business days after the date of the signing of the contract by notifying the seller in writing of such intent and by either mailing the notice before 12:00 Midnight of the seventh business day after the date of the signing of the contract or by hand delivering the notice of cancellation to the health spa before 12:00 Midnight of the seventh business day following the date of the signing of the contract. The notice must be accompanied by the contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to the buyer. If the health spa member so cancels, any payments made under the contract will be refunded and any evidence of indebtedness executed by the health spa member will be canceled by the seller, provided that the member shall be liable for the fair market value of services actually received, which in no event shall exceed \$100.00. The preparation of any documents shall not be construed to be services; provided, however, that any documents prepared which are merely ancillary to services which are actually rendered shall not prevent the health spa from charging for such services actually rendered up to the limits specified in this subsection. Each health spa contract shall contain the following paragraphs separated from all other paragraphs:

“You (the buyer) have seven business days to cancel this contract. To cancel, mail or hand deliver a letter to the following address:

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Name of health spa

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Address

---

City, State, ZIP Code

Do not sign this contract if there are any blank spaces above. In the event optional services are offered, be sure that any options you have not selected are lined through or that it is otherwise indicated that you have

not selected these options. It is recommended that you send your cancellation notice by registered or certified mail or statutory overnight delivery, return receipt requested, in order to prove that you did cancel. If you do hand deliver your cancellation, be sure to get a signed statement from an official of the spa acknowledging your cancellation.

To be effective, your cancellation must be postmarked by midnight, or hand delivered by midnight on \_\_\_\_\_ (date) \_\_\_\_\_, and must include all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to you.”

The health spa shall fill in the blank spaces in the above paragraph before the consumer signs the contract. In the event a consumer fails to provide with the cancellation notice all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered, the health spa shall either cancel the contract or provide written notice by certified mail or statutory overnight delivery to the consumer that such documents must be provided within 30 days in order for the cancellation to be effective. In the event that the consumer provides the documents within 30 days, the contract shall be canceled as of the date on which the cancellation notice was delivered; provided, however, that should the consumer continue to use the facilities or services during the 30 day period, the cancellation shall be effective on the first business day following the last day on which the consumer uses the facilities or services.

(f) In the event a health spa no longer offers a substantial service which was offered at the time of the initiation of the contract, or in the event a health spa which previously limited its membership to members of one sex should become coeducational or one which was previously coeducational should become limited to members of one sex, the member shall have 30 days from the time the member knew or should have known of the change to cancel the remainder of the membership and receive a refund. The refund shall be calculated by dividing the total cost of the membership by the total number of months under the membership and refunding the monthly cost for any months or fractions of months remaining under the membership. The contract shall contain a clause in at least ten-point boldface type which reads as follows:

“You (the buyer) may cancel this agreement within 30 days from the time you knew or should have known of any substantial change in the services or programs available at the time you joined. Substantial changes include, but are not limited to, changing from being coed to being exclusively for one sex and vice versa. To cancel, send written notice of your cancellation to the address provided in this contract for sending a notice of cancellation. The best way to cancel is by keeping a photocopy and sending the cancellation by registered or certified mail or statutory overnight delivery, return receipt requested.”

The provisions of this subsection shall not apply in any instance where a court has ordered that a change be made in the sexual character of the health spa. The administrator is authorized upon petition to issue a declaratory ruling under Code Section 50-13-11 as to whether any planned change in a health spa is a substantial change or whether alternate locations are substantially similar under this Code section. Such declaratory rulings shall be subject to review as under Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(g) Every contract for health spa services shall contain a clause providing that if the member becomes totally and permanently disabled during the membership term, he may cancel his contract and that the health spa is entitled to a reasonable predetermined fee in such event in addition to an amount equal to the value of services made available for use. This amount shall be computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months expired under the membership term. The health spa shall have the right to require and verify reasonable evidence of total and permanent disability. For purposes of this subsection, "total and permanent disability" means a condition which has existed or will exist for more than 45 days and which will prevent the member from using the facility to the same extent as the member used it before commencement of the condition.

(h) The health spa contract shall state that if a consumer has a history of heart disease, he should consult a physician before joining a spa.

(i) Every health spa contract shall comply with either paragraph (1) or paragraph (2) of this subsection:

(1)(A) The written contract used shall contain the following clause: "Under this contract, no further payments shall be due to anyone, including any purchaser of any note associated with or contained in this contract, in the event the health spa at which the contract is entered into ceases operation and fails to offer an alternate location, substantially similar, within ten miles."

(B) All payments due under the contract must be in equal monthly installments spread over the entire term of the contract.

(C) There can be no payments of any type, including, but not limited to, down payments, enrollment fees, membership fees, or any other direct payment to the health spa, other than the equal monthly installment payments.

(D) There can be no complimentary, compensatory, or other extensions of the term incident to the term of the contract, including but not limited to a promise of lifetime renewal for a minimal annual fee, provided that an agreement of both parties to extend the term of the contract to compensate for time during which the member could



not fully utilize the spa due to a temporary physical or medical condition arising after the member joined shall not be considered to bring the spa into noncompliance under this paragraph; or

(2)(A) The written contract used shall contain the following clause: "Under this contract, no further payments shall be due to anyone, including any purchaser of any note associated with or contained in this contract, in the event the health spa at which the contract is entered into ceases operation and fails to offer an alternate location, substantially similar, within ten miles."

(B) The written contract shall contain the following statement in boldface type which is larger and bolder than any other type which is in the contract and in at least 14 point boldface, which statement must be separately signed by the consumer:

"NOTICE

State law requires that we inform you that should you (the buyer) choose to pay for any part of this agreement in advance, be aware that you are paying for future services and may be risking loss of your money in the event this health spa ceases to conduct business. Health spas do not post a bond, and there may be no other protections provided to you should you choose to pay in advance."

(j) An alternate location for a health spa shall not be considered substantially similar if:

(1) The original facility was limited to use by members of one sex and the alternate facility is used by members of both sexes;

(2) The original facility was for use by members of both sexes and the alternate facility's use is limited to members of one sex; or

(3) The size, facilities, equipment, or services available to the member at the alternate location are not substantially equal to or do not exceed the size, facilities, equipment, or services available to the member at the health spa location at which the contract was entered into.

(k) Every contract for health spa services shall contain a clause providing that if the member dies during the membership term or any renewal term, his or her estate may cancel the contract and that the health spa is entitled to a reasonable predetermined fee in such event in addition to an amount computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months expired under the membership term. The contract may require the member's estate seeking relief under this subsection to provide reasonable proof of death.

(l)(1) A health spa shall not enter or offer to enter into a health spa agreement with a consumer unless the health spa is fully operational and available for use.

(2) For purposes of this subsection, “fully operational and available for use” means that all of the facilities, equipment, or services which are promised at the time of entering into the membership contract are operational and available for use at that time. Nothing contained in this subsection shall be construed to prohibit a health spa from selling a membership for existing services and facilities at a location under construction which can be converted at a later date to a membership for additional services and facilities, provided that:

(A) The additional services and facilities are fully operational and available for use at the time of the conversion;

(B) Additional consideration, other than just a nominal consideration, is required from the consumer under the terms of the conversion; and

(C) The member has until seven days following the date the additional consideration or a part of the additional consideration becomes due and owing to cancel the remainder of the contract and receive a refund computed by dividing the total cost of the membership by the total number of months under the membership and multiplying the result by the number of months remaining under the membership term.

(3) The provisions of this subsection shall not apply if all of the following conditions are met:

(A) The health spa has submitted forms prescribed by the administrator requiring, in addition to whatever other information the administrator may require, as much detail as to the size, facilities, equipment, or services to be provided as the administrator may require;

(B) The health spa has obtained the approval in writing of the administrator to sell memberships to a health spa before it is fully operational and available for use;

(C) The health spa has agreed in writing with the administrator, on forms prescribed by the administrator, to deposit all funds obtained by selling memberships before a health spa is fully operational and available for use in a single account in a bank or trust company domiciled in the State of Georgia. Such deposits are to be held in safekeeping for release only upon authorization of the administrator. The bank or trust company must be approved by the administrator. The administrator may consult with the commissioner of banking and finance or with any of the employees of the commissioner of banking and finance regarding whether the bank or trust company should be approved and may disapprove the bank or trust company if he has reason to believe any deposits into the account might not be secure;

(D) Each deposit to the single account established under this paragraph shall be identified by the name and address of the individual

who purchased the membership. The bank or trust company and the health spa shall maintain a list of the deposits, their amount, and the name and address of the membership purchaser, which list shall be available to the administrator or for inspection or copying by the administrator's employees upon request;

(E) The condition of the account established under this paragraph shall be that no funds shall be released from the account to any person unless the administrator has certified in writing to the bank or trust company that either the health spa is fully operational and available for use or that the health spa has not complied and does not appear likely to comply with its obligation to make the health spa fully operational and available for use in accordance with the documents submitted to the administrator or in accordance with representations made to membership purchasers. No action may be maintained in any court against the administrator or any of his employees for any determination or as a consequence of any determination made by the administrator under this subparagraph unless the administrator's determination was a willful and wanton abuse of discretion given the facts and circumstances actually provided to the administrator in making this determination;

(F) If the administrator certifies to the bank or trust company that the health spa is fully operational and available for use, then the funds in the account shall be released to the health spa, along with any accrued interest. If the administrator certifies to the bank or trust company that the health spa has not complied and does not appear likely to comply with its obligation to make the health spa fully operational and available for use, then the funds in the account shall be released to the administrator on behalf of the individuals who purchased memberships prior to the health spa's being fully operational and available for use. Any accrued interest on the account shall be paid on a pro rata basis to the membership purchasers;

(G) Any costs imposed by the bank or trust company for administering the account shall be borne by the health spa; and

(H) The member shall have until seven business days following the date upon which the health spa becomes fully operational and available for use to cancel the contract and receive a full refund of any payments and the cancellation of any evidence of indebtedness, provided that the member shall be liable for the fair market value of any services actually received, which in no event shall exceed \$50.00. The preparation of any documents shall not be construed to be services; provided, however, that all documents prepared which are merely ancillary to services which are actually rendered shall not prevent the health spa from charging for such services actually rendered up to the limits specified in this subparagraph.



(m) All moneys due the consumer under contracts canceled for the reasons contained in this Code section shall be refunded within 30 days of receipt of such notice of cancellation. The notice must be accompanied by the contract forms, membership cards, and any and all other documents and evidence of membership previously delivered to the buyer, except in the case of a deceased member. In the event a consumer fails to provide with the cancellation notice all contract forms, membership cards, and any and all other documents and evidence of membership previously delivered, the health spa shall either cancel the contract or provide written notice by certified mail or statutory overnight delivery to the consumer that such documents must be provided within 30 days in order for the cancellation to be effective. In the event that the consumer provides the documents within 30 days, the contract shall be canceled as of the date on which the cancellation notice was delivered; provided, however, that should the consumer continue to use the facilities or services during the 30 day period, the cancellation shall be effective on the first business day following the last day on which the consumer uses the facility or services.

(n) Any contract which does not comply with this Code section shall be void and unenforceable; no purchaser of any note associated with or contained in any health spa contract shall make any attempt to collect on the note or to report the buyer as delinquent to any consumer reporting or consumer credit reporting agency if there has been any violation by the health spa of subsections (b) through (m) or of subsection (o) of this Code section. Any attempt by any purchaser or by any agent of any purchaser to collect on the note or to report the buyer as delinquent as described in this subsection shall be considered an unfair and deceptive act or practice as provided in Code Section 10-1-393.

(o) After November 15, 1989, no health spa contract shall be valid or enforceable unless the health spa operator has on file a statement signed by the administrator or his designee certifying that a copy of the contract is on file with the administrator and is in compliance with this part. Health spas may begin submitting a copy of their contract for approval by the administrator on July 1, 1989, and shall submit all contract changes thereafter for approval prior to entering or offering to enter into that contract with a consumer. In addition to any action which may be taken by the administrator under this part, and in addition to any recovery of a consumer in the private action provided for under this part, any consumer who has entered into a contract which has not been approved by the administrator prior to the date of the contract shall be entitled to recover as an additional penalty an amount equal to any amount paid plus any amount claimed owing on the contract.

(p) In addition to any other penalties provided for in this part, any person who operates or aids or assists in the operation of a health spa in violation of any of the provisions of subsection (i) or (o) of this Code

section shall be guilty of a misdemeanor. Each day of operation of a health spa in violation of subsection (i) or (o) shall be considered a separate and distinct violation. In addition to any other penalties provided in this part, any person who violates subsection (l) of this Code section shall be guilty of a felony. Each sale of a membership in violation of subsection (l) of this Code section shall be considered a separate and distinct violation. Each failure to place properly all of the funds generated from a particular membership agreement into a properly approved and established trust account shall be considered a separate and distinct violation. (Code 1981, § 10-1-393.2, enacted by Ga. L. 1989, p. 1606, § 2; Ga. L. 1999, p. 81, § 10; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

### JUDICIAL DECISIONS

**Violation of section.** — Since it was apparent from the face of the health club contracts that the contracts did not comply with the requirements of O.C.G.A. § 10-1-393.2, summary judgment was properly granted to defendants. *Georgia Receivables, Inc. v. Te*, 240 Ga. App. 292, 523 S.E.2d 352 (1999).

**Contract was void and unenforceable for failing to comply with statute.** — If the required language was not set out in three separate paragraphs as the statute requires, the language in the contract regarding the buyer's rights was not separated from all other paragraphs as the statute requires, and the consumer was not given a specific date for the last date to cancel the contract,

resulted in the health spa membership contract being void and unenforceable. *Georgia Receivables, Inc. v. Welch*, 242 Ga. App. 146, 529 S.E.2d 164 (2000).

**Compliance with section required.** — In an action to collect payment under a health spa contract, grant of summary judgment to defendant based upon violations of O.C.G.A. § 10-1-393.2 was authorized even though defendant failed to raise the issue because any contract that does not comply with § 10-1-393.2 is void and unenforceable under subsection (n). *Georgia Receivables, Inc. v. Kirk*, 242 Ga. App. 801, 531 S.E.2d 393 (2000).

### RESEARCH REFERENCES

**ALR.** — Liability of proprietor of private health club for injury to patron, 79 ALR4th 127.

### 10-1-393.3. Prohibited use of purchaser's credit card information by merchant.

(a) As used in this Code section, the term "merchant" means any person who offers goods, wares, merchandise, or services for sale to the public and shall include an employee of a merchant.

(b) A merchant shall be prohibited from requiring a purchaser to provide the purchaser's personal or business telephone number as a

condition of purchase when payment for the transaction is made by credit card.

(c) A merchant shall be prohibited from using a purchaser's credit card to imprint the information contained on the credit card on the face or back of a check or draft from the purchaser as a condition of acceptance of such check or draft as payment for a purchase.

(d) A merchant shall be prohibited from recording in any manner the number of a purchaser's credit card as a condition of acceptance of a check or draft of the purchaser as payment for a purchase.

(e) Any merchant who violates the provisions of this Code section shall be subject to the penalties provided in this part.

(f) This Code section shall not prohibit a merchant from:

(1) Recording a credit card number and expiration date as a condition to cashing or accepting a check where the merchant has agreed with the credit card issuer to cash or accept such checks as a service to the issuer's cardholders and the issuer has agreed with the merchant to guarantee payment of all cardholder checks cashed or accepted by the merchant;

(2) Requesting a purchaser to display a credit or charge card as a means of identification or as an indication of credit worthiness or financial responsibility;

(3) Recording on the check or elsewhere the type of credit or charge card displayed for the purposes of paragraph (2) of this subsection and the credit or charge card expiration date; or

(4) Recording the address or telephone number of a credit cardholder if the information is necessary for the shipping, delivery, or installation of consumer goods or for special orders of consumer goods or services.

(g) This Code section shall not require acceptance of a check or draft because a credit card is presented. (Code 1981, § 10-1-393.3, enacted by Ga. L. 1991, p. 1101, § 1; Ga. L. 1992, p. 6, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, in subsection (f), a semicolon was substituted for the period at the end of paragraph (1) and a comma was deleted following "identification" in paragraph (2).

**Law reviews.** — For note on 1991 enactment of this Code section, see 8 Ga. St. U.L. Rev. 7 (1992).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

#### 10-1-393.4. Prohibited pricing practices during state of emergency.

(a) It shall be an unlawful, unfair, and deceptive trade practice for any person, firm, or corporation doing business in any area in which a state of emergency, as such term is defined in Code Section 38-3-3, has been



declared, for as long as such state of emergency exists, to sell or offer for sale at retail any goods or services necessary to preserve, protect, or sustain the life, health, or safety of persons or their property at a price higher than the price at which such goods were sold or offered for sale immediately prior to the declaration of a state of emergency; provided, however, that such price may be increased only in an amount which accurately reflects an increase in cost of the goods or services to the person selling the goods or services or an increase in the cost of transporting the goods or services into the area.

(b) Notwithstanding the provisions of subsection (a) of this Code section, a retailer or installer of lumber, plywood, and other lumber products may increase the price of such products as may be necessary to replenish his or her existing daily stock at current market rates, maintaining the same markup percentage he or she applied prior to the state of emergency. (Code 1981, § 10-1-393.4, enacted by Ga. L. 1995, p. 1362, § 1.)

#### **10-1-393.5. Prohibited telemarketing, Internet activities, or home repair.**

(a) For purposes of this Code section, the term “telemarketing” shall have the same meaning which it has under 16 Code of Federal Regulations Part 310, the Telemarketing Sales Rule of the Federal Trade Commission, except that the term “telemarketing” shall also include those calls made in intrastate as well as interstate commerce.

(b) Without otherwise limiting the definition of unfair and deceptive acts or practices under this part, it shall be unlawful for any person who is engaged in telemarketing, any person who is engaged in any activity involving or using a computer or computer network, or any person who is engaged in home repair work or home improvement work to:

(1) Employ any device, scheme, or artifice to defraud a person, organization, or entity;

(2) Engage in any act, practice, or course of business that operates or would operate as a fraud or deceit upon a person, organization, or entity; or

(3) Commit any offense involving theft under Code Sections 16-8-2 through 16-8-9.

(c) In addition to any civil penalties under this part, any person who intentionally violates subsection (b) of this Code section shall be subject to a criminal penalty under paragraph (5) of subsection (a) of Code Section 16-8-12. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty

if the person did not have prior actual knowledge of the acts violating subsection (b) of this Code section.

(d) Any person who intentionally targets an elder or disabled person, as defined in Article 31 of this chapter, in a violation of subsection (b) of this Code section shall be subject to an additional civil penalty, as provided in Code Section 10-1-851.

(e) Persons employed full time or part time for the purpose of conducting potentially criminal investigations under this article shall be certified peace officers and shall have all the powers of a certified peace officer of this state when engaged in the enforcement of this article, including but not limited to the power to obtain, serve, and execute search warrants. Such Georgia certified peace officers shall be subject to the requirements of Chapter 8 of Title 35, the “Georgia Peace Officer Standards and Training Act,” and are specifically required to complete the training required for peace officers by that chapter. Such certified peace officers shall be authorized, upon completion of the required training, with the written approval of the administrator, and notwithstanding Code Sections 16-11-126, 16-11-128, and 16-11-129, to carry firearms of a standard police issue when engaged in detecting, investigating, or preventing crimes under this article.

(f) The administrator shall be authorized to promulgate procedural rules relating to his or her enforcement duties under this Code section. (Code 1981, § 10-1-393.5, enacted by Ga. L. 1996, p. 231, § 1; Ga. L. 1997, p. 1507, § 2; Ga. L. 2004, p. 631, § 10.)

**Cross references.** — Deceptive, fraudulent, or abusive telemarketing, § 10-5B-1 et seq.

**Law reviews.** — For article, “Problems Arising Out of the Use of ‘www.Trademark.Com’: The Application of Principles of Trademark Law to Internet Domain Name Disputes,” see 13 Ga. St. U.L. Rev. 455 (1997). For article commenting on

the 1997 amendment of this Code section, see 14 Georgia St. U. L. Rev. 29 (1997).

For note, “Tilting at Windmills: Defamation and the Private Person in Cyberspace,” see 13 Ga. St. U.L. Rev. 547 (1997).

For review of 1996 commerce and trade legislation, see 13 Ga. St. U.L. Rev. 33 (1996).

#### RESEARCH REFERENCES

**ALR.** — Validity of state statutes and administrative regulations regulating internet communications under commerce clause

and First Amendment of federal constitution, 98 ALR5th 167.

#### 10-1-393.6. Unlawful telemarketing transactions; criminal penalty.

(a) For purposes of this Code section, the term “telemarketing” shall have the same meaning which it has under Code Section 10-1-393.5.

(b) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part and without limiting any other Code section under this part, it shall be unlawful for any person to:

(1) In connection with a telemarketing transaction, request a fee in advance to remove derogatory information from or improve a person's credit history or credit record;

(2) Request or receive payment in advance from a person to recover, or otherwise aid in the return of, money or any other item lost by the consumer in a prior telemarketing transaction; provided, however, that this paragraph shall not apply to goods or services provided to a person by a licensed attorney; or

(3) In connection with a telemarketing transaction, procure the services of any professional delivery, courier, or other pickup service to obtain immediate receipt or possession of a consumer's payment, unless the goods are delivered with the opportunity to inspect before any payment is collected.

(c) In addition to any civil penalties under this part, any person who intentionally violates subsection (b) of this Code section shall be subject to a criminal penalty under paragraph (5) of subsection (a) of Code Section 16-8-12. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have prior actual knowledge of the acts violating subsection (b) of this Code section. (Code 1981, § 10-1-393.6, enacted by Ga. L. 1998, p. 643, § 2; Ga. L. 2004, p. 631, § 10.)

**Cross references.** — Deceptive, fraudulent, or abusive telemarketing, § 10-5B-1 et seq.

**Editor's notes.** — Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that this Code section shall apply to

acts and offenses committed on or after July 1, 1998.

**Law reviews.** — For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U. L. Rev. 9 (1998).

### 10-1-393.7. Solicitation during final illness; penalty.

(a) Without otherwise limiting the definition of unfair or deceptive acts or practices under this part, it shall be unlawful for any person to solicit another during such other's final illness or during the final illness of any other person for the purpose of persuading a person who is suffering from his or her final illness or a person acting on behalf of such person to seek refund of moneys paid for an existing preneed contract for burial services or merchandise or funeral services or merchandise.



(b) In addition to any other penalty imposed for the violation of this Code section, the administrative agency which issues a finding of violation shall order the violator to pay restitution in the amount of the refund to the person, corporation, partnership, or other legal entity which refunded moneys paid for an existing preneed contract for burial services or merchandise or funeral services or merchandise. (Code 1981, § 10-1-393.7, enacted by Ga. L. 2000, p. 882, § 2.)

**Cross references.** — Georgia Cemetery and Funeral Services Act of 2000, § 10-14-1 et seq.

#### **10-1-393.8. Protection from disclosure of an individual's social security number.**

(a) Except as otherwise provided in this Code section, a person, firm, or corporation shall not:

(1) Publicly post or publicly display in any manner an individual's social security number. As used in this Code section, "publicly post" or "publicly display" means to intentionally communicate or otherwise make available to the general public;

(2) Require an individual to transmit his or her social security number over the Internet, unless the connection is secure or the social security number is encrypted; or

(3) Require an individual to use his or her social security number to access an Internet website, unless a password or unique personal identification number or other authentication device is also required to access the Internet website.

(b) This Code section shall not apply to:

(1) The collection, release, or use of an individual's social security number as required by state or federal law;

(2) The inclusion of an individual's social security number in an application, form, or document sent by mail, electronically transmitted, or transmitted by facsimile:

(A) As part of an application or enrollment process;

(B) To establish, amend, or terminate an account, contract, or policy; or

(C) To confirm the accuracy of the individual's social security number;

(3) The use of an individual's social security number for internal verification or administrative purposes; or

(4) An interactive computer service provider's or a telecommunications provider's transmission or routing of, or intermediate temporary storage or caching of, an individual's social security number.

(c) This Code section shall not impose a duty on an interactive computer service provider or a telecommunications provider actively to monitor its service or to affirmatively seek evidence of the transmission of social security numbers on its service.

(d) Notwithstanding the provisions of this Code section, the clerks of superior court of this state and the Georgia Superior Court Clerks' Cooperative Authority shall be held harmless for filing, publicly posting, or publicly displaying any document containing an individual's social security number that the clerk is otherwise required by law to file, publicly post, or publicly display for public inspection. (Code 1981, § 10-1-393.8, enacted by Ga. L. 2006, p. 486, § 1/SB 588.)

**10-1-393.9. Registration of private child support collectors; surety bond or alternative.**

(a) Private child support collectors shall register with the Secretary of State and shall provide information as requested by the Secretary of State, including, but not limited to, the name of the private child support collector, the office address and telephone number for such entity, and the registered agent in this state on whom service of process is to be made in a proceeding against such private child support collector.

(b) An application for registration shall be accompanied by a surety bond filed, held, and approved by the Secretary of State, and the surety bond shall be:

- (1) Issued by a surety authorized to do business in this state;
- (2) In the amount of \$50,000.00;
- (3) In favor of the state for the benefit of a person damaged by a violation of this Code section; and
- (4) Conditioned on the private child support collector's compliance with this Code section and Code Section 10-1-393.10 and the faithful performance of the obligations under the private child support collector's agreements with its clients.

(c) In lieu of a surety bond, the Secretary of State may accept a deposit of money in the amount of \$50,000.00. The Secretary of State shall deposit any amounts received under this subsection in an insured depository account designated for that purpose. (Code 1981, § 10-1-393.9, enacted by Ga. L. 2009, p. 1001, § 3/HB 189.)

**Effective date.** — This Code section became effective July 1, 2009. See the Editor's note for applicability.

**Editor's notes.** — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly,

provides, in part, that this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

**10-1-393.10. Filing of contracts for collection; requirements for contracts; role of collector; cancellation of contract; forwarding of payments.**

(a) Any contract for the collection of child support between a private child support collector and an obligee shall be filed by the private child support collector with the Governor's Office of Consumer Affairs.

(b) Any contract for the collection of child support between a private child support collector and an obligee shall be in writing, in at least ten-point type, and signed by such private child support collector and obligee. The contract shall include:

- (1) An explanation of the nature of the services to be provided;
- (2) An explanation of the amount to be collected from the obligor by the private child support collector and a statement of a sum certain of the total amount that is to be collected by the private child support collector that has been engaged by the obligee;
- (3) An explanation in dollar figures of the maximum amount of fees which could be collected under the contract and an example of how fees are calculated and deducted;
- (4) A statement that fees shall only be charged for collecting past due child support, although the contract may include provisions to collect current and past due child support;
- (5) A statement that a private child support collector shall not retain fees from collections that are primarily attributable to the actions of the department and that a private child support collector shall be required by law to refund any fees improperly retained;
- (6) An explanation of the opportunities available to the obligee or private child support collector to cancel the contract or other conditions under which the contract terminates;
- (7) The mailing address, telephone numbers, facsimile numbers, and e-mail address of the private child support collector;
- (8) A statement that the private child support collector shall only collect money owed to the obligee and not child support assigned to the State of Georgia;
- (9) A statement that the private child support collector is not a governmental entity and that the department provides child support enforcement services at little or no cost to the obligee; and



(10) A statement that the obligee may continue to use or pursue services through the department to collect child support.

(c) A private child support collector shall not:

(1) Improperly retain fees from collections that are primarily attributable to the actions of the department. If the department or an obligee notifies a private child support collector of such improper fee retention, such private child support collector shall refund such fees to the obligee within seven business days of the notification of the improper retention of fees and shall not be liable for such improper fee retention. A private child support collector may require documentation that the collection was primarily attributable to the actions of the department prior to issuing any refund;

(2) Charge fees in excess of one-third of the total amount of child support payments collected;

(3) Solicit obligees using marketing materials, advertisements, or representations reasonably calculated to create a false impression or mislead an obligee into believing the private child support collector is affiliated with the department or any other governmental entity;

(4) Use or threaten to use violence or other criminal means to cause harm to an obligor or the property of the obligor;

(5) Falsely accuse or threaten to falsely accuse an obligor of a violation of state or federal laws;

(6) Take or threaten to take an enforcement action against an obligor that is not authorized by law;

(7) Represent to an obligor that the private child support collector is affiliated with the department or any other governmental entity authorized to enforce child support obligations or fail to include in any written correspondence to an obligor the statement that "This communication is from a private child support collector. The purpose of this communication is to collect a child support debt. Any information obtained will be used for that purpose.";

(8) Communicate to an obligor's employer, or his or her agent, any information relating to an obligor's indebtedness other than through proper legal action, process, or proceeding;

(9) Communicate with an obligor whenever it appears the obligor is represented by an attorney and the attorney's name and address are known, or could be easily ascertained, unless the attorney fails to answer correspondences, return telephone calls, or discuss the obligation in question, or unless the attorney and the obligor consent to direct communication;

(10) Contract with an obligee who is owed less than three months of child support arrearages; or

(11) Contract with an obligee for a sum certain to be collected which is greater than the total sum of arrearages and the statutory interest owed as of the date of execution of the contract.

(d) In addition to any other cancellation or termination provisions provided in the contract between a private child support collector and an obligee, the contract shall be cancelled or terminate if:

(1) The obligee requests cancellation in writing within 30 days of signing the contract;

(2) The obligee requests cancellation in writing after any 12 consecutive months in which the private child support collector fails to make a collection;

(3) The private child support collector breaches any term of the contract or violates any provision contained within this Code section; or

(4) The amount to be collected pursuant to the contract has been collected.

(e) When it reasonably appears to the administrator that a private child support collector has contracted with obligees on or after July 1, 2009, using a contract that is not in compliance with this Code section, the administrator may demand pursuant to Code Section 10-1-403 that such private child support collector produce a true and accurate copy of each such contract. If such private child support collector fails to comply or the contracts are determined by the administrator to not be compliant with the provisions of this Code section, the administrator may utilize any of the powers vested in this part to ensure compliance.

(f) Upon the request of an obligee, the Child Support Enforcement Agency of the department shall forward child support payments made payable to the obligee to any private child support collector that is in compliance with the provisions of this Code section and Code Section 10-1-393.9.

(g) The remedies provided in this part shall be cumulative and shall be in addition to any other procedures, rights, or remedies available under any other law.

(h) Any waiver of the rights, requirements, and remedies provided by this Code section that are contained in a contract between a private child support collector and an obligee violates public policy and shall be void. (Code 1981, § 10-1-393.10, enacted by Ga. L. 2009, p. 1001, § 3/HB 189.)

**Effective date.** — This Code section became effective July 1, 2009. See the Editor's note for applicability.

**Editor's notes.** — Ga. L. 2009, p. 1001, § 6, not codified by the General Assembly,

provides, in part, that this Code section shall be applicable to all contracts for private collection of child support payments entered into on or after July 1, 2009.

### **10-1-394. Adoption of federal rules prohibiting unfair or deceptive practices; application of Chapter 13 of Title 50.**

(a) The administrator is authorized to adopt as substantive rules that prohibit specific acts or practices in violation of Code Section 10-1-393 those rules and regulations of the Federal Trade Commission interpreting Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. Section 45(a)(1)), as from time to time amended.

(b) Such rules shall be promulgated only when it is determined by the administrator, in the reasonable exercise of his discretion, on the basis of his expertise and facts, submissions, evidence, and all information before him, that such rules are needed to prohibit or control acts or practices which create the probability of actual and substantial injury to consumers. No rule shall be promulgated where it is reasonably certain that the burden of complying with the rule will outweigh the public interest in prohibiting or controlling the practice which would be so prohibited or controlled. No such rule so promulgated shall be arbitrary or capricious nor shall its promulgation be characterized by an abuse of discretion or an unwarranted exercise of discretion.

(c) Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," shall apply to the promulgation of rules and regulations by the administrator pursuant to subsection (a) of this Code section and in taking testimony pursuant to Code Sections 10-1-403 and 10-1-404.

(d) The Consumer Advisory Board shall be authorized to ratify or veto rules promulgated by the administrator at its next regular meeting after the rules are promulgated by the administrator under the provisions of Chapter 13 of Title 50. (Ga. L. 1975, p. 376, § 4.)

**Law reviews.** — For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

### **JUDICIAL DECISIONS**

**Federal Trade Commission Act standards applicable.** — Federal Trade Commission Act, 15 U.S.C. § 45, is expressly made the appropriate standard by which the purpose and intent of this part is to be effectuated,

implemented, and construed. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Cited in** *Bennett v. D.L. Claborn Buick, Inc.*, 202 Ga. App. 308, 414 S.E.2d 12 (1991).



**10-1-395. Appointment and duties of administrator; Consumer Advisory Board; relations with other regulatory agencies.**

(a) The administrator shall be appointed by the Governor and shall serve at his pleasure. The office of the administrator shall be attached to the office of the Governor for administrative purposes only. The administrator shall perform all functions formerly performed by the Consumer Services Unit of the Division of Special Programs of the Department of Human Resources (now known as the Department of Human Services).

(b)(1) A Consumer Advisory Board is created whose duty it shall be to advise and make recommendations to the administrator. The board shall consist of 15 members with the administrator or his designee to serve as the ex officio member. The members of this board shall be appointed by the Governor; however, the Attorney General shall not be an appointee. One member shall be appointed from each congressional district and the remaining members shall be appointed from the state at large. At least four members shall be attorneys representing consumers' interests and two of these consumers' attorneys shall represent Georgia Indigent Legal Services or any other legal aid society. At least four members shall be representatives of the business community, two of which are recommended by the Georgia Retail Association and two recommended for appointment by the Business Council of Georgia, Inc.

(2)(A) On and after July 1, 1983, the Consumer Advisory Board shall consist of 15 members who shall be appointed by the Governor as provided in this paragraph. The initial terms of those members other than the ex officio member shall be as follows: five members shall be appointed to serve for a term ending July 1, 1984; five members shall be appointed to serve for a term ending July 1, 1985; and five members shall be appointed for a term ending July 1, 1986. Thereafter, all members appointed to the board by the Governor shall be appointed for terms of three years and until their successors are appointed and qualified. In the event of a vacancy during the term of any member by reason of death, resignation, or otherwise, the appointment of a successor by the Governor shall be for the remainder of the unexpired term of such member.

(B) The first members appointed under this paragraph shall be appointed for terms which begin July 1, 1983. The members of the Consumer Advisory Board serving on April 1, 1983, shall remain in office until June 30, 1983, and until their successors are appointed.

(3) The board shall elect its chairman and shall meet not less than once every four calendar months at a time and place specified in writing by the administrator. The board may also meet from time to time upon its own motion as deemed necessary by a majority of the members thereof for the purpose of conducting routine or special business. Each member

of the board shall serve without pay but shall receive standard state per diem for expenses and receive standard travel allowance while attending meetings and while in the discharge of his responsibilities.

(4) The board shall assist the administrator in an advisory capacity in carrying out the duties and functions of the office concerning:

(A) Policy matters relating to consumer interests; and

(B) The effectiveness of the state consumer programs and operations.

(5) The board shall make recommendations concerning:

(A) The improvement of state consumer programs and operations;

(B) The elimination of duplication of effort;

(C) The coordination of state consumer programs and operations with other local and private programs related to consumer interests;

(D) Legislation needed in the area of consumer protection; and

(E) Avoidance of unnecessary burdens on business, if any, resulting from the administration of this part.

(6) The board shall make a written report to the Governor not less frequently than at the end of each calendar year on its activities and the administration of this part, with such recommendations for changes, if any, as the board deems proper.

(c) The administrator shall receive all complaints under this part. He shall refer all complaints or inquiries concerning conduct specifically approved or prohibited by the Department of Agriculture, Commissioner of Insurance, Public Service Commission, Department of Natural Resources, Department of Banking and Finance, or other appropriate agency or official of this state to that agency or official for initial investigation and corrective action other than litigation.

(d) Any official of this state receiving a complaint or inquiry as provided in subsection (c) of this Code section shall advise the administrator of his action with respect to the complaint or inquiry.

(e) All officials and agencies of this state having responsibility under this part are authorized and directed to consult and assist one another in maintaining compliance with this part.

(f) In the event a person holding a professional license as defined in Chapter 4 of Title 26 or in Title 43 shall be determined by the administrator to be operating a business or profession intentionally, persistently, and notoriously in a manner contrary to this part, the Secretary of State, at the instruction of the administrator, shall begin proceedings to revoke such professional license.

(g) The administrator shall not be authorized to exercise any powers granted in this part against a person regulated by an agency or department listed in subsection (c), subsection (d), or subsection (e) of this Code section with regard to conduct specifically approved or prohibited by such agency or department if such agency or department certifies to the administrator that the exercise of such powers would not be in the public interest.

(h) On December 31 of each year the administrator shall make a written report to the Governor summarizing the types and numbers of complaints received and the dispositions concerning these complaints by his office.

(i) Nothing contained in this part shall be construed as repealing, limiting, or otherwise affecting the existing powers of the various regulatory agencies of the State of Georgia except that all agencies of this state, in making determinations as to whether actions or proposed actions of persons subject to their jurisdiction and control are in the public interest, shall consider the situation in the light of the policies expressed by this part. (Ga. L. 1975, p. 376, § 5; Ga. L. 1983, p. 743, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1986, p. 855, § 2; Ga. L. 1987, p. 3, § 10; Ga. L. 1988, p. 426, § 1; Ga. L. 2009, p. 453, § 2-6/HB 228.)

**The 2009 amendment,** effective July 1, 2009, added “(now known as the Department of Human Services)” at the end of the last sentence in subsection (a).

**Cross references.** — Consumers’ insurance advocate, Ch. 57, T. 33.

**Law reviews.** — For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Cited** in State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15 (1978).

## OPINIONS OF THE ATTORNEY GENERAL

**Administrator may authorize delegate to receive documentary materials.** — The administrator does not have to be present and personally receive documentary materials required of persons pursuant to this part; the administrator, on the contrary, may authorize a delegate to perform this function for the administrator. 1975 Op. Att’y Gen. No. 75-134.

**Not all complaints need be referred to other agencies.** — Pursuant to subsection (c)

of Ga. L. 1975, p. 376, § 5 (see O.C.G.A. § 10-1-393), the administrator is required to refer to the Board of Registration of Used Car Dealers all complaints concerning conduct specifically approved or prohibited by the board, but those matters involving conduct not specifically approved or prohibited by the Used Car Dealers’ Registration Act, § 43-47-1 et seq., or the rules and regulations of the board, need not be referred to the board. 1978 Op. Att’y Gen. No. 78-79.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1152.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 342 et seq., 391, 392.

**10-1-396. Acts exempt from part.**

Nothing in this part shall apply to:

(1) Actions or transactions specifically authorized under laws administered by or rules and regulations promulgated by any regulatory agency of this state or the United States;

(2) Acts done by the publisher, owner, agent, or employee of a newspaper, periodical, or radio or television station in the publication or dissemination of an advertisement of or for another person, when the publisher, owner, agent, or employee did not have knowledge of the false, misleading, or deceptive character of the advertisement, did not prepare the advertisement, or did not have a direct financial interest in the sale or distribution of the advertised product or service. (Ga. L. 1975, p. 376, § 6.)

## JUDICIAL DECISIONS

**Insurance transactions** are among those types of transactions which are exempt from the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *Ferguson v. United Ins. Co. of Am.*, 163 Ga. App. 282, 293 S.E.2d 736 (1982).

**Trades by brokerage firms and brokers.** — The Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., does not apply to an investor's claims against brokerage firms and a broker for allegedly unauthorized trades; the alleged wrongful transactions that provide the basis for the action entail conduct that is "specifically authorized and regulated" by the Securities and Commodity Exchange Acts. *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983).

**Area of finance charges, disclosure, and truth in lending** falls outside the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., except where expressly covered. *Chancellor v. Gateway Lincoln-Mercury, Inc.*, 233 Ga. App. 38, 502 S.E.2d 799 (1998).

**Publisher of advertising periodical.** — Publisher of telephone "yellow pages" was exempt from a claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq.,

because the allegedly improper acts were committed in the course of the publisher's business as the publisher of an advertising periodical. *Robin v. BellSouth Adv. & Publishing Co.*, 221 Ga. App. 360, 471 S.E.2d 294 (1996).

**Regulation under another act.** — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., alleging that the lender deceptively and without the consumer's knowledge inflated the amount of the consumer's income on the loan application, causing the loan to be underwritten in a far greater amount and in turn making the loan payments much larger than the consumer could afford, while "settlement services" under the Real Estate Settlement Procedures Act (RESPA), 12 U.S.C. § 2602, included taking of loan applications, loan processing, and the underwriting and funding of loans, the lender failed to show that the alleged conduct was regulated by RESPA such that, under O.C.G.A. § 10-1-396(a), the Georgia Fair Business Practices Act would not apply.

Kitchen v. Ameriquest Mortg. Co., F.  
Supp. 2d , 2005 U.S. Dist. LEXIS 43937  
(N.D. Ga. Apr. 29, 2005).

**10-1-397. Authority of administrator to issue cease and desist order or impose civil penalty; judicial relief; receivers.**

(a) Whenever it may appear to the administrator that any person is using, has used, or is about to use any method, act, or practice declared by Code Section 10-1-393, 10-1-393.1, 10-1-393.2, 10-1-393.3, 10-1-393.4, 10-1-393.5, or 10-1-393.6 or by regulations made under Code Section 10-1-394 to be unlawful and that proceedings would be in the public interest, whether or not any person has actually been misled, he or she may:

(1) Subject to notice and opportunity for hearing in accordance with Code Section 10-1-398, unless the right to notice is waived by the person against whom the sanction is imposed, take any or all of the following actions:

(A) Issue a cease and desist order prohibiting any unfair or deceptive act or practice against any person; or

(B) Issue an order against a person who willfully violates this part, imposing a civil penalty up to a maximum of \$2,000.00 per violation; or

(2) Without regard as to whether the administrator has issued any orders under this Code section, upon a showing by the administrator in any superior court of competent jurisdiction that a person has violated or is about to violate this part, a rule promulgated under this part, or an order of the administrator, the court may enter or grant any or all of the following relief:

(A) A temporary restraining order or temporary or permanent injunction;

(B) A civil penalty up to a maximum of \$5,000.00 per violation of this part;

(C) A declaratory judgment;

(D) Restitution to any person or persons adversely affected by a defendant's actions in violation of this part;

(E) The appointment of a receiver, auditor, or conservator for the defendant or the defendant's assets; or

(F) Other relief as the court deems just and equitable.

(b) Unless the administrator determines that a person subject to this part designs quickly to depart from this state or to remove his property therefrom or to conceal himself or his property therein or that there is immediate danger of harm to citizens of this state or of another state, he

shall, unless he seeks a temporary restraining order to redress or prevent an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, before initiating any proceedings as provided in this Code section, give notice in writing that such proceedings are contemplated and allow such person a reasonable opportunity to appear before the administrator and execute an assurance of voluntary compliance as provided in this part. The determination of the administrator under this subsection shall be final and not subject to judicial review.

(c) With the exception of consent judgments entered before any testimony is taken, a final judgment under this Code section is admissible as prima-facie evidence of such specific findings of fact as may be made by the court which enters the judgment in subsequent proceedings by or against the same person or his successors or assigns.

(d) When a receiver is appointed by the court pursuant to this part, he shall have the power to sue for, collect, receive, and take into his possession all the goods and chattels, rights and credits, moneys and effects, lands and tenements, books, records, documents, papers, choses in action, bills, notes, and property of every description derived by means of any practice declared to be illegal and prohibited by this part, including property with which such property has been mingled if it cannot be identified in kind because of such commingling, and to sell, convey, and assign the same and hold and dispose of the proceeds thereof under the direction of the court. In the case of a partnership or business entity, the receiver may, in the discretion of the court, be authorized to dissolve the business and distribute the assets under the direction of the court. The court shall have jurisdiction of all questions arising in such proceedings and may make such orders and judgments therein as may be required.

(e)(1) Whenever the administrator issues a cease and desist order to any person regarding the use of a telephone number which when called automatically imposes a per-call charge or other costs to the consumer, other than a regular charge imposed for long distance service, including but not limited to a telephone number in which the local prefix is 976 or in which the long distance prefix is 900, the administrator may certify to the appropriate local or long distance carrier responsible for billing consumers for the charges that billing for the charges or for certain of the charges should be suspended. The carrier shall then suspend such billing with reasonable promptness to preserve the assets of consumers in accordance with the certification, without incurring any liability to any person for doing so. For the purposes of this Code section, "reasonable promptness to preserve the assets of consumers" shall mean to act as quickly as the carrier would act to preserve its own assets, provided that the carrier cannot be required to make any changes to its existing systems, technologies, or methods used for billing, other than any minimal procedural changes necessary to actually suspend the billing.



The carrier shall not be made a party to any proceedings under this part for complying with this requirement but shall have a right to be heard as a third party in any such proceedings.

(2) The suspension of billing under this subsection shall remain in effect until the administrator certifies to the carrier that the matter has been resolved. The administrator shall certify to the carrier with reasonable promptness when the matter has been resolved. In this certification the administrator shall advise the carrier to collect none of, all of, or any designated part of the billings in accordance with the documents or orders which resolved the matter. The carrier shall collect or not collect the billings in the manner so designated and shall not incur any liability to any person for doing so.

(3) Nothing contained in this subsection shall limit or restrict the right of the carrier to place its own restrictions, guidelines, or criteria, by whatever name denominated, upon the use of such telephone service, provided such restrictions, guidelines, or criteria do not conflict with the provisions of this subsection. (Ga. L. 1975, p. 376, §§ 7, 8; Ga. L. 1986, p. 1046, § 3; Ga. L. 1988, p. 983, § 2; Ga. L. 1988, p. 1659, § 1; Ga. L. 1991, p. 1101, § 2; Ga. L. 1991, p. 1346, § 1; Ga. L. 1995, p. 1362, § 2; Ga. L. 2000, p. 136, § 10; Ga. L. 2001, p. 1245, § 2.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, “willfully” was substituted for “wilfully” in subparagraph (a)(1)(B).

**Law reviews.** — For note on 1991 amend-

ment of this Code section, see 8 Ga. St. U.L. Rev. 1 (1992).

For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

**Opportunity must be given to execute assurance of voluntary compliance.** — The administrator under this section must provide an opportunity to execute an assurance of voluntary compliance. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff’d sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978).

**Administrator may reject assurance.** — Administrator may reject an assurance the administrator deems, in the exercise of the administrator’s discretion, to be inadequate. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff’d sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978).

## OPINIONS OF THE ATTORNEY GENERAL

**Investigative demand, notice of contemplated civil action, combinable.** — Whenever the administrator has reason to believe that any person has violated or is about to violate any provision of this part or any regulations promulgated thereunder, it would be proper

for the administrator to issue an investigative demand and notice of contemplated civil action simultaneously under this part and such may be included in one document. 1975 Op. Att’y Gen. No. 75-91.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1127.      **C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 391, 392.

**10-1-397.1. Initiation or intervention by administrator.**

The administrator is authorized to initiate or intervene as a matter of right or otherwise appear in any federal court or administrative agency to implement the provisions of this article. (Code 1981, § 10-1-397.1, enacted by Ga. L. 2001, p. 1245, § 3.)

**10-1-398. Stay of cease and desist order; hearing.**

(a) Any person receiving a cease and desist order from the administrator, and who demonstrates in any superior court of competent jurisdiction, after petition to the court and notice to the administrator, that such order will unlawfully cause him irreparable harm, shall receive a temporary stay of the order pending the court's review of that order. Such temporary stay shall not exceed 30 days, during which time the court will review the order to determine if an interlocutory stay will be issued pending a final judicial determination of the issues.

(b) Where the administrator has issued any order prohibiting any unfair or deceptive act or practice, he shall promptly send by certified or registered mail or statutory overnight delivery or by personal service to the person or persons so prohibited a notice of opportunity for hearing. Hearings shall be conducted pursuant to this Code section by the administrator. Such notice shall state:

- (1) The order which has issued and which is proposed to be issued;
- (2) The ground for issuing such order and proposed order;
- (3) That the person to whom such notice is sent will be afforded a hearing upon request if such request is made within ten days after receipt of the notice; and
- (4) That the person to whom such notice is sent may obtain a temporary stay of the order upon a showing of irreparable harm in any superior court of competent jurisdiction.

(c) Whenever a person requests a hearing in accordance with this Code section, there shall promptly be set a date, time, and place for such hearing and the person requesting such hearing shall be notified thereof. The date set for such hearings shall be within 15 days, but not earlier than five days after the request for hearing has been made, unless otherwise agreed to by the administrator and the person requesting the hearing.

(d) In the case of any hearing conducted under this Code section, the administrator may conduct the hearing or he may appoint a referee to conduct the hearing who shall have the same powers and authority in conducting the hearing as are in this Code section granted to the administrator. The referee shall have been admitted to the practice of law in this state and possess such additional qualifications as the administrator may require.

(e) The administrator or referee authorized to hold a hearing shall have authority to do the following:

- (1) Administer oaths and affirmations;
- (2) Sign and issue subpoenas;
- (3) Rule upon offers of proof;
- (4) Regulate the course of the hearing, set the time and place for continued hearings, and fix the time for filing briefs;
- (5) Dispose of motions to dismiss for lack of agency jurisdiction over the subject matter or parties or for any other ground;
- (6) Dispose of motions to amend or to intervene;
- (7) Provide for the taking of testimony by deposition or interrogatory; and
- (8) Reprimand or exclude from the hearing any person for any indecorous or improper conduct committed in the presence of the agency or the referee.

(f) Subpoenas shall be issued without discrimination between public and private parties. When a subpoena is disobeyed, any party may apply to the superior court of the county where the hearing is being heard for an order requiring obedience. Failure to comply with such order shall be cause for punishment as for contempt of court. The costs of securing the attendance of witnesses, including fees and mileage, shall be computed and assessed in the same manner as prescribed by law in civil cases in the superior court.

(g) A record shall be kept in each contested case and shall include:

- (1) All pleadings, motions, and intermediate rulings;
- (2) A summary of the oral testimony plus all other evidence received or considered except that oral proceedings or any part thereof shall be transcribed or recorded upon request of any party. Upon written request therefor, a transcript of the oral proceedings or any part thereof shall be furnished to any party of the proceedings. The administrator shall set a uniform fee for such service;
- (3) A statement of matters officially noticed;



(4) Questions and offers of proof and rulings thereon;

(5) Proposed findings and exceptions;

(6) Any decision, including any initial, recommended, or tentative decision, opinion, or report by the officer presiding at the hearing; and

(7) All staff memoranda or data submitted to the hearing officer or members of the agency in connection with their consideration of the case.

(h) Findings of fact shall be based exclusively on the evidence and on matters officially noticed.

(i) If the administrator does not receive a request for a hearing within the prescribed time where he has issued an order prohibiting any unfair or deceptive act or practices, he may permit an order previously entered to remain in effect or he may enter a proposed order. If a hearing is requested and conducted as provided in this Code section, the administrator shall issue a written order which shall:

(1) Set forth his findings with respect to the matters involved; and

(2) Enter an order in accordance with his findings.

(j) The administrator may promulgate such procedural rules and regulations as may be necessary for the effective administration of the authority granted to the administrator under this Code section. (Code 1981, § 10-1-398, enacted by Ga. L. 1988, p. 1659, § 2; Ga. L. 2000, p. 1589, § 4.)

**Editor's notes.** — Ga. L. 1988, p. 1659, § 2, effective July 1, 1988, repealed former Code Section 10-1-398, as enacted by Ga. L. 1975, p. 376, § 9, relating to actions by the administrator for damages, and enacted the current Code section.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

### **10-1-398.1. Appeal from order of administrator.**

(a) An appeal may be taken from any order of the administrator resulting from a hearing held in accordance with Code Section 10-1-398 by any person adversely affected thereby to the Superior Court of Fulton County by serving on the administrator, within 20 days after the date of entry of such order, a written notice of appeal, signed by the appellant, stating:

(1) The order from which the appeal is taken; and

(2) The ground upon which a reversal or modification of the order is sought.

(b) The court shall not substitute its judgment for that of the administrator as to the weight of the evidence on questions of fact. The court may

affirm the decision of the administrator or remand the case for further proceedings. The court may reverse or modify the decision if substantial rights of the appellant have been prejudiced because the administrative findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the administrator;
- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record; or
- (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. (Code 1981, § 10-1-398.1, enacted by Ga. L. 1988, p. 1659, § 3.)

**10-1-399. Civil or equitable remedies by individuals.**

(a) Any person who suffers injury or damages as a result of a violation of Chapter 5B of this title, as a result of consumer acts or practices in violation of this part, as a result of office supply transactions in violation of this part or whose business or property has been injured or damaged as a result of such violations may bring an action individually, but not in a representative capacity, against the person or persons engaged in such violations under the rules of civil procedure to seek equitable injunctive relief and to recover his general and exemplary damages sustained as a consequence thereof in any court having jurisdiction over the defendant; provided, however, exemplary damages shall be awarded only in cases of intentional violation. Notwithstanding any other provisions of law, a debtor seeking equitable relief to redress an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, upon facts alleged showing a likelihood of success on the merits, may not, within the discretion of the court, be required to make a tender. Nothing in this subsection or paragraph (20) of subsection (b) of Code Section 10-1-393 shall be construed to interfere with the obligation of the debtor to a lender who is not in violation of paragraph (20) of subsection (b) of Code Section 10-1-393. A claim under this Code section may also be asserted as a defense, setoff, cross-claim, or counter-claim or third-party claim against such person.

(b) At least 30 days prior to the filing of any such action, a written demand for relief, identifying the claimant and reasonably describing the unfair or deceptive act or practice relied upon and the injury suffered, shall be delivered to any prospective respondent. Any person receiving such a demand for relief who, within 30 days of the delivering of the demand for relief, makes a written tender of settlement which is rejected by the claimant

may, in any subsequent action, file the written tender and an affidavit concerning this rejection and thereby limit any recovery to the relief tendered if the court finds that the relief tendered was reasonable in relation to the injury actually suffered by the petitioner. The demand requirements of this subsection shall not apply if the prospective respondent does not maintain a place of business or does not keep assets within the state. The 30 day requirement of this subsection shall not apply to a debtor seeking a temporary restraining order to redress or prevent an injury resulting from a violation of paragraph (20) of subsection (b) of Code Section 10-1-393, provided that said debtor gives, or attempts to give the written demand required by this subsection at least 24 hours in advance of the time set for the hearing of the application for the temporary restraining order. Such respondent may otherwise employ the provisions of this Code section by making a written offer of relief and paying the rejected tender into court as soon as practicable after receiving notice of an action commenced under this Code section. All written tenders of settlement such as described in this subsection shall be presumed to be offered without prejudice in compromise of a disputed matter.

(c) Subject to subsection (b) of this Code section, a court shall award three times actual damages for an intentional violation.

(d) If the court finds in any action that there has been a violation of this part, the person injured by such violation shall, in addition to other relief provided for in this Code section and irrespective of the amount in controversy, be awarded reasonable attorneys' fees and expenses of litigation incurred in connection with said action; provided, however, the court shall deny a recovery of attorneys' fees and expenses of litigation which are incurred after the rejection of a reasonable written offer of settlement made within 30 days of the mailing or delivery of the written demand for relief required by this Code section; provided, further, that, if the court finds the action continued past the rejection of such reasonable written offer of settlement in bad faith or for the purposes of harassment, the court shall award attorneys' fees and expenses of litigation to the adverse party. Any award of attorneys' fees and expenses of litigation shall become a part of the judgment and subject to execution as the laws of Georgia allow.

(e) Any manufacturer or supplier of merchandise whose act or omission, whether negligent or not, is the basis for action under this part shall be liable for the damages assessed against or suffered by retailers charged under this part. A claim of such liability may be asserted by cross-claim, third-party complaint, or by separate action.

(f) It shall not be a defense in any action under this part that others were, are, or will be engaged in like practices.

(g) In any action brought under this Code section the administrator shall be served by certified or registered mail or statutory overnight delivery



with a copy of the initial complaint and any amended complaint within 20 days of the filing of such complaint. The administrator shall be entitled to be heard in any such action, and the court where such action is filed may enter an order requiring any of the parties to serve a copy of any other pleadings in an action upon the administrator. (Ga. L. 1975, p. 376, § 10; Ga. L. 1985, p. 642, § 1; Ga. L. 1986, p. 1046, § 4; Ga. L. 1987, p. 794, § 3; Ga. L. 1988, p. 983, § 3; Ga. L. 1996, p. 231, § 2; Ga. L. 2000, p. 1589, § 4.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article suggesting the tortious nature of a violation of the Fair Business Practices Act, see 10 Ga. L. Rev. 917

(1976). For article, "The Federalization and Privatization of Public Consumer Protection Law in the United States: Their Effect on Litigation and Enforcement," see 24 Ga. St. U.L. Rev. 663 (2008).

For comment, "The Georgia Fair Business Practices Act: Business As Usual," see 9 Ga. St. U.L. Rev. 453 (1993).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### DEMAND FOR RELIEF

#### TENDER OF SETTLEMENT

#### CAUSE OF ACTION

##### 1. IN GENERAL

##### 2. DILIGENCE OF PLAINTIFF

##### 3. EVIDENCE

#### DAMAGES

#### ILLUSTRATIVE CASES

### General Consideration

**Factors determining if part violated.** — In analyzing whether defendant's allegedly wrongful activities are in violation of this part or an "isolated" incident not covered under the statute, two factors are determinative: (a) medium through which act or practice is introduced into stream of commerce; and (b) market on which act or practice is reasonably intended to impact. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Impact on consumer marketplace required.** — Unless it can be said that defendant's actions had or has potential harm for consumer public, the act or practice cannot be said to have "impact" on consumer marketplace and any act or practice which is outside that context, no matter how unfair or deceptive, is not directly regulated by this part. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Though plaintiff may be a "consumer"

with regard to the transaction, if the deceptive or unfair act or practice had or has no potential for harm to the general consuming public, the allegedly wrongful act of defendant was not made in the context of the consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Cited in** *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15 (1978); *Rewis v. Browning*, 153 Ga. App. 352, 265 S.E.2d 316 (1980); *Pendigrass v. Edmonds*, 247 Ga. 508, 277 S.E.2d 247 (1981); *Preiser v. Jim Letts Oldsmobile, Inc.*, 160 Ga. App. 658, 288 S.E.2d 219 (1981); *Taylor v. Bear Stearns & Co.*, 572 F. Supp. 667 (N.D. Ga. 1983); *Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers*, 756 F.2d 801 (11th Cir. 1985); *Paces Ferry Dodge, Inc. v. Thomas*, 174 Ga. App. 642, 331 S.E.2d 4 (1985); *Tilley v. Page*, 181 Ga. App. 98, 351 S.E.2d 464 (1986); *Brown Realty Assocs. v. Thomas*, 193 Ga. App. 847, 389 S.E.2d 505 (1989); *Sharpe v. GMC*, 198 Ga. App. 313, 401 S.E.2d 328 (1991); *Billy*

**General Consideration (Cont'd)**

Cain Ford Lincoln Mercury, Inc. v. Kaminski, 230 Ga. App. 598, 496 S.E.2d 521 (1998); SunTrust Bank v. Hightower, 291 Ga. App. 62, 660 S.E.2d 745 (2008).

**Demand for Relief****Section incorporates common law. —**

Since subsection (b) contemplates notice of deception relied upon as prerequisite to suit for recovery of damages resulting from that deception, this section is construed as incorporating "reliance" element of common-law tort of misrepresentation into causation element of an individual claim. Zeeman v. Black, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Liberal construction.** — The notice requirement of subsection (b) of O.C.G.A. § 10-1-399 is to be liberally construed and the sufficiency of notice is a question for the court. Lynas v. Williams, 216 Ga. App. 434, 454 S.E.2d 570 (1995).

**Notice sufficient although part not cited.**

— Even though a letter of notice does not cite Ga. L. 1975, p. 376, if the letter is sufficient in and of itself to independently apprise defendant of the underlying facts giving rise to the claim, then the letter is sufficient notice under this section. Colonial Lincoln-Mercury Sales, Inc. v. Molina, 152 Ga. App. 379, 262 S.E.2d 820 (1979).

**Notice under Fair Business Practices Act.**

— While the notice pursuant to O.C.G.A. § 10-1-399 is not technically an element of a cause of action for a Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., violation, it is a statutory prerequisite to the filing of a FBPA suit that adequate written notice be timely sent. Lynas v. Williams, 216 Ga. App. 434, 454 S.E.2d 570 (1995).

Tenant's letter to a former landlord informing the landlord that the tenant's eviction was unfair and requesting that the landlord pay for damages done to the tenant's family was adequate notice for purposes of the tenant's Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim. Stringer v. Bugg, 254 Ga. App. 745, 563 S.E.2d 447 (2002).

Trial court erred in granting summary judgment to an auto dealership in a purchaser's suit asserting fraud and violations of Georgia's Fair Business Practices Act,

O.C.G.A. § 10-1-390 et seq., with regard to the purchase of a vehicle as genuine issues of material fact existed as to each element, and the purchaser's certified letter to the auto dealership was sufficient to satisfy the ante litem notice requirement of the Act; it was irrelevant that the sale was rescinded as there was evidence that the auto dealership offered a vehicle for sale that was not the more valuable model that the dealership represented; and the merger clause in the purchase agreement did not prevent the purchaser from standing on any representation allegedly made by a salesman since that provision directly contradicted the express provisions of the Act. Johnson v. GAPVT Motors, Inc., 292 Ga. App. 79, 663 S.E.2d 779 (2008).

**No tolling of limitations period.** — The 30-day notice requirement of O.C.G.A. § 10-1-399(b) does not toll or extend the limitations period provided for in O.C.G.A. § 10-1-401 and does not constitute the bringing of an action. Greene v. Team Properties, Inc., 247 Ga. App. 544, 544 S.E.2d 726 (2001).

**Demand not required when claim raised as a counterclaim.** — Because a debtor asserted a Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim as a counterclaim, the debtor was not required to deliver a written demand for relief under O.C.G.A. § 10-1-399(b). 1st Nationwide Collection Agency, Inc. v. Werner, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

**Tender of Settlement****Tender of settlement must be in writing.**

— Subsection (b) of O.C.G.A. § 10-1-399 expressly requires that the tender of settlement be in writing and is so plain and unambiguous that judicial construction is both unnecessary and unauthorized, and the legislature's clear intent that the settlement offer be in writing will not be thwarted by invocation of the rule of substantial compliance. Regency Nissan, Inc. v. Taylor, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

**Plaintiff not deprived of cause of action.**

— Although a tender of settlement may limit the amount of damages recoverable, it does not deprive a plaintiff of the plaintiff's cause of action. Crown Ford, Inc. v. Crawford, 221 Ga. App. 881, 473 S.E.2d 554 (1996).

## Cause of Action

### 1. In General

#### **Section gives separate cause of action.** —

There is a separate and distinct cause of action under the provisions of this section, and a consumer who is damaged has an independent right to recover under this part regardless of any other theory of recovery. *Attaway v. Tom's Auto Sales, Inc.*, 144 Ga. App. 813, 242 S.E.2d 740 (1978); *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Suit must serve public interest.** — Suits brought pursuant to Ga. L. 1975, p. 376, § 10 must serve public interest and implement purpose of Ga. L. 1975, p. 376 — the end to unfair or deceptive acts or practices in public consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Purpose and intent of Ga. L. 1975, p. 376 is protection of public, and private suit under Ga. L. 1975, p. 376, § 10 may be brought only if the suit implements that underlying purpose and intent. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Justifiable reliance must be shown if misrepresentation is alleged.** — O.C.G.A. § 10-1-401(a)(1) did not bar a home buyer's claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the buyer did not suffer any actual damages at the time of the alleged violation, and could not have suffered any such damages at least until the homebuilder conveyed the house to the buyer without complying with code requirements or used the contractual language in question to deny liability; therefore, the buyer's cause of action did not accrue until less than two years prior to the date the buyer filed suit. *Tiismann v. Linda Martin Homes Corp.*, 279 Ga. 137, 610 S.E.2d 68 (2005).

In an action in which the injured party alleged that the builder made a misrepresentation in the construction contract by including conflicting provisions regarding liability for construction of the property in accordance with building codes, justifiable reliance, pursuant to O.C.G.A. § 10-1-399, was an essential element of the injured party's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claim. *Tiismann*

*v. Linda Martin Homes Corp.*, 276 Ga. App. 846, 625 S.E.2d 32 (2005).

Owner was unable to hold the builder liable under O.C.G.A. § 10-1-399 based upon an alleged misrepresentation in a contract purporting to limit the builder's liability for failing to build the owner's home to code; the owner did not rely on the provision at issue, as the owner had read the provision and signed the agreement anyway, believing the provision to be unenforceable. *Tiismann v. Linda Martin Homes Corp.*, 281 Ga. 137, 637 S.E.2d 14 (2006).

Case law interpreting O.C.G.A. § 10-1-399 to include an element of reliance in cases involving misrepresentation is still valid despite amendments to § 10-1-399. *Tiismann v. Linda Martin Homes Corp.*, 281 Ga. 137, 637 S.E.2d 14 (2006).

**Volitional act and impact on marketplace required.** — To be subject to direct suit under this part, an alleged offender must perform some volitional act to avail oneself of the channels of consumer commerce, and the allegedly offensive activity must take place within the context of the consumer marketplace. *State ex rel. Ryles v. Meredith Chevrolet, Inc.*, 145 Ga. App. 8, 244 S.E.2d 15, aff'd sub nom. *State v. Meredith Chevrolet, Inc.*, 242 Ga. 294, 249 S.E.2d 87 (1978); *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

In action on contract where defendant denied liability on contract on ground of partial failure of consideration and brought counterclaim against plaintiff under O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10, but failed to present evidence of a volitional unfair or deceptive act or practice, O.C.G.A. § 10-1-399 was not applicable and plaintiff's failure to comply with the statute's terms was irrelevant. *Gresham v. White Repair & Contracting Co.*, 158 Ga. App. 235, 279 S.E.2d 528 (1981).

**Damage must be in capacity as member of consuming public.** — While suit under this section is brought in plaintiff's individual capacity, it must be in the plaintiff's capacity as an individual member of a consuming public who has suffered damage as a result of unfair or deceptive act or practice which had or has potential harmful effect on general consuming public. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

The owner of a trademark in a trademark



**Cause of Action (Cont'd)****1. In General (Cont'd)**

infringement case was not a consumer who sustained damage and thus the owner was not entitled to an award of attorney fees under O.C.G.A. § 10-1-399. *Lone Star Steakhouse & Saloon v. Longhorn Steaks, Inc.*, 106 F.3d 355 (11th Cir. 1997).

**Right of nonconsumers to bring action unsettled.** — Contrary to *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980), subsection (a) of O.C.G.A. § 10-1-399 does not appear to limit actions under O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10 to individual members of the consuming public; instead, it simply allows any person injured as a result of a violation to bring an action and, thus, whether a FBPA plaintiff must be an individual member of the consuming public seems to be an unsettled question of Georgia law. *Friedlander v. PDK, Labs, Inc.*, 59 F.3d 1131 (11th Cir. 1995) (see annotation under catchline "Damage must be in capacity as member of consuming public").

**Injury to individual by breach of duty to consuming public.** — One may bring a private suit under this part only if one is individually injured by breach of duty owed to consuming public in general. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Private transactions.** — This section does not encompass suits based upon allegedly deceptive or unfair acts or practices which occur in essentially private transactions. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

This section, providing for a private right of action, was enacted to give effect to the intent of the General Assembly that such practices be swiftly stopped, and is part of enforcement and regulatory scheme underlying public protection policy of this part and as such does not create an additional remedy for redress of private wrongs occurring outside context of public consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

That Ga. L. 1975, p. 376, § 10 provides for equitable injunctive relief and for recovery of treble damages for intentional violations is evidence that the legislature intended the statute to serve as an aid in enforcing the underlying public protection policy of Ga. L.

1975, p. 376 by enlisting litigative assistance of those individual members of consuming public damaged by unfair or deceptive acts or practices and not as a basis for new private remedy for individuals who are damaged by acts or practices which have no potential for impact on general consuming public. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Private claim under this part has three elements:** violation of this part, causation, and injury. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980); *Moore-Davis Motors, Inc. v. Joyner*, 252 Ga. App. 617, 556 S.E.2d 137 (2001).

**Single instance of unfair or deceptive act or practice** is sufficient predicate upon which to base claim for damages under this section if public consumer interest would be served thereby. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Jury trial may be ordered.** — Despite the inherent equitable nature of the claim, the trial court retains the authority to order a jury trial of claims under this part or as to ex delicto actions involving unliquidated damages which must be determined by a jury. *Greenbriar Dodge, Inc. v. May*, 155 Ga. App. 892, 273 S.E.2d 186 (1980).

**Question of law and fact.** — While the fact of notice under subsection (b) of this section is a question for jury resolution, the sufficiency of notice, if given, is a matter for court determination. *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 262 S.E.2d 820 (1979).

Question of sufficiency of notice is one for court. *Plaza Pontiac, Inc. v. Shaw*, 158 Ga. App. 799, 282 S.E.2d 383 (1981).

**Dismissal of claims against non-profit hospital.** — Court dismissed, without prejudice, an uninsured patient's Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., claims against a non-profit hospital and an affiliated health company because: (1) the patient alleged that the defendants violated state and federal law with regard to its billing practices for uninsured and/or indigent patients and that the patient should not have to pay patient's treatment costs because the hospital was a non-profit hospital; and (2) I.R.S. § 501(c)(3) did not confer subject matter jurisdiction on the court over the patient's fair business practice claims because the claims were based on the theory

that § 501(c)(3) created an enforceable trust between the hospital and the federal government, and no such trust was created under federal law. *Ellis v. Phoebe Putney Health Sys.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 19935 (M.D. Ga. Apr. 8, 2005).

## 2. Diligence of Plaintiff

**Plaintiff must be diligent in discovering truth.** — Under Ga. L. 1975, p. 376, p. 10, a claimant who alleges Ga. L. 1975, p. 376 was violated as a result of misrepresentation must demonstrate that the claimant was injured as result of reliance upon alleged misrepresentation, and therefore, the claimant is not entitled to recover if the claimant had equal and ample opportunity to ascertain the truth but failed to exercise proper diligence to do so. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980); *Nims v. Otter*, 188 Ga. App. 516, 373 S.E.2d 396 (1988); *Massey v. Thomaston Ford Mercury*, 196 Ga. App. 278, 395 S.E.2d 663 (1990).

Where any damage purchaser may have suffered was charged to the purchaser's lack of diligence and not to the purchaser's reliance upon any misrepresentation, the purchaser suffered no damage as a result of a violation of O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10. *Heidt v. Potamkin Chrysler-Plymouth, Inc.*, 181 Ga. App. 903, 354 S.E.2d 440 (1987).

**Failure to read lease agreements.** — Trial court erred in denying automobile dealer's motion for summary judgment with respect to customers' claims that lease transactions violated O.C.G.A. Pt. 2, Art. 15, Ch. 1, T. 10, where customers alleged no artifice or fraud which would have prevented the customers from reading the lease agreements prior to signing the leases. *Delta Chevrolet, Inc. v. Wells*, 187 Ga. App. 694, 371 S.E.2d 250 (1988).

**Diligence not shown as a matter of law.** — In a case in which the injured party alleged that the builder violated the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the construction contract contained contradictory language that assured the injured party that the builder was to build the home in accordance with the building codes but also incorporated a limited warranty disclaiming responsibility for any violations of the building codes, the injured party's claim under the Act failed, as

the injured party did not, as a matter of law, reasonably rely upon the contradictory contract provisions as required for an action under O.C.G.A. § 10-1-399; there was no confidential relationship between the parties, and the injured party was not prevented by artifice or fraud from making an inspection to determine the truth or falsity of the alleged representation. *Tiismann v. Linda Martin Homes Corp.*, 276 Ga. App. 846, 625 S.E.2d 32 (2005).

## 3. Evidence

**Oral misrepresentation contrary to written agreement.** — If the alleged oral misrepresentation attributed to defendant was contrary to the express terms of the written agreement underlying the sale, the trial court did not err in ruling that the purchaser's testimony regarding that misrepresentation was inadmissible. *Heidt v. Potamkin Chrysler-Plymouth, Inc.*, 181 Ga. App. 903, 354 S.E.2d 440 (1987).

**A mere showing that a person became sick subsequent to eating food** was insufficient to establish a claim for violation of the Fair Business Practice Act, O.C.G.A. § 10-1-390 et seq., predicated upon the allegation that the plaintiff was injured because of the unfair and deceptive practice of selling foodstuffs after the expiration date. *Stevenson v. Winn-Dixie Atlanta, Inc.*, 211 Ga. App. 572, 440 S.E.2d 465 (1993).

## Damages

**Measure of damages** is the actual injury suffered. *Standish v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979); *Givens v. Bourrie*, 190 Ga. App. 425, 379 S.E.2d 223 (1989).

An award for general damages under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., is limited to those damages that can be measured by actual injury suffered, and the general provisions of O.C.G.A. § 51-12-2(a) are not applicable. *Regency Nissan, Inc. v. Taylor*, 194 Ga. App. 645, 391 S.E.2d 467 (1990).

**Actual injury suffered.** — The measure of damages to be applied for in a statutory violation was that of actual injury suffered; the general provisions of O.C.G.A. § 51-12-2(a), damages recoverable without proof of amount, were not applicable.

**Damages (Cont'd)**

Moore-Davis Motors, Inc. v. Joyner, 252 Ga. App. 617, 556 S.E.2d 137 (2001).

When a consumer sued a car dealer under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., concerning the car purchased from the dealer, the consumer did not show an actual injury by any alleged violation because there was no evidence of the actual value of the car at the time the car was bought, as actual damages, for purposes of the Act, meant relief other than a refund of the purchase price and restitution. *Small v. Savannah Int'l Motors, Inc.*, 275 Ga. App. 12, 619 S.E.2d 738 (2005).

**"Actual damages" more than refund of purchase price.** — Within the meaning of this part, "actual damages" means relief other than the refund of the purchase price and the return to the status quo that constitutes restitution. *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 262 S.E.2d 820 (1979).

**Treble damages** and attorney fees may be awarded for certain egregious or intentional misconduct. *Stanley v. Hub Motor Co.*, 149 Ga. App. 365, 254 S.E.2d 416 (1979).

A debtor was properly awarded treble damages in the debtor's claim against a collection agency. The trial court found that the agency intentionally violated the Fair Debt Collection Practices Act, 15 U.S.C. § 16921, thereby violating the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq. *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

**Exemplary damages** are not necessarily subsumed in treble damages allowed under subsection (c) of this section. *Colonial Lincoln-Mercury Sales, Inc. v. Molina*, 152 Ga. App. 379, 262 S.E.2d 820 (1979).

**Full trial damages recovered under subsection (b) of O.C.G.A. § 10-1-399.** — See *Park Leasing Co. v. TWS, Inc.*, 206 Ga. App. 864, 426 S.E.2d 620 (1992).

**Awards.** — Trial court was authorized to award punitive damages, but not required to award three times the compensatory damages, or any amount at all. *Conseco Fin. Servicing Corp. v. Hill*, 252 Ga. App. 774, 556 S.E.2d 468 (2001).

**Attorney fees awarded.** — Where jury rendered verdict in favor of beauty pageant

contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-835 and 10-1-399 was proper. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

A debtor was properly awarded attorney fees in the debtor's claim against a collection agency. The agency, which did not appear at the trial, did not provide the appellate court with a transcript of the nonjury trial sufficient to enable the appellate court to determine the issue at hand; moreover, the affidavit submitted by the debtor's attorneys clearly provided detailed information sufficient to enable the fact finder to determine what each of the attorneys did, to allocate the services provided between successful and unsuccessful claims, and to determine whether any services rendered were duplicative. *1st Nationwide Collection Agency, Inc. v. Werner*, 288 Ga. App. 457, 654 S.E.2d 428 (2007).

**Attorney fees, arbitration clauses, and federal law.** — Because a cable television subscriber would automatically recover attorney fees if the subscriber prevailed on the subscriber's claim against cable television providers under the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(d), and was highly likely to recover fees under O.C.G.A. § 13-6-11 if the subscriber prevailed on intentional tort claims for fraud and trespass, an attorney would have an incentive to represent the subscriber during arbitration. Therefore, a class action waiver contained in an arbitration clause in the parties' subscription contract was not unconscionable under Georgia law, and the arbitration clause was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

**Illustrative Cases**

**Misrepresentation in selling own home.** — Misrepresentation made by homeowner selling the seller's own house is not likely to be a recurring "consumer" threat and, therefore, has no potential "impact" on general



consuming public. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

Any misrepresentation made by a seller in the context of selling the seller's own home is not made "in the conduct of any trade or business" but rather in the course of private negotiations between two individual parties who have countervailing rights and liabilities established under common law principles of contract, tort, and property law. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Single misrepresentation by business in isolated sale.** — Single oral misrepresentation made by real estate business in content of isolated nondevelopmental sale of real property relating to unique facts concerning that property appears to be an essentially "private" controversy with no impact whatsoever on consumer marketplace. *Zeeman v. Black*, 156 Ga. App. 82, 273 S.E.2d 910 (1980).

**Advertisement of "buy one get one free sale."** — In an action against a store based on a sign advertising a "buy one get one free" sale without indicating limitations, if the sale actually applied only to certain items, plaintiff was not entitled to recovery because of the plaintiff's inability to prove causation and damages. *Agnew v. Great Atl. & Pac. Tea Co.*, 232 Ga. App. 708, 502 S.E.2d 735 (1998).

**Borrower whose loan was disapproved for a bona fide reason** unrelated to a lender's allegedly deceptive interest rate commitment could not claim to have been injured by the alleged unfair practice; moreover, statistical evidence of recent loan applications tended to negate the borrower's allegation that the lender engaged in a "bait and switch" operation. *Whisenant v. Fulton Fed. Sav. & Loan Ass'n*, 200 Ga. App. 31, 406 S.E.2d 793 (1991).

**Pressure to purchase more expensive van.** — Evidence, which included a showing of an auto dealership's attempt to pressure a customer into purchasing a more expensive van, was insufficient to support the jury's award of actual and punitive damages. *Miles Rich Chrysler-Plymouth, Inc. v. Mass*, 201 Ga. App. 693, 411 S.E.2d 901 (1991).

**Pool installation.** — Because the pool installers failed to respond to a pool purchaser's request for admissions, pursuant to O.C.G.A. § 9-11-36(a), those admissions were deemed admitted and were sufficient to establish the purchaser's claims of fraud and conspiracy to

defraud, and accordingly, summary judgment was properly granted to the purchaser on those claims; however, summary judgment to the purchaser was error on the claim that the installers violated the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., as there was no evidence that the actions by the installers were introduced into the stream of commerce or were reasonably intended to impact on any market other than on the purchaser, and the commensurate awards of attorney fees and treble damages, pursuant to O.C.G.A. § 10-1-399(c) and (d), were vacated. *Brown v. Morton*, 274 Ga. App. 208, 617 S.E.2d 198 (2005).

**Building code.** — In a case involving a contract in which a builder limited the builder's liability for failing to build to code, the builder's post-closing refusal to accept responsibility for remedying the code violations was not unfair or deceptive under O.C.G.A. § 10-1-399, as it was based on the contract that the owner had signed, and the builder's decision to litigate the issue was not unfair or deceptive and did not injure the owner, who received a substantial sum in arbitration as a result. *Tiismann v. Linda Martin Homes Corp.*, 281 Ga. 137, 637 S.E.2d 14 (2006).

**Arbitration clause in cable television subscription agreement.** — Because the Georgia Fair Business Practices Act, O.C.G.A. § 10-1-399(a), by the Act's terms, prohibited consumer class actions, an arbitration clause in a cable television subscription agreement that contained a class action waiver clause was not unconscionable under Georgia law and was enforceable under the Federal Arbitration Act, 9 U.S.C. § 2. *Honig v. Comcast of Ga. I, LLC*, 537 F. Supp. 2d 1277 (N.D. Ga. 2008).

**"Largest to smallest" transaction policy by bank.** — After plaintiff bank customers alleged defendant bank had a practice of manipulating the posting of transactions to impose overdraft fees, such claims under O.C.G.A. §§ 10-1-391, 10-1-393, and 10-1-399, were not preempted under the National Bank Act regulations and if the allegations that the bank shrouded the bank's actions in a broadly worded "largest to smallest" transaction posting policy, unqualified by time limits or other restrictions, it stated claims under the Georgia Fair Business Practices Act. *White v. Wachovia Bank, N.A.*, 563 F. Supp. 2d 1358 (N.D. Ga. 2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Practices, § 1127.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 245.

**ALR.** — Punitive or exemplary damages as recoverable for trademark infringement or unfair competition, 47 ALR2d 1117.

Right to private action under state consumer protection Act, 62 ALR3d 169.

Reasonableness of offer of settlement under deceptive trade practice and consumer protection Acts, 90 ALR3d 1350.

Right to private action under state consumer protection act — Preconditions to action, 117 ALR5th 155.

### 10-1-400. Limitation on recovery in case of bona fide error.

In any action in which damages are demanded under Code Section 10-1-399, recovery will be limited to the amount, if any, by which the injured party suffered injury or damage caused by the violation if the adverse party proves that the violation resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid any such error and that such error was not the result of negligence in the maintenance of such procedures. (Ga. L. 1975, p. 376, § 11.)

**Law reviews.** — For review of 1996 commerce and trade legislation, see 13 Ga. St. U. L. Rev. 33 (1996).

## RESEARCH REFERENCES

**ALR.** — Liability for innocent infringement of trademark or trade name, 96 ALR 651.

### 10-1-401. Limitation of actions; right to set off damages or penalties not limited.

(a) No action shall be brought under this part:

(1) More than two years after the person bringing the action knew or should have known of the occurrence of the alleged violation; or

(2) More than two years after the termination of any proceeding or action by the State of Georgia, whichever is later.

(b) Damages or penalties to which a person is entitled pursuant to this part may be set off against the allegation of the person to the seller and may be raised as a defense to a suit on the obligation without regard to the time limitations prescribed by this Code section. (Ga. L. 1975, p. 376, § 17.)

**Law reviews.** — For article, “Acquisition and Georgia Law,” see 7 Ga. St. B.J. 14 of Trademark Rights Under United States (2001).

## JUDICIAL DECISIONS

**Application to alleged unfair trade practices.** — The two-year statute of limitation under O.C.G.A. § 10-1-401 applied to a vending machine purchaser's unfair trade practices claim against the sellers. *League v. United States Postmatic, Inc.*, 235 Ga. App. 171, 508 S.E.2d 210 (1998).

**Commencement of limitations period.** — The plaintiffs' cause of action under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., was barred by the two year statute of limitations since the action was commenced more than two years after the defendant obtained the plaintiffs' property without complying with statutory requirements, notwithstanding the plaintiffs' contention that the statute of limitations did not begin to run until the plaintiffs discovered the plaintiffs had been injured, which occurred when the plaintiffs received notice of a dispossessory action, since the failure of the defendant to provide a written contract or notice of right to rescind as required by statute was evident and complete at the time the property was transferred to the defendant. *Greene v. Team Properties, Inc.*, 247 Ga. App. 544, 544 S.E.2d 726 (2001).

O.C.G.A. § 10-1-401(a)(1) did not bar a home buyer's claim under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq.,

because the buyer did not suffer any actual damages at the time of the alleged violation, and could not have suffered any such damages at least until the homebuilder conveyed the house to the buyer without complying with code requirements or used the contractual language in question to deny liability; therefore, the buyer's cause of action did not accrue until less than two years prior to the date suit was filed. *Tiismann v. Linda Martin Homes Corp.*, 279 Ga. 137, 610 S.E.2d 68 (2005).

**Thirty day demand for relief provision does not toll limitations period.** — Because plaintiffs knew or should have known of alleged Sale of Business Opportunity Act, O.C.G.A. § 10-1-410 et seq., violations more than two years before bringing claims, the trial court properly held that the plaintiff's claims were time-barred. *Touchton v. Amway Corp.*, 247 Ga. App. 269, 543 S.E.2d 782 (2000).

The 30-day notice requirement of O.C.G.A. § 10-1-399(b) does not toll or extend the limitations period provided for in O.C.G.A. § 10-1-401 and does not constitute the bringing of an action. *Greene v. Team Properties, Inc.*, 247 Ga. App. 544, 544 S.E.2d 726 (2001).

**Cited in** *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870 (1989).

## RESEARCH REFERENCES

**ALR.** — Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Validity, and applicability to causes of action not already barred, of a statute enlarging limitation period, 79 ALR2d 1080.

Settlement negotiations as estopping reliance on statute of limitations, 39 ALR3d 127.

Fraud as extending statutory limitations period for contesting will or its probate, 48 ALR4th 1094.

## 10-1-402. Assurances of voluntary compliance.

In the administration of this part the administrator may accept an assurance of voluntary compliance with respect to any act or practice deemed to be violative of this part from any person who has engaged or was about to engage in such act or practice. Any such assurance shall be in writing and be filed with the clerk of the superior court of the county in which the alleged violator resides or has his principal place of business or with the clerk of the Superior Court of Fulton County. Such assurance of voluntary compliance shall not be considered an admission of violation for



any purpose. Matters thus processed may at any time be reopened by the administrator for further proceedings in the public interest, pursuant to Code Section 10-1-397. This Code section shall not bar any claim against any person who has engaged in any act or practice in violation of this part. (Ga. L. 1975, p. 376, § 12.)

**Law reviews.** — For comment, “The Georgia Fair Business Practices Act: Business As Usual,” see 9 Ga. St. U.L. Rev. 453 (1993).

### JUDICIAL DECISIONS

**Discretion as to acceptance of assurance.** — The permissive wording of Ga. L. 1975, p. 376, § 12 indicates that it is not mandatory that the administrator accept an assurance of voluntary compliance with respect to acts

or practices violative of Ga. L. 1975, p. 376. State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15, aff’d sub nom. State v. Meredith Chevrolet, Inc., 242 Ga. 294, 249 S.E.2d 87 (1978).

### 10-1-403. Investigations; demands for evidence.

(a) When it reasonably appears to the administrator that a person has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part or when he believes it to be in the public interest that an investigation should be made to ascertain whether a person in fact has engaged in, is engaging in, or is about to engage in any act or practice declared to be unlawful by this part, he may, with the consent of the Attorney General, execute in writing and cause to be served upon any person who is believed to have information, documentary material, or physical evidence relevant to the alleged or suspected violation an investigative demand requiring such person to furnish, under oath or otherwise, a report in writing setting forth the relevant facts and circumstances of which he has knowledge or to appear and testify or to produce relevant documentary material or physical evidence for examination at such reasonable time and place as may be stated in the investigative demand, concerning the advertisement, sale, or offering for sale of any goods or services or the conduct of any trade or commerce that is the subject matter of the investigation.

(b) If a matter that the administrator makes the subject of an investigative demand is located outside the state, the person receiving the investigative demand may either make it available to the administrator at a convenient location within this state or pay the reasonable and necessary expenses for the administrator or his representative to examine the matter at the place where it is located. The administrator may designate representatives, including officials of the state in which the matter is located, to inspect the matter on his behalf; and he may respond to similar requests from officials of other states.

(c)(1) Each such investigative demand shall state the nature of the conduct constituting the alleged violation of this part which is under

investigation and the provision of law applicable thereto; describe the class or classes of documentary material to be produced thereunder with such definiteness and certainty as to permit such material to be fairly identified; describe the nature, scope, and purpose of the investigation with such definiteness and certainty as to permit any person whose testimony is sought to be fairly appraised of the subject matter of the inquiry; prescribe a return date which will provide a reasonable period of time within which the material so demanded may be assembled and made available for inspection and copying or reproduction and the person or persons whose testimony is sought may prepare for the same; and identify the person to whom such material shall be made available.

(2) No such investigative demand shall:

(A) Contain any requirement which would be held to be unreasonable as contained in a subpoena for the production of documentary evidence issued by a court of this state in aid of a grand jury investigation of such alleged violation; or

(B) Require the production of any documentary evidence or oral testimony which would be privileged from disclosure if demanded by a subpoena for the production of documentary evidence issued by a court of this state in aid of a grand jury investigation of such alleged violation;

provided, however, that the limitations on the scope of demand contained in this paragraph do not require as a condition to the issuance of an investigative demand that the alleged violation be of sufficient seriousness as to constitute a violation of the criminal laws of this state, as opposed to the civil provisions of this part. (Ga. L. 1975, p. 376, § 13; Ga. L. 1988, p. 1659, § 4.)

### JUDICIAL DECISIONS

**Cited** in *Atlanta Auto Auction v. Ryles*, 148 Ga. App. 20, 251 S.E.2d 28 (1978).

### OPINIONS OF THE ATTORNEY GENERAL

**Investigative demand, notice of contemplated civil action, combinable.** — Whenever the administrator has reason to believe that any person has violated or is about to violate any provision of this part or any regulations promulgated thereunder, it would be proper for the administrator to issue an investigative demand and notice of contemplated civil action simultaneously under this part, and such may be included in one document. 1975 Op. Att'y Gen. No. 75-91.

**Forwarding of documentary materials by**

**registered mail authorized.** — The administrator would not be acting beyond the scope of the administrator's authority to permit documentary materials to be forwarded to his office by use of registered mail under the terms of the investigative demand. 1975 Op. Att'y Gen. No. 75-134.

**Receipt of documentary materials by administrator's delegate.** — The administrator does not have to be present and personally receive documentary materials required of persons pursuant to this part; the adminis-

trator, on the contrary, may authorize a administrator. 1975 Op. Att'y Gen. No. delegate to perform this function for the 75-134.

**10-1-404. Administrator's subpoena and hearing powers; procedural rules; court enforcement orders; self-incrimination; confidentiality.**

(a) To carry out the duties prescribed by Code Sections 10-1-394, 10-1-395, 10-1-397, 10-1-398, and 10-1-403, the administrator, in addition to other powers conferred upon him by this part, may, with the consent of the Attorney General, issue subpoenas to any person, administer an oath or affirmation to any person, conduct hearings in aid of any investigation or inquiry, prescribe such forms, and promulgate such procedural rules and regulations as may be necessary, which procedural rules and regulations shall have the force of law.

(b) Upon failure of a person without lawful excuse to obey an investigative demand or subpoena, the administrator may apply to a superior court having jurisdiction for an order compelling compliance. Such person may object to the investigative demand or subpoena on grounds that it fails to comply with this part or upon any constitutional or other legal right or privilege of such person. The court may issue an order modifying or setting aside such demand or subpoena or directing compliance with the original demand or subpoena.

(c) The Attorney General may request that a natural person who refuses to testify or to produce relevant matter on the ground that the testimonial matter may incriminate him be ordered by the court to provide the testimonial matter. With the exception of a prosecution for perjury and an action under Code Section 10-1-397, 10-1-398, 10-1-399, or 10-1-405, a natural person who complies with the court order to provide a testimonial matter after asserting a privilege against self-incrimination to which he is entitled by law shall not be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise.

(d)(1) Information obtained pursuant to investigative demands, subpoenas, oaths, affirmations, or hearings enforced by this part shall not be made public or, except as authorized in paragraph (2) of this subsection, disclosed by the administrator or his employees beyond the extent necessary for the enforcement of this part.

(2) The administrator or his employees shall be authorized to provide to any federal, state, or local law enforcement agency any information acquired under this part which is subpoenaed by such agency. State or local law enforcement agencies shall be authorized to provide any information to the administrator when the administrator issues an investigative demand or subpoena for such information. (Ga. L. 1975, p. 376, § 14; Ga. L. 1984, p. 441, § 1; Ga. L. 1988, p. 1659, § 5.)



**10-1-405. Civil penalties; individual liability.**

(a) Any person who violates the terms of an injunction issued under Code Section 10-1-397 shall forfeit and pay to the state a civil penalty of not more than \$25,000.00 per violation. For purposes of this Code section, the superior court issuing an injunction shall retain jurisdiction and the cause shall be continued and in such cases the administrator, acting in the name of the state, may petition for recovery of civil penalties.

(b) In the case of a continuing violation under this part, each day shall be regarded as a separate violation.

(c) Any intentional violation by a corporation, partnership, or association shall be deemed to be also that of the individual directors, officers, partners, employees, or agents of the corporation, partnership, or association who had actual knowledge of the acts constituting the violation and who directly authorized, supervised, ordered, or did any of the acts constituting in whole or in part the violation; provided, however, no such individual directors, officers, partners, employees, or agents shall have any individual liability under this subsection unless the corporation, partnership, or association, as the case may be, which has committed the intentional violation shall fail to pay into the court within 30 days after judgment sufficient moneys or assets to satisfy the judgment.

(d) The administrator shall have the authority to compromise or settle claims for penalty brought under this Code section. (Ga. L. 1975, p. 376, § 15; Ga. L. 1988, p. 1659, § 6.)

**Law reviews.** — For article discussing liability, under common-law agency principles, of all persons in the chain of command, for

a violation of this part, see 10 Ga. L. Rev. 917 (1976).

**JUDICIAL DECISIONS**

**Cited** in State ex rel. Ryles v. Meredith Chevrolet, Inc., 145 Ga. App. 8, 244 S.E.2d 15 (1978).

**RESEARCH REFERENCES**

**ALR.** — Recovery of cumulative statutory penalties, 71 ALR2d 986.

**10-1-406. Duty of prosecuting attorneys.**

Whenever an investigation has been conducted under this article and such investigation reveals conduct which constitutes a criminal offense, the administrator shall forward the results of such investigation to a prosecuting attorney of this state who shall commence any criminal prosecution that

such prosecuting attorney deems appropriate. (Ga. L. 1975, p. 376, § 16; Ga. L. 1997, p. 1507, § 3.)

**Editor's notes.** — Ga. L. 1997, p. 1507, § 3, not codified by the General Assembly, provided that the 1997 amendment was applicable to offenses committed on or after July 1, 1997.

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Georgia St. U. L. Rev. 29 (1997).

### 10-1-407. Part not exclusive.

This part is cumulative with other laws and is not exclusive. The rights or remedies provided for in this part shall be in addition to any other procedures, rights, remedies, or duties provided for in any other law or in decisions of the courts of this state dealing with the subject matter. (Ga. L. 1975, p. 376, § 19.)

## PART 3

### MULTILEVEL DISTRIBUTION COMPANIES; SALE OF BUSINESS OPPORTUNITIES

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 54 Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 90 et seq. 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, §§ 985, 1007, 1047, 1204 et seq. 62B Am. Jur. 2d, Private Franchise Contracts, § 1 et seq.

**C.J.S.** — 58 C.J.S., Monopolies, §§ 26, 77 et seq., 126, 144.

**ALR.** — Remedy by mandatory injunction or specific performance for breach of contract to furnish one the requirements of his business, 98 ALR 421.

Contract for exclusive distribution or sales agency as subject of suit for specific performance, 145 ALR 684.

Measure of damages for buyer's breach of contract to purchase article from dealer or manufacturer's agent, 24 ALR2d 1008.

Damages to franchisee for failure of franchisor of national brand or service to provide the services or facilities contracted for, 41 ALR3d 1436.

Validity and construction of restrictive covenant not to compete ancillary to franchise agreement, 50 ALR3d 746.

Validity, construction, and effect of clause in franchise contract prohibiting transfer of franchise or contract, 59 ALR3d 244.

Fraud in connection with franchise or distributorship relationships, 64 ALR3d 1375.

Validity, construction, and effect of state franchising statute, 67 ALR3d 1299.

Validity, construction, and effect of state business opportunity statutes, 84 ALR4th 374.

### 10-1-410. Definitions.

As used in this part, the term:

(1) "Agreement" means any agreement relating to a business opportunity or multilevel distribution company, including, but not limited to, the contract.

(2)(A) “Business opportunity” means the sale or lease of, or offer to sell or lease, any products, equipment, supplies, or services for the purpose of enabling the purchaser to start a business and in which the seller or company represents:

(i) That the seller or company will provide locations or assist the purchaser in finding locations for the use or operation of vending machines, racks, display cases or other similar devices, or currency operated amusement machines or devices. For purposes of this subparagraph, “assist the purchaser in finding locations” includes but is not limited to supplying the purchaser with names of locator companies, contracting with the purchaser to provide assistance or supply names, or collecting a fee on behalf of or for a locator company;

(ii) That the seller or company will purchase any or all products made, produced, fabricated, grown, bred, or modified by the purchaser using, in whole or in part, the supplies, services, or chattels sold to the purchaser; or

(iii) That the company, in conjunction with any agreement which requires a total initial payment of an amount exceeding \$500.00, will provide a sales program or marketing program; provided, however, that this subparagraph shall not apply to the sale of a sales program or a marketing program made in conjunction with the licensing of a registered trademark or service mark.

(B) The term “business opportunity” does not include:

(i) The sale of an ongoing business when the owner of that business sells and intends to sell only that one business opportunity;

(ii) Any relationship created solely by or involving:

(I) The relationship between an employer and an employee or among general business partners; or

(II) Membership in a bona fide cooperative association or transactions between bona fide cooperative associations and their members. As used in this subdivision, the term “cooperative association” means either (1) an association of producers of agricultural products organized pursuant to Article 3 of Chapter 10 of Title 2 or statutes similar thereto enacted by other states, or (2) an organization operated on a cooperative basis by and for independent retailers which wholesales goods or furnishes services primarily to its member-retailers;

(iii) Any agribusiness corporation;

(iv) Any insurance agency;



(v) Any offer or sale of a business opportunity where the seller has a net worth on a consolidated basis of not less than \$15 million as determined on the basis of the seller's most recent audited financial statement; and where the seller satisfies all of the following conditions or is a wholly owned subsidiary of a company that satisfies all of the following conditions:

(I) Seller is a publicly traded company;

(II) Seller has a class of securities registered pursuant to Section 12(b) or 12(g) of the Securities Exchange Act of 1934 and has timely filed all reports required under Sections 13 and 14 of the Securities Exchange Act of 1934 for a period of 36 months;

(III) Seller has not failed to pay any dividend or defaulted on any loan payment in the last five fiscal years;

(IV) Seller has an annual trading volume of stock of 3,000,000 shares or more; and

(V) Seller has an aggregate market value of the voting stock held by nonaffiliates of \$100 million or more; or

(vi) A landlord, property manager, or owner who licenses or leases pushcarts or kiosks within or adjacent to a retail center containing divided retail floor space and common areas which will be used by any such licensee or lessee to sell goods or services not supplied by the landlord, property manager, or owner or any entity affiliated or associated with the landlord, property manager, or owner. For the purposes of this division, the term "pushcart" means a mobile retail unit from which goods or services are sold in the common area of a retail center, and the term "kiosk" means a temporary retail unit from which goods or services are sold in the common area of a retail center.

(3) "Business opportunity seller or company" means any corporation, whether domestic or foreign, or any business, whether a partnership, limited partnership, sole proprietorship, joint venture, association, trust, unincorporated organization, or other entity, which shall solicit, advertise, offer, or contract for any business opportunity or cause to be solicited, advertised, offered, or contracted for any business opportunity in this state, or which has a principal place of business in this state, even if solicitations are of nonresidents of Georgia.

(4) "Company" means any multilevel distribution company or business opportunity company or seller.

(5) "Initial payment" means the total amount which a purchaser or participant is obligated or agrees to pay under the terms of an agreement before or at the time of delivery of the goods or services to the purchaser

or participant and which a purchaser or participant is obligated to pay within six months of the date that the purchaser or participant commences operation of the business. If the agreement states a total price and provides that the total price is to be paid partially as an initial cash payment and the remainder in specific monthly payments, the term means the total price. The term does not include any amount required by the seller to be deposited as security for the performance by a purchaser or participant of the operation of the business or that secures an extension of credit. If purchasers or participants may enter a multilevel distribution company or business opportunity at different levels, "initial payment" means the total sum the purchaser or participant is obligated to pay to enter at the level chosen by the purchaser or participant.

(6) "Multilevel distribution company" means any person, firm, corporation, or other business entity which sells, distributes, or supplies for a valuable consideration goods or services through independent agents, contractors, or distributors at different levels wherein such participants may recruit other participants and wherein commissions, cross-commissions, bonuses, refunds, discounts, dividends, or other considerations in the program are or may be paid as a result of the sale of such goods or services or the recruitment, actions, or performances of additional participants. The term shall not include licensed insurance agents, insurance agencies, licensed real estate brokers, licensed real estate agents, licensed real estate agencies, licensed securities dealers, licensed limited securities dealers, licensed securities salesmen, or licensed limited securities salesmen. Any multilevel distribution company which operates in any of the forms precluded by paragraphs (1) through (4) of subsection (a) of Code Section 10-1-411 shall be considered an unlawful pyramid club under Code Section 16-12-38.

(7) "Participant" means anyone who participates at any level in a multilevel distribution company.

(8) "Person" means any individual, corporation, partnership, joint venture, association, trust, unincorporated organization, or other entity and shall include any other person that has a substantive interest in or effectively controls such person as well as the individual officers, directors, general partners, trustees, or other individuals in control of the activities of such person.

(9) "Purchaser" means any person who is solicited to become obligated, or does become obligated, under any agreement.

(10) "Seller" means any multilevel distribution company or it means any person who offers to sell to individuals any business opportunity, either directly or through any agent. (Ga. L. 1980, p. 1233, § 1; Ga. L. 1984, p. 522, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1986, p. 10, § 10; Ga. L. 1988, p. 1868, § 1; Ga. L. 1989, p. 218, § 1; Ga. L. 1992, p. 2370, § 1; Ga. L. 1995, p. 757, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, “Code Section 16-12-38” was substituted for “Code Section 10-12-38” at the end of paragraph (6).

**Law reviews.** — For note, “The Georgia Sale of Business Opportunities Act,” see 1 Ga. St. U.L. Rev. 219 (1985).

## JUDICIAL DECISIONS

**“Seller” includes lessors to corporations.** — The term “individual”, as used in paragraph (10) of O.C.G.A. § 10-1-410, may include artificial persons. Therefore, the fact that the lessee is a corporation would not preclude a finding that the lessor is a “seller” as defined in paragraph (10). *Park Leasing Co. v. TWS, Inc.*, 206 Ga. App. 864, 426 S.E.2d 620 (1992).

**Defendant found to be “seller.”** — Because the defendant headed a field installation and maintenance services division of a business engaged in designing, manufacturing, and marketing electronic components and equipment for the coin operated telephone market, defendant was personally a “seller” within the meaning of paragraph (10) of O.C.G.A. § 10-1-410 in that the defendant was an individual who had a substantive interest in a corporation which offered to sell a business opportunity. *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870 (1989).

**Sale of franchise not a “business opportunity.”** — Franchiser’s sale of a restaurant franchise to a franchisee did not meet the definition of a business opportunity under O.C.G.A. § 10-1-410(2)(A)(iii) because the sales and marketing program associated with the franchise system were provided to the franchisee in conjunction with the licensing of registered trademarks and service marks;

thus, the Georgia Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., did not apply to the sale. *Am. Casual Dining, L.P. v. Moe’s Southwest Grill, L.L.C.*, 426 F. Supp. 2d 1356 (N.D. Ga. 2006).

**Statute of limitations.** — The general statute of limitations, providing that an action to enforce a right accruing to an individual under state statute must be brought within 20 years after the action accrues, governs a cause of action arising solely under the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., since the Act itself contains no statute of limitations. *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870 (1989).

**Contractual defenses** are inapplicable when an action is based not on the contract but solely on an alleged violation of the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq. *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870 (1989).

**Agribusiness exemption.** — Investment in cattle feeding and sales program was exempt under the agribusiness exemption in division (2)(B)(iii) of O.C.G.A. § 10-1-410. *Seale v. Miller*, 698 F. Supp. 883 (N.D. Ga. 1988).

**Cited in Georgia ex rel. Adm’r of Fair Bus. Practices Act v. Family Vending, Inc., 171 Bankr. 907 (Bankr. N.D. Ga. 1994); *Touchton v. Amway Corp.*, 247 Ga. App. 269, 543 S.E.2d 782 (2000).**

## 10-1-411. Prohibited activities by multilevel distribution company or participant in marketing program; disclosure statement.

(a) No multilevel distribution company or participant in its marketing program shall:

(1) Operate or, directly or indirectly, participate in the operation of any multilevel marketing program wherein the financial gains to the participants are primarily dependent upon the continued, successive recruitment of other participants and where sales to nonparticipants are not required as a condition precedent to realization of such financial gains;



(2) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing program solely for the solicitation or recruitment of other participants therein;

(3) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant in a multilevel marketing program in connection with the sale of any product or service unless the participant performs a bona fide supervisory, distributive, selling, or soliciting function in the sale or delivery of such product or services to the ultimate consumer;

(4) Offer to pay, pay, or authorize the payment of any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration to any participant:

(A) Where payment thereof is or would be dependent on the element of chance dominating over the skill or judgment of such participant;

(B) Where no amount of judgment or skill exercised by the participant has any appreciable effect upon any finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration which the participant may receive; or

(C) Where the participant is without that degree of control over the operation of such plan as to enable him substantially to affect the amount of finder's fee, bonus, refund, override, commission, cross-commission, dividend, or other consideration which he may receive or be entitled to receive; or

(5) Represent, directly or by implication, that participants in a multilevel marketing program will earn or receive any stated gross or net amount or represent in any manner the past earnings of participants except as may be permitted under this part; provided, however, that a written or verbal description of the manner in which the marketing plan operates shall not, standing alone, constitute a representation of earnings, past or future. Multilevel distribution companies shall not represent, directly or by implication, that it is relatively easy to secure or retain additional distributors or sales personnel or that most participants will succeed.

(b) At least 48 hours prior to the time the purchaser signs a business opportunity contract or at least 48 hours prior to the receipt of any consideration by the seller, whichever occurs first, the seller must provide the prospective purchaser a written document, the cover sheet of which is entitled in at least ten-point boldface capital letters: "DISCLOSURES

REQUIRED BY GEORGIA LAW.” Under this title shall appear the statement in at least ten-point type that:

“The State of Georgia has not reviewed and does not approve, recommend, endorse, or sponsor any business opportunity. The information contained in this disclosure has not been verified by the state. If you have any questions about this investment, see an attorney before you sign a contract or agreement.”

Nothing except the title and required statement shall appear on the cover sheet. The disclosure document shall contain the following information:

(1) The name of the company; whether the company is doing business as a proprietorship, partnership, or corporation; the names under which the company has done, is doing, or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with purchasers or which takes responsibility for statements made by the seller;

(2) The names, addresses, and titles of the company’s officers, directors, trustees, general partners, general managers, principal executives, and any other persons charged with responsibility for the company’s business activities relating to the sale of business opportunities;

(3) The length of time the company has:

(A) Sold business opportunities; and

(B) Sold business opportunities involving the products, equipment, supplies, or services currently offered to the purchaser;

(4) A full and detailed description of the actual services that the seller or company undertakes to perform for the purchaser;

(5) A copy of a current (not older than 13 months) financial statement of the company, updated to reflect any material changes in the company’s financial condition;

(6) If training of any type is promised by the seller or company, a complete description of the training and the length of the training;

(7) If the seller or company promises services to be performed in connection with the placement of equipment, product, or supplies at various locations, the full nature of those services as well as the nature of the agreements to be made with the owners or managers of those locations where the purchaser’s equipment, product, or supplies will be placed;

(8) If the company is required to secure a bond or establish a trust

deposit pursuant to Code Section 10-1-412, either of the following statements:

(A) “As required by Georgia law, the company has secured a bond issued by \_\_\_\_\_,  
(name and address of surety company)

a surety company authorized to do business in this state. Before signing a contract to purchase this business opportunity, you should check with the surety company to determine the bond’s current status.”; or

(B) “As required by Georgia law, the company has established a trust account \_\_\_\_\_ with  
(number of account)

\_\_\_\_\_. Before signing  
(name and address of bank or savings institution)

a contract to purchase this business opportunity, you should check with the bank or savings institution to determine the current status of the trust account.”;

(9) The following statement:

“If the company fails to deliver the product, equipment, or supplies necessary to begin substantial operation of the business within 45 days of the delivery date stated in your contract, you may notify the company in writing and demand that the contract be canceled.”;

(10) If the seller or company makes any statement concerning sales or earnings or range of sales or earnings that may be made through this business opportunity, the following disclosures:

(A) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered who, to the company’s knowledge, have actually received earnings in the amount or range specified within three years prior to the date of the disclosure statement; and

(B) The total number of purchasers of business opportunities involving the product, equipment, supplies, or services being offered within three years prior to the date of the disclosure statement;

(11) The following statement:

“The company selling a business opportunity or the seller shall collect no more than 15 percent of the purchase price. The balance of the purchase price shall be paid into an escrow account, established with a bank or an attorney, which is agreed upon by both parties. The balance in escrow shall be paid to the company 60 days after the date the purchaser commences operation of the business or upon complete compliance with the terms of the contract, whichever happens first.”; and



(12) The seller's principal business address and the name and address of its agent in this state authorized to receive service of process.

(c) In lieu of the disclosures required by paragraphs (1) through (7), (9), and (10) of subsection (b) of this Code section, a seller may utilize the documents prescribed by the Federal Trade Commission, pursuant to Title 16, Chapter 1, Subchapter D, Trade Regulation Rules, Part 436 — Disclosure Requirements and Prohibitions Concerning Franchising and Business Opportunity Ventures, provided that the seller shall provide the prospective purchaser with a separate written cover sheet which is entitled in at least ten-point boldface capital letters: "DISCLOSURES REQUIRED BY GEORGIA LAW." Under this title shall appear the statement in at least ten-point type that:

"The State of Georgia has not reviewed and does not approve, recommend, endorse, or sponsor any business opportunity. The information contained in this disclosure has not been verified by the state. If you have any questions about this investment, see an attorney before you sign a contract or agreement."

Nothing except the title and required statement shall appear on the cover sheet. (Ga. L. 1980, p. 1233, § 2; Ga. L. 1982, p. 3, § 10; Ga. L. 1984, p. 522, § 2; Ga. L. 1988, p. 1868, § 1.)

**Law reviews.** — For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

#### **10-1-412. When bond or trust account required; escrow account required.**

(a) Any business opportunity seller or company which represents, in conjunction with any agreement which requires a total initial payment of an amount exceeding \$500.00, that the seller or company will refund all or part of the price paid for the business opportunity or will repurchase any of the products, equipment, supplies, or chattels supplied by the seller or company if the purchaser is dissatisfied with the business opportunity and any multilevel distribution company must either have obtained a surety bond issued by a surety company authorized to do business in this state or have established a trust account with a licensed and insured bank or savings institution located in this state. For purposes of this subsection, deposits shall not be considered part of the price paid for the business opportunity. The amount of the bond or trust account shall be an amount not less than \$75,000.00. The bond or trust account shall be in favor of the state for the benefit of any person who is damaged by any violation of this part or by the seller's or company's breach of the contract or agreement or of any obligation arising therefrom. Such person may bring an action against the bond or trust account to recover damages suffered; provided, however, that the aggregate liability of the surety or trustee shall be only for actual

damages and in no event shall exceed the amount of the bond or trust account. A multilevel distribution company which requires an initial payment of less than \$500.00 from each participant shall be exempt from the requirements of this Code section.

(b) In any sale of a business opportunity, the seller shall collect no more than 15 percent of the total purchase price, with the balance to be placed in an independent escrow account agreed upon by both parties. The balance in the escrow account shall be paid to the seller 60 days after the date the purchaser commences operation of the business or upon complete compliance with the terms of the contract, whichever happens first. (Ga. L. 1980, p. 1233, § 3; Ga. L. 1984, p. 522, § 3; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 2.)

**Law reviews.** — For note, “The Georgia Sale of Business Opportunities Act,” see 1 Ga. St. U.L. Rev. 219 (1985).

### **10-1-413. Required disclosures; updating; form of notice.**

(a) Every multilevel distribution company intending to have participants in this state, with an agreement made in this state, or with its principal place of business in this state shall have readily available to any potential participants, prior to obtaining any participants in this state or elsewhere, a copy of the contract and of any material incorporated by reference into the contract to be used with participants. In every instance in which a multilevel distribution company solicits any initial payment in excess of \$500.00, the multilevel distribution company shall also have readily available to the particular potential participant or participants, prior to signing the contract, a disclosure statement containing the following:

(1) The name and principal business address of the company; whether the company is doing business as a proprietorship, partnership, or corporation; the names under which the company has done, is doing, or intends to do business; and the name of any parent or affiliated company that will engage in business transactions with participants;

(2) The names, addresses, and titles of the company’s officers, directors, and trustees;

(3) The length of time the company has:

(A) Been engaged in multilevel distribution; and

(B) Been engaged in multilevel distributions involving the types of products, equipment, supplies, or services currently offered to the purchaser; and

(4) A detailed description of the levels of distribution in the multilevel program, the manner in which participants will be compensated, and the extent or amount of any compensation.

(b) Every seller shall update the disclosures required by subsection (b) of Code Section 10-1-411 and by subsection (a) of Code Section 10-1-413 as often as any material change in the required information occurs, but not less than annually.

(c) Whenever a multilevel distribution company must provide the disclosure statement required by subsection (a) of this Code section, the multilevel distribution company, prior to obtaining any participant, shall provide that participant with an 8 1/2 inch by 11 inch document in at least ten-point type, which reads as follows:

“NOTICE REQUIRED BY STATE  
LAW REGARDING DISCLOSURES

State law requires that a multilevel distribution company shall make available certain disclosures regarding the company prior to obtaining participants. This is your official notice that you have a right to request to see these disclosures prior to entering into any agreement with a multilevel distribution company. This will be the only notice you receive regarding your rights to see these disclosures. If you waive these rights, you are giving up an important consumer protection that the State of Georgia has found you should be provided. If you wish to exercise these rights, please indicate below that you want to see the disclosures before agreeing to be a participant, then do not agree to become a participant until the disclosures have been made available to you.

SIGN ONLY ONE OF THE FOLLOWING STATEMENTS:

I wish to see the disclosures required by law before I agree to become a participant. \_\_\_\_\_

Date: \_\_\_\_\_

I do not wish to see the disclosures required by law; I understand that I will not be seeing important information which might affect my decision to participate in this multilevel distribution company. \_\_\_\_\_

Date: \_\_\_\_\_”

(d) Every multilevel distribution company shall maintain on file all of the statements as described in subsection (c) of this Code section for a period of two years from the date such statements are signed.

(e) Every seller shall include the following regarding each officer, director, principal, and owner in the disclosures required by subsection (b) of Code Section 10-1-411 and by subsection (a) of Code Section 10-1-413:

(1) Whether he or she has at any time during the previous seven fiscal years been convicted of a felony or pleaded nolo contendere to a felony



charge if the felony involved fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade;

(2) Whether he or she has at any time during the previous seven fiscal years been held liable in a civil action resulting in a final judgment or has settled out of court any civil action or is a party to any civil action involving fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade;

(3) Whether he or she is currently subject to any state or federal agency or court injunctive or restrictive order or is a party to a proceeding currently pending in which such an order is sought relating to fraud, including violation of any franchise law, unfair or deceptive acts or practices law, business opportunity law, multilevel distributing law, or pyramid law; embezzlement; fraudulent conversion; misappropriation of property; or restraint of trade; and

(4) Whether he or she has at any time during the previous seven fiscal years filed in bankruptcy, been adjudged bankrupt, or been reorganized due to insolvency or has been a principal, director, executive officer, or partner of any other person that has so filed or was so adjudged or reorganized during or within one year after the period that such person held such position in such other person.

(f) The disclosures required under subsection (e) of this Code section shall include any of the following which are applicable:

(1) The identity and location of the court or agency;

(2) The date of conviction, judgment, or decision;

(3) The penalty imposed;

(4) The damages assessed;

(5) The terms of settlement or the terms of the order and the date, nature, and issuer of each such order or ruling; and

(6) The name and principal business address of any other person which filed, was adjudged, or was reorganized in bankruptcy. (Ga. L. 1980, p. 1233, § 4; Ga. L. 1984, p. 522, § 4; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 3.)

**Law reviews.** — For note, “The Georgia Sale of Business Opportunities Act,” see 1 Ga. St. U.L. Rev. 219 (1985).

**10-1-414. Prohibited acts by sellers.**

Sellers shall not:

(1) Represent that a business opportunity or multilevel program provides income or earning potential of any kind unless the seller has documented data to substantiate the claims of income or earning potential, which data shall be furnished to the administrator or his representatives upon request;

(2) Use the trademark, service mark, trade name, logotype, advertising, or other commercial symbol of any business which does not either control the ownership interest in the seller or accept responsibility for all representations made by the seller unless it is clear from the circumstances that the owner of the commercial symbol is not involved in the business opportunity or multilevel distribution company; or

(3) Make or authorize the making of any reference to its compliance with this part in any advertisement or other contract with purchasers or participants or in any manner represent, explicitly or implicitly, that the State of Georgia or any department, agency, officer, or employee has reviewed, approved, sanctioned, or endorsed a business opportunity or multilevel program. (Ga. L. 1980, p. 1233, § 5; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 4.)

**Law reviews.** — For note, “The Georgia Sale of Business Opportunities Act,” see 1 Ga. St. U.L. Rev. 219 (1985).

**10-1-415. Contracts to be in writing; delivery of copy; required provisions; cancellation rights.**

(a) Every business opportunity or multilevel distribution contract shall be in writing, and a copy shall be given to the purchaser or participant at the time he or she signs the contract.

(b) Every contract or any material incorporated therein by reference shall include the following:

(1) The terms and conditions of payment, including but not limited to compensation paid to a participant by the company and any payments to be made by the participant to the company within the first six months of the agreement;

(2) A full and detailed description of the acts or services that the seller undertakes to perform for the purchaser or participant, including a specific description of the product or service being marketed;

(3) The seller’s principal business address. For purposes of this paragraph, a post office box shall not be considered a principal place of business; and

(4) The approximate delivery date of any products, equipment, supplies, or services that the seller is to deliver to the purchaser or participant.

(c) In addition to the information required in subsection (b) of this Code section, every multilevel distribution contract, or an addendum thereto, shall contain the following:

(1) If training of any type is promised by the seller or company, a complete description of the training and the length of the training;

(2) If a bond is required under Code Section 10-1-412, the following statement, with all blanks properly filled:

“As required by Georgia law, the company has secured a bond or established a trust account for your protection. This bond or trust account can be identified as # \_\_\_\_\_ in the name of \_\_\_\_\_, provided by the following bonding company or trust company: \_\_\_\_\_, which is located at the following address: \_\_\_\_\_ in the City of \_\_\_\_\_, State of \_\_\_\_\_.”;

(3) A participant in a multilevel marketing plan has a right to cancel at any time, regardless of reason. If a participant will be under an obligation to make any payment after the agreement has been entered into, a statement in ten-point boldface type as follows must appear in the contract or an addendum thereto:

“A participant in this multilevel marketing plan has a right to cancel at any time, regardless of reason. Cancellation must be submitted in writing to the company at its principal business address.”; and

(4) A description of any cancellation rights.

(d) Cancellation rights pursuant to paragraph (4) of subsection (c) of this Code section must, at a minimum, provide the following:

(1) If the participant has purchased products or paid for administrative services while the contract of participation was in effect, the seller shall repurchase all unencumbered products, sales aids, literature, and promotional items which are in a reasonably resalable or reusable condition and which were acquired by the participant from the seller; such repurchase shall be at a price not less than 90 percent of the original net cost to the participant of the goods being returned. For purposes of this paragraph, “original net cost” means the amount actually paid by the participant for the goods, less any consideration received by the participant for purchase of the goods which is attributable to the specific goods now being returned. Goods shall be deemed “resalable or reusable” if the goods are in an unused, commercially resalable condition at the time



the goods are returned to the seller. Goods which are no longer marketed by a company shall be deemed "resalable or reusable" if the goods are in an unused, commercially resaleable condition and are returned to the seller within one year from the date the company discontinued marketing the goods; provided, however, that goods which are no longer marketed by a multilevel distribution company shall not be deemed "resalable or reusable" if the goods are sold to participants as nonreturnable, discontinued, or seasonal items and the nonreturnable, discontinued, or seasonal nature of the goods was clearly disclosed to the participant seeking to return the goods prior to the purchase of the goods by the participant. Notwithstanding anything to the contrary contained in this paragraph, a multilevel distribution company may not assert that any more than 15 percent of its total yearly sales per calendar year to participants in dollars are from nonreturnable, discontinued, or seasonal items;

(2) The repayment of all administrative fees or consideration paid for other services shall be at not less than 90 percent of the costs to the participant of such fees or services and shall reflect all other administrative services that have not, at the time of termination, been provided to the participant; and

(3) The participant may be held responsible for all shipping expenses incurred in returning sales aids or products to the company but only if such responsibility of a canceling participant is disclosed in the written description of the cancellation rights. (Ga. L. 1980, p. 1233, § 6; Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 5.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, "#" was deleted following "in the name of" in paragraph (c)(2) and "Goods" was substituted for "Good" in the third sentence of paragraph (d)(1).

Pursuant to Code Section 28-9-5, in 1994,

"City" and "State" were substituted for "city" and "state" near the end of paragraph (c)(2).

**Law reviews.** — For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

### 10-1-416. Appointment of Secretary of State as agent for service of process.

(a) Each seller numbering among its participants or purchasers any resident of this state, which has agreements made in this state, or which has its principal place of business in this state, shall irrevocably appoint the Secretary of State of this state as its agent for service of process for any alleged violation of this part and shall pay a \$10.00 filing fee. Compliance with this Code section shall not in and of itself subject any seller to the provisions or consequences of any other statute of this state.

(b) Any seller which numbers among its participants or purchasers any resident of this state, which has agreements made in this state, or which has its principal place of business in this state, and which fails to comply with

subsection (a) of this Code section shall be deemed to have thereby irrevocably appointed the Secretary of State as its agent for service of process for any alleged violation of this part.

(c) Service shall be made by delivering to and leaving with the Secretary of State duplicate copies of such process, notice, or demand, together with an affidavit giving the last known post office address of such seller; and such service shall be sufficient if notice thereof and a copy of the process, notice, or demand are forwarded by registered mail or certified mail or statutory overnight delivery addressed to such seller at the address given in such affidavit. (Code 1981, § 10-1-416, enacted by Ga. L. 1988, p. 1868, § 1; Ga. L. 1992, p. 2370, § 6; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 989, § 1.)

**Editor's notes.** — Ga. L. 1988, p. 1868, § 1, effective July 1, 1988, redesignated former Code Section 10-1-416 as present Code Section 10-1-417.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the

amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For note, "The Georgia Sale of Business Opportunities Act," see 1 Ga. St. U.L. Rev. 219 (1985).

**10-1-417. Purchaser and participant remedies; violations as unfair or deceptive acts; penalty.**

(a) If a business opportunity seller or multilevel distribution company uses any untrue or misleading statements; or fails to comply with Code Section 10-1-411; or fails to deliver the equipment, supplies, or products necessary to begin substantial operation within 45 days of the delivery date stated in the contract; or if the business opportunity seller or multilevel distribution company does not comply with the requirements of Code Sections 10-1-410 through 10-1-416, then, within one year of the date of the contract, upon written notice to the seller, the purchaser or participant may void the contract and shall be entitled to receive from the seller all sums paid to the seller. Upon receipt of such sums, the purchaser or participant shall make available to the seller at the purchaser's or participant's address or at the places at which they are located at the time notice is given, all products, equipment, or supplies received by the purchaser or participant. However, the purchaser or participant shall not be entitled to unjust enrichment by exercising the remedies provided for in this subsection.

(b) The violation of any provision of this part shall constitute an unfair or deceptive act or practice in the conduct of a consumer act or practice or consumer transactions under Part 2 of this article, the "Fair Business Practices Act of 1975," and shall authorize an affected participant or purchaser to seek the remedies provided for in Code Section 10-1-399 and in subsection (a) of Code Section 10-1-417.

(c) Nothing contained in this part shall be construed to limit, modify, or repeal any provisions of Chapter 5 of this title, the "Georgia Uniform

Securities Act of 2008,” including, but not limited to, the definition of the term “security” as contained in paragraph (31) of Code Section 10-5-2.

(d) Any person who fails to comply with this part shall be guilty of a misdemeanor of a high and aggravated nature. In addition thereto, if the violator is a corporation, each of its officers and directors may be subjected to a like penalty; and, if the violator is a sole proprietorship, the owner thereof may be subjected to a like penalty; and, if the violator is a partnership, each of the partners may be subjected to a like penalty, provided that no person shall be subjected to a like penalty if the person did not have actual knowledge of the acts violating this part. (Ga. L. 1980, p. 1233, § 7; Ga. L. 1985, p. 947, § 1; Code 1981, § 10-1-416; Code 1981, § 10-1-417, as redesignated by Ga. L. 1988, p. 1868, § 1; Ga. L. 1991, p. 94, § 10; Ga. L. 1992, p. 2370, § 7; Ga. L. 2008, p. 381, § 5/SB 358.)

**The 2008 amendment**, effective July 1, 2009, in subsection (c), substituted “‘Georgia Uniform Securities Act of 2008,’” for “‘Georgia Securities Act of 1973,’” near the middle and substituted “paragraph (31)”

for “paragraph (26) of subsection (a)” near the end.

**Law reviews.** — For note, “The Georgia Sale of Business Opportunities Act,” see 1 Ga. St. U.L. Rev. 219 (1985).

## JUDICIAL DECISIONS

**Remedies dependent on written notice.** — The statutory right to rescind the transaction and recover the investment that is derived from the Sale of Business Opportunities Act, O.C.G.A. § 10-1-410 et seq., is not available to a plaintiff who has not notified the seller of the exercise of that right within

one year. *League v. United States Postmatic, Inc.*, 235 Ga. App. 171, 508 S.E.2d 210 (1998).

**Cited in** *Hornsby v. Phillips*, 190 Ga. App. 335, 378 S.E.2d 870 (1989); *Touchton v. Amway Corp.*, 247 Ga. App. 269, 543 S.E.2d 782 (2000).

## PART 4

### FALSE ADVERTISING

**Cross references.** — Regulation of advertising of instruments purported to be insured or guaranteed in manner comparable to insured deposit or share account in financial institution, § 7-1-133. Advertising of child-adoption services, § 19-8-24. False advertisements relating to food, §§ 26-2-29, 26-2-30. Advertisement and sale of meat generally, § 26-2-150 et seq. Misrepresentation of food as Kosher, §§ 26-2-331, 26-2-332. Restrictions on use of outdoor advertising signs, § 32-6-75. Prohibition against persons or organizations misleading public as to

involvement with law enforcement agency, T. 35, Ch. 10. Prohibition against use of state or Confederate flag for advertising purposes, § 50-3-8.

**Law reviews.** — For article discussing available remedies in this state for deceptive trade practices, in light of the model Unfair Trade Practices and Consumer Protection Law, proposed in Georgia in 1973, 10 Ga. St. B.J. 281 (1973). For article explaining the Unfair Trade Practices and Consumer Protection Act, proposed in Georgia in 1973, 10 Ga. St. B.J. 409 (1974).



## RESEARCH REFERENCES

**ALR.** — Right to protection against appropriation of advertising matter or methods, 30 ALR 615.

Validity, construction, and effect of state legislation regulating or controlling “bait-and-switch” or “disparagement” advertising or sales practices, 50 ALR3d 1008.

Trade dress simulation of cosmetic products as unfair competition, 86 ALR3d 505.

Unfair competition by imitation in sign or design of business place, 86 ALR3d 884.

Practices forbidden by state deceptive trade practice and consumer protection Acts, 89 ALR3d 449.

Actionable nature of advertising impugning quality or worth of merchandise or products, 42 ALR4th 318.

### 10-1-420. Advertising without intending to sell on stated terms; disclaimers as to availability.

(a) No person, firm, or corporation shall offer for sale merchandise, commodities, or services by making, publishing, disseminating, circulating, or placing before the public within this state in a newspaper or other publication, or in the form of a book, notice, handbill, poster, sign, billboard, bill, circular, pamphlet, letter, photograph, motion picture, or by radio, loud-speaker, telephone, television, telegraph, or in any other way, or advertise merchandise, commodities, or services with intent, design, or purpose not to sell the merchandise, commodities, or services so advertised or offered for sale at the price or upon the terms stated therein or otherwise communicated, or with intent not to sell the merchandise, commodities, or services so advertised.

(b) Any disclaimer that merchandise, commodities, or services advertised for sale may not be available or that availability may be limited or any statement containing the conditions of a lease or rental agreement shall be in the same style as the advertisement and, if in written or printed form, such disclaimer and any asterisk or other symbol directing the attention of the reader to such disclaimer shall be not smaller than one-fifth of the type size used in the main body of the advertisement, provided that the minimum type size shall be not smaller than six-point type in Helvetica font.

(c) Any person, firm, or corporation violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1958, p. 411, §§ 1, 3; Ga. L. 1993, p. 701, § 1.)

**Law reviews.** — For note discussing the evolution and interpretation of this section, see 12 Mercer L. Rev. 260 (1960). For note

criticizing this provision and proposing an alternative, see 12 Mercer L. Rev. 360 (1961).

## JUDICIAL DECISIONS

**Standing.** — Patentee of a weight loss drug who had not produced or marketed a weight control product, and was not a person likely

to be damaged by the practices of alleged competitors, lacked standing to bring suit under the False Advertising Act, O.C.G.A.

§ 10-1-420. *Friedlander v. HMS-PEP Prods., Inc.*, 226 Ga. App. 123, 485 S.E.2d 240 (1997).

#### OPINIONS OF THE ATTORNEY GENERAL

**Advertising one price and selling product at lower price** is not the kind of deception proscribed by this section. 1965-66 Op. Att'y Gen. No. 66-141.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1178.

**ALR.** — Seller's advertisements affecting rights of parties to sale of personal property, 28 ALR 991; 158 ALR 1413.

Advertisement addressed to public relating to sale or purchase of goods at specified price as an offer the acceptance of which will consummate a contract, 43 ALR3d 1102.

Validity, construction, and effect of state legislation regulating or controlling "bait-and-switch" or "disparagement" advertising or sales practices, 50 ALR3d 1008.

Validity and construction of regulations dealing with misrepresentation in the sale of Kosher food, 52 ALR3d 959.

#### **10-1-421. False or fraudulent statements in advertising prohibited; broadcaster or publisher acting in good faith excepted; penalties.**

(a) No person, firm, corporation, or association or any employee thereof, with intent directly or indirectly to dispose of real or personal property or to perform services, professional or otherwise, or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto, shall make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, radio, television, or advertising device or by public outcry or proclamation or any other manner or means whatever, any statement concerning such real or personal property or services, professional or otherwise, or concerning any circumstances or matter of fact connected with the proposed performance or disposition thereof which is untrue or fraudulent and which is known or which by the exercise of reasonable care should be known to be untrue or fraudulent.

(b) Nothing in this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false or fraudulent character.

(c) Whoever violates this Code section shall be fined not less than \$200.00 nor more than \$1,000.00 or imprisoned not more than 20 days, or both. (Ga. L. 1961, p. 197, § 1; Ga. L. 1963, p. 507, § 1.)

**Cross references.** — Solicitation of professional employment by or on behalf of attorneys, §§ 15-19-54, 15-19-55. Prohibition against persons or organizations misleading public as to involvement with law enforcement agency, Ch. 10, T. 35. Unauthorized use of terms “certified public accountant,” “public accountant,” etc., § 43-3-35. Advertising for architectural services by unqualified persons, § 43-4-10. Advertising of chiropractic services by unqualified persons, § 43-9-19. Unauthorized use of persons’ names for purpose of soliciting charitable

contributions, § 43-17-12. Advertising by dispensing opticians, § 43-29-15. Unauthorized use of terms “M.D.,” “Doctor,” “Doctor of Osteopathy,” etc., §§ 43-34-26, 43-34-44. Authority of Georgia Real Estate Commission to take disciplinary action against real estate brokers in connection with false, misleading, etc., advertising of property, § 43-40-25. Time-share program false advertising prohibited, § 44-3-185.

**Law reviews.** — For note criticizing this provision and proposing an alternative, see 12 Mercer L. Rev. 360 (1961).

### JUDICIAL DECISIONS

**Cited in** Southern Bell Tel. & Tel. Co. v. Associated Tel. Directory Publishers, 756 F.2d 801 (11th Cir. 1985); Gold Kist, Inc. v.

ConAgra, Inc., 708 F. Supp. 1291 (N.D. Ga. 1989).

### RESEARCH REFERENCES

**ALR.** — Seller’s advertisements as affecting rights of parties to sale of personal property, 28 ALR 991; 158 ALR 1413.

Legal aspects of television, 15 ALR2d 785; 51 ALR3d 8; 56 ALR3d 386; 65 ALR4th 346.

Validity and construction of regulations dealing with misrepresentation in the sale of Kosher food, 52 ALR3d 959.

Application of state law to sex discrimination in employment advertising, 66 ALR3d 1237.

Increase in tuition as actionable in suit by student against college or university, 99 ALR3d 885.

What goods or property are “used,” “secondhand,” or the like, for purposes of state consumer laws prohibiting claims that such items are new, 59 ALR4th 1192.

Strict products liability: product malfunction or occurrence of accident as evidence of defect, 65 ALR4th 346.

### 10-1-422. Degree to be designated in advertisements using “Doctor” or “Dr.”; penalty for violation.

(a)(1) Each individual who uses the term “Doctor” or “Dr.” in conjunction with his name in any letter, business card, advertisement, sign, public listing, display, or circular of any nature shall designate:

(A) The degree to which he is entitled by reason of his diploma of graduation from a school or other entity, professional or otherwise;

(B) The degree as honorary when an honorary acknowledgment has been made;

(C) “No degree” if he is not entitled to any such recognition.

(2) The designation required by this subsection shall not be necessary:

(A) If the term is a part of the person’s legal name;



(B) In the case of the use in a corporate charter of the name of a professional association or professional corporation organized in this state as provided by law.

(b) Any person willfully violating, with intent to defraud, subsection (a) of this Code section shall be guilty of a misdemeanor. (Ga. L. 1978, p. 2046, § 1; Ga. L. 1979, p. 628, § 1.)

**Cross references.** — Unauthorized use of terms “M.D.,” “Doctor,” “Doctor of Osteopathy,” etc., §§ 43-34-26, 43-34-44.

#### RESEARCH REFERENCES

**ALR.** — Practice of medicine, dentistry, or law through radio broadcasting stations, newspapers, or magazines, 114 ALR 1506.

#### 10-1-423. Enjoining prohibited advertising.

Any person, firm, or corporation offering through advertising merchandise, commodities, or services for sale in violation of Code Section 10-1-420, 10-1-421, or 10-1-422 may be enjoined from such advertising by the superior court having jurisdiction, upon the suit of any person aggrieved or about to be aggrieved thereby. (Ga. L. 1958, p. 411, § 2; Ga. L. 1963, p. 507, § 2.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Section does not authorize a state suit.**  
1965-66 Op. Att’y Gen. No. 66-141.

#### RESEARCH REFERENCES

**ALR.** — Validity and construction of regulations dealing with misrepresentation in the sale of Kosher food, 52 ALR3d 959.

Right to private action under state consumer protection Act, 62 ALR3d 169.

#### 10-1-424. Misrepresenting nature of business.

It shall be unlawful:

(1) For any person, firm, association, or corporation to misrepresent the true nature of its business by use of the words “manufacturer,” “wholesaler,” “retailer,” or words of similar import; or

(2) For any person, firm, association, or corporation to represent itself as selling at wholesale or use the word “wholesale” in any form of sale or advertising,

unless such person, firm, association, or corporation is actually selling at wholesale those items advertised for the purpose of resale. For the purpose

of this Code section the term “wholesale” means a sale made for the purpose of resale and not one made to the consuming purchaser. (Ga. L. 1962, p. 129, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 54A Am. Jur. 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices, § 1211.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 265, 266.

**ALR.** — Seller’s advertisements as affecting rights of parties to sale of personal property, 28 ALR 991; 158 ALR 1413.

#### 10-1-425. Misrepresenting ownership in advertising liquidation, auction, or going-out-of-business sale prohibited.

It shall be unlawful for any person, firm, association, or corporation to misrepresent the true ownership of a business for the purpose of carrying on a liquidation sale, auction sale, or other sale which represents that the firm is going out of business; and any person, firm, association, or corporation which advertises in any manner whatever a liquidation sale, auction sale, or going-out-of-business sale shall clearly state the true name and permanent address of the actual owner or owners of such business in any and all such advertising. (Ga. L. 1962, p. 129, § 2.)

#### JUDICIAL DECISIONS

**Cited** in *Pendigrass v. Edmonds*, 247 Ga. 508, 277 S.E.2d 247 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Advertising, §§ 3, 6, 7, 14.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 265, 266.

**ALR.** — Regulations affecting auctions or auctioneers, 39 ALR 773; 111 ALR 473.

#### 10-1-426. Penalty for violations of Code Sections 10-1-424 and 10-1-425; broadcasters and publishers acting in good faith excepted.

Any person, firm, association, or corporation violating any of the provisions of Code Sections 10-1-424 and 10-1-425 shall be guilty of a misdemeanor. Nothing in Code Section 10-1-424 or 10-1-425 or this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false or fraudulent character. (Ga. L. 1962, p. 129, § 3; Ga. L. 1993, p. 91, § 10.)

**10-1-427. False advertising of legal services; exemption for broadcasters or publishers acting in good faith; complaints; violation of cease and desist order.**

(a) No person, firm, corporation, or association or any employee thereof, with intent directly or indirectly to perform legal services or to do anything of any nature whatsoever to induce the public to enter into any obligation relating thereto, shall make or disseminate or cause to be made or disseminated before the public in this state, in any newspaper or other publication, radio, television, or advertising device or by public outcry or proclamation or any other manner or means whatever, any statement concerning such legal services or concerning any circumstances or matter of fact connected with the proposed performance thereof which is untrue, fraudulent, deceptive, or misleading and which is known or which by the exercise of reasonable care should be known to be untrue, fraudulent, deceptive, or misleading.

(b) Nothing in this Code section shall apply to any visual or sound broadcasting station or to any publisher or printer of a newspaper, magazine, or other form of printed advertising who broadcasts, telecasts, publishes, or prints such advertisement in good faith without knowledge of its false, fraudulent, deceptive, or misleading character.

(c) The Governor's Office of Consumer Affairs is authorized and empowered, upon the receipt of a complaint or upon its own initiative, to investigate any advertising which might be in violation of subsection (a) of this Code section. If the office determines that any advertising is in violation of subsection (a) of this Code section, it is authorized and empowered, after providing the offender with reasonable notice and an opportunity for a hearing, to issue a public reprimand, to issue a cease and desist order against the offender, to report any such action to any board, agency, commission, association, or other entity governing or supervising the legal profession, and to publicize any such action in a medium or media likely to reach the recipients of the improper advertising. Any person against whom the office issues an adverse decision may, as his sole remedy in equity or at law, seek a restraining order against such adverse decision in the superior court.

(d) Any person who violates a cease and desist order issued pursuant to subsection (c) of this Code section shall be guilty of a misdemeanor in the county in which such person resides. Nothing in this subsection shall prohibit any board, agency, commission, association, or other entity governing or supervising the legal profession from taking any lawful action against such person as a result of such improper practices. Each publication of an advertisement in violation of any such cease and desist order shall constitute a separate offense. (Code 1981, § 10-1-427, enacted by Ga. L. 1992, p. 1556, § 1.)



**Cross references.** — Misrepresentation of notary services as deceptive trade practice, § 45-17-8.2

**Law reviews.** — For annual survey on legal ethics, see 44 Mercer L. Rev. 281 (1992).

For note on 1992 enactment of this Code section, see 9 G. St. U.L. Rev. 159 (1992).

#### RESEARCH REFERENCES

**ALR.** — Propriety of radio and television attorney advertisements, 20 ALR6th 385.

### PART 5

#### LIMITED EDITION ART REPRODUCTIONS

#### 10-1-430. Definitions.

As used in this part, the term:

(1) “Art dealer” means a person who is in the business of dealing exclusively or nonexclusively in fine art multiples, a person who by his occupation holds himself out as having knowledge or skill peculiar to fine art multiples or persons to whom that knowledge or skill may be attributed by his employment of an agent or other intermediary who by his occupation holds himself out as having that knowledge or skill, or an auctioneer who sells fine art multiples at public auction. The term shall not include consignors or principals of auctioneers unless such consignors or principals are otherwise specifically defined as art dealers by this paragraph.

(2) “Artist” means the person who created the image which is contained in or constitutes the master or who conceived of and approved the image which is contained in or constitutes the master.

(3) “Fine art multiple” or “multiple” means any print, positive or negative photograph, or similar art object produced in more than one copy. The term includes pages or sheets taken from books or magazines but shall not include books or magazines.

(4) “Limited edition” means fine art multiples produced from a master all of which are the same image and which bear numbers or other markings to denote the limited production thereof to a stated maximum number of multiples or which are otherwise held out as limited to a maximum number of multiples.

(5) “Master” means a printing plate, stone, block, screen, photographic negative, or other device which contains an image and is used to produce fine art objects in multiples.

(6) “Person” means an individual, partnership, corporation, association, or other entity.

(7) "Print" means a multiple produced by, but not limited to, engraving, etching, woodcutting, lithography, and serigraphy and a multiple produced or developed from photographic negatives.

(8) "Proofs" means multiples which are the same as and which are produced in a limited edition from the same master as the multiples but which, whether so designated or not, are set aside from and are in addition to the limited edition to which they relate.

(9) "Signed" means autographed by the artist's own hand, and not by mechanical means of reproduction, after the multiple is produced.

(10) "Written instrument" means a written or printed agreement, bill of sale, invoice, certificate of authenticity, catalogue, note, memorandum, or label describing a multiple which is to be sold, exchanged, or consigned by an art dealer. (Code 1981, § 10-1-430, enacted by Ga. L. 1986, p. 635, § 1.)

#### **10-1-431. Advertising and sale of multiples.**

(a) An art dealer shall not sell or consign a multiple in, into, or out of this state unless a written instrument is furnished to the purchaser or consignee prior to the sale or consignment which sets forth as to each multiple the descriptive information required by Code Section 10-1-432. If a prospective purchaser so requests, the information shall be transmitted to him prior to the payment or placing of an order for a multiple. If payment is made by a purchaser prior to delivery of such a multiple, this information shall be supplied at the time of or prior to delivery. With respect to auctions, this information may be furnished in catalogues or other written materials which are made readily available for consultation and purchase prior to sale, provided that a bill of sale, receipt, or invoice describing the transaction is then provided which makes reference to the catalogue and lot number in which this information is supplied. Information supplied pursuant to this subsection shall be clearly, specifically, and distinctly addressed to each of the items listed in Code Section 10-1-432 unless the required data is not applicable. This Code section is applicable to transactions by and between art dealers and others considered to be art dealers for the purposes of this part.

(b)(1) An art dealer shall not cause a catalogue, prospectus, flyer, or other written material or advertisement to be distributed in, into, or from this state which solicits a direct sale, by inviting transmittal of payment for a specific multiple, unless it clearly sets forth, in close physical proximity to the place in such material where the multiple is described, the descriptive information required by Code Section 10-1-432. In lieu of this required information, the written material or advertising may set forth the material contained in the following quoted passage, or the passage itself, if the art dealer then supplies the required information prior to or

with delivery of the multiple. The nonobservance of the terms within the following passage shall constitute a violation of this part:

“Georgia law provides for disclosure in writing of information concerning certain fine prints and photographs prior to effecting a sale of them. This law requires disclosure of such matters as the identity of the artist, the artist’s signature, the medium, whether the multiple is a reproduction, the time when the multiple was produced, use of the plate which produced the multiple, and the number of multiples in a ‘limited edition.’ If a prospective purchaser so requests, the information shall be transmitted to him prior to payment or the placing of an order for a multiple. If payment is made by a purchaser prior to delivery of the multiple, this information will be supplied at the time of or prior to delivery, in which case the purchaser is entitled to a refund if, for reasons related to matter contained in such information, he returns the multiple in the condition in which received within 30 days of receiving it. In addition, if after payment and delivery, it is ascertained that the information provided is incorrect, the purchaser may be entitled to certain remedies, including refund upon return of the multiple in the condition in which received.”

(2) This requirement is not applicable to general written material or advertising which does not constitute an offer to effect a specific sale.

(c) In each place of business in the state where an art dealer is regularly engaged in sales of multiples, the art dealer shall post in a conspicuous place, a sign which, in a legible format, contains the information included in the following passage:

“Georgia law provides for the disclosure in writing of certain information concerning prints and photographs. This information is available to you, and you may request to receive it prior to purchase.”

(d) If an art dealer offering multiples by means of a catalogue, prospectus, flyer, or other written material or advertisement distributed in, into, or from this state disclaims knowledge as to any relevant detail referred to in Code Section 10-1-432, he shall so state specifically and categorically with regard to each such detail to the end that the purchaser shall be able to judge the degree of uniqueness or scarcity of each multiple contained in the edition so offered. Describing the edition as an edition of “reproductions” eliminates the need to furnish further informational details unless the edition was allegedly published in a signed, numbered, or limited edition, or any combination thereof, in which case all of the informational details are required to be furnished.

(e) Whenever an artist sells or consigns a multiple of his own creation or conception, the artist shall disclose the information required by Code Section 10-1-432, but an artist shall not otherwise be regarded as an art dealer. (Code 1981, § 10-1-431, enacted by Ga. L. 1986, p. 635, § 1.)



**10-1-432. Descriptive information.**

(a) Except as provided in subsections (c), (d), and (e) of this Code section, the following information shall be provided as required by Code Section 10-1-431:

(1) The name of the artist;

(2) If the artist's name appears on the multiple, a statement whether the multiple was signed by the artist; or if the multiple was not signed by the artist, a statement of the source of the artist's name on the multiple, such as whether the artist placed his signature on the multiple or on the master, whether his name was stamped or estate stamped on the multiple or on the master, or was from some other source or in some other manner placed on the multiple or on the master;

(3) A description of the medium or process, and where pertinent to photographic processes, the material used in producing the multiple, such as whether the multiple was produced through the etching, engraving, lithographic, serigraphic, or a particular method or material used in photographic developing processes. If an established term, in accordance with the usage of the trade, cannot be employed accurately to describe the medium or process, a brief, clear description shall be made;

(4) If the multiple or the image on or in the master constitutes a photomechanical or photographic type of reproduction of an image produced in a different medium, for a purpose other than the creation of the multiple being described, a statement of this information and the respective mediums;

(5) If paragraph (4) of this subsection is applicable, and the multiple is not signed, a statement whether the artist authorized or approved in writing the multiple or the edition of which the multiple being described is one;

(6) If the purported artist was deceased at the time the master was made which produced the multiple, this shall be stated;

(7) If the multiple is a "posthumous" multiple, that is, if the master was created during the life of the artist but the multiple was produced after the artist's death, this shall be stated;

(8) If the multiple was made from a master which produced a prior limited edition, or from a master which constitutes or was made from a reproduction of a prior multiple or the master which produced the prior limited edition, this shall be stated as shall the total number of multiples, including proofs, of all other editions produced from that master;

(9) As to multiples produced after 1949, the year or approximate year the multiple was produced shall be stated. As to multiples produced prior

to 1950, state the year, approximate year, or period when the master was made which produced the multiple and when the particular multiple being described was produced. The requirements of this paragraph shall be satisfied when the year stated is approximately accurate;

(10) Whether the edition is being offered as a limited edition, and if so the authorized maximum number of signed or numbered impressions, or both, in the edition; the authorized maximum number of unsigned or unnumbered impressions, or both, in the edition; the authorized maximum number of artist's, publisher's, or other proofs, if any, outside of the regular edition; and the total size of the edition; and

(11) Whether or not the master has been destroyed, effaced, altered, defaced, or canceled after the current edition.

(b) If the multiple is part of a limited edition and was printed after July 1, 1986, the statement of the size of the limited edition, as stated pursuant to paragraph (10) of subsection (a) of this Code section, shall also constitute an express warranty that no additional multiples of the same image, including proofs, have been produced in this or in any other limited edition.

(c) If the multiple was produced in the period from 1950 to July 1, 1986, the information required to be supplied need not include the information required by paragraphs (5) and (8) of subsection (a) of this Code section.

(d) If the multiple was produced in the period from 1900 to 1949, the information required to be supplied need only consist of the information required by paragraphs (1), (2), (3), and (9) of subsection (a) of this Code section.

(e) If the multiple was produced before the year 1900, the information to be supplied need only consist of the information required by paragraphs (1), (3), and (9) of subsection (a) of this Code section. (Code 1981, § 10-1-432, enacted by Ga. L. 1986, p. 635, § 1; Ga. L. 1992, p. 6, § 10.)

#### **10-1-433. Warranties.**

(a)(1) Except as provided in paragraph (2) of this subsection, whenever an art dealer furnishes information as required by Code Section 10-1-432, such information shall be a part of the basis of the bargain and shall create express warranties as to the information provided. Such warranties shall not be negated or limited because the art dealer in the written instrument did not use formal words such as "warrant" or "guarantee" or because the art dealer did not have a specific intention or authorization to make a warranty or because any required statement is or purports to be the art dealer's opinion. The existence of a basis in fact for information warranted by virtue of this subsection shall not be a defense in an action to enforce such warranty.

(2) With respect to photographic multiples produced prior to 1950 and other multiples produced prior to 1900, the information required by paragraph (3) of subsection (a) of Code Section 10-1-432 shall be deemed to be correct if a reasonable basis in fact exists for the information provided.

(b) When information is not supplied, this shall constitute the express warrant that such information is not required to be disclosed.

(c) Whenever an art dealer disclaims knowledge as to a particular item about which information is required, such disclaimer shall be ineffective unless clearly, specifically, and categorically stated as to the particular item and contained in the physical context of other language setting forth the required information as to a specific multiple. (Code 1981, § 10-1-433, enacted by Ga. L. 1986, p. 635, § 1.)

#### **10-1-434. Remedies not exclusive.**

(a) The rights, liabilities, and remedies created by this part shall be construed to be in addition to and not in substitution, exclusion, or displacement of other rights, liabilities, and remedies provided by law.

(b) Whenever an artist sells or consigns a multiple of his own creation, the artist shall incur the obligations prescribed by this part for an art dealer.

(c) An artist or merchant who consigns a multiple to an art dealer for the purpose of effecting a sale of the multiple shall have no liability to a purchaser under this part if such consignor, as to the consignee, has complied with the provisions of this part.

(d) When an art dealer has agreed to sell a multiple on behalf of a consignor who is not an art dealer or when an artist has not consigned a multiple to an art dealer, but the art dealer has agreed to act as the agent for an artist for the purpose of supplying the information required by this part, such art dealer shall incur the liabilities of other art dealers prescribed by this part as to a purchaser.

(e) When an art dealer is liable to a purchaser pursuant to the provisions of this part, as a result of providing information in the situations referred to in this Code section, as well as when such an art dealer purchased such a multiple from another art dealer, if the art dealer can establish that his liability results from incorrect information which was provided by the consignor, artist, or art dealer to him in writing, and the art dealer who is liable in good faith relied on such information, the consignor, artist, or art dealer shall similarly incur such liabilities as to the purchaser and such art dealer. (Code 1981, § 10-1-434, enacted by Ga. L. 1986, p. 635, § 1.)

#### **10-1-435. Civil remedies for violations.**

(a) An art dealer, including a dealer consignee, who offers or sells a multiple in, into, or from this state without providing the information



required in Code Sections 10-1-431 and 10-1-432 or who provides information which is mistaken, erroneous, or untrue, except for harmless errors such as typographical errors, shall be liable to the purchaser of the multiple. The art dealer's liability shall consist of the consideration paid by the purchaser for the multiple, with interest at the legal rate thereon, upon the return of the multiple in the condition in which received by the purchaser.

(b) In any case in which an art dealer, including a dealer consignee, willfully offers or sells a multiple in violation of this part, the person purchasing such multiple may recover from the art dealer, including a dealer consignee, who offers or sells such multiple an amount equal to three times the amount required under subsection (a) of this Code section.

(c) No action shall be maintained to enforce any liability under this Code section unless brought within one year after discovery of the violation upon which it is based and in no event more than three years after the multiple was sold.

(d) In any action to enforce any provision of this part, the court may allow the prevailing purchaser the costs of the action together with reasonable attorneys' and expert witnesses' fees. In the event, however, the court determines that an action to enforce was brought in bad faith, it may allow such expenses to the seller as it deems appropriate.

(e) These remedies shall not bar or be deemed inconsistent with a claim for damages or with the exercise of additional remedies otherwise available to the purchaser.

(f) In any proceeding in which an art dealer relies upon a disclaimer of knowledge as to any relevant information set forth in Code Section 10-1-432 for any time period, such disclaimer shall be effective unless the claimant is able to establish that the art dealer failed to make reasonable inquiries, according to the custom and usage of the trade, to ascertain the relevant information or that such relevant information would have been ascertained as a result of such reasonable inquiries. (Code 1981, § 10-1-435, enacted by Ga. L. 1986, p. 635, § 1.)

#### **10-1-436. Civil penalties; injunctions.**

(a) Whenever the Attorney General or any district attorney has reason to believe that any person is violating any provision of this part, he may bring an action against such person to restrain or enjoin continued violations. With the exception of consent judgments entered before any testimony is taken, a final judgment under this Code section is admissible as prima-facie evidence of such specific findings of fact as may be made by the court which enters the judgment in subsequent proceedings by or against the same person or his successors or assigns.

(b) Any person who violates any provision of this part may be liable for a civil penalty not to exceed \$500.00 for each violation. Such penalty may be

assessed and recovered in a civil action brought by the Attorney General or any district attorney. (Code 1981, § 10-1-436, enacted by Ga. L. 1986, p. 635, § 1.)

### **10-1-437. Exemptions.**

(a) This part shall not apply to any fine art multiple when offered for sale or sold at wholesale or retail for \$100.00 or less, exclusive of any frame.

(b) Any charitable organization which conducts a sale or auction of fine art multiples shall be exempt from the disclosure requirements of this part if it posts in a conspicuous place, at the site of the sale or auction, a disclaimer of any knowledge of the information specified in Code Section 10-1-432 and includes such a disclaimer in a catalogue, if any, distributed by the organization with respect to the sale or auction of fine art multiples. If a charitable organization uses or employs an art dealer to conduct a sale or auction of fine art multiples, the art dealer shall be subject to all disclosure requirements otherwise required of an art dealer under this part. (Code 1981, § 10-1-437, enacted by Ga. L. 1986, p. 635, § 1.)

## **PART 6**

### **DISASTER RELATED VIOLATIONS**

**Editor's notes.** — Ga. L. 1995, p. 697, § 2, violations occurring on or after April 18, 1995.  
not codified by the General Assembly, provides that this part applies with respect to

### **10-1-438. Definitions; disaster related violations of Part 1, 2, or 4 of this article; civil penalties; cause of action for damages and attorney's fees.**

(a) As used in this part, the term:

(1) "Administrator" means the administrator appointed pursuant to Code Section 10-1-395.

(2) "Disaster related violation" means any violation of Part 1, 2, or 4 of this article, which violation involves:

(A) The sale or offer for sale of supplies for use in the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster; or

(B) The performance of or offer to perform services for the salvage, repair, or rebuilding of a structure damaged as a result of a natural disaster.

(3) "Natural disaster" means any natural disaster for which a state of emergency is proclaimed by the Governor.

(b) Whenever the administrator or any court is imposing a penalty for any violations of Part 1, 2, or 4 of this article and the violation is a disaster related violation, in addition to any other applicable penalty there may be imposed an additional civil penalty not to exceed \$10,000.00 for each transaction.

(c) Any person who suffers damage or injury as a result of a disaster related violation shall have a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Amounts recovered in such an action shall have priority over a civil penalty imposed under this Code section. (Code 1981, § 10-1-438, enacted by Ga. L. 1995, p. 697, § 1.)

## ARTICLE 16

### TRADEMARKS, SERVICE MARKS, AND TRADE NAMES

**Cross references.** — Fraudulent nature of use of similar trademarks, names, or devices with intention of deceiving and misleading public, § 23-2-55. Use of word "Georgia" in trademark, trade name, service mark, or

advertisement in connection with meat or meat food products, § 26-2-115. Authority of pharmacists to substitute generic drugs for brand name drugs, § 26-4-80 et seq.

#### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Trade Dress (Packaging) Simulation, 3 POF2d 577.

Cancellation of Registration of Trademark That Has Become Generic Term, 37 POF2d 67.

Wrongful Use of Another's Trademark or Tradename, 47 POF2d 643.

Monetary Recovery for Trademark Infringement, 17 POF3d 609.

Common-Law Trademarks or Tradename Rights in Geographical Areas of Prior Use, 22 POF3d 623.

Proof of Distinctiveness and Secondary Meaning of Trademark or Service Mark, 22 POF3d 691.

Proof of Music Sampling in Copyright Infringement, 26 POF3d 537.

Proof of Extraordinary Remedies for Copyright Infringement, 28 POF3d 379.

Extraordinary Remedies for Trademark Infringement, 36 POF3d 255.

Misuse of Intellectual Property, 37 POF3d 315.

Dilution of a Trademark, 38 POF3d 1.

Proof of Copyright Infringement by Unauthorized Use of Software, 52 POF3d 107.

Proof of Trade Dress Infringement, 55 POF3d 383.

Proof of Copyright Infringement by File Sharing, 63 POF3d 1.

Proof of Facts Establishing a Claim for Trade Libel or Product Disparagement under Sec. 43(a) of the Lanham Act, 15 U.S.C.A. Section 1125(a), 79 POF3d 1.

Establishing Liability for Trademark Infringement by Use of Website Metatags, 84 POF3d 93.

## PART 1

### REGISTRATION AND USE OF TRADEMARKS AND SERVICE MARKS

**Law reviews.** — For article, "Trademarks and Semantics: The Use and Misuse of Trademarks in Dictionaries and Trade Journals," see 6 Ga. L. Rev. 311 (1972). For

article, "Trademark Litigation," a brief overview of the subject, see 17 Ga. St. B.J. 158 (1981). For article, "Protecting the Trademark 'Coca-Cola' in the Courts," see 28 Ga.



St. B.J. 42 (1991). For article, "Elite Personnel, Inc. v. Elite Personnel Services, Inc.: Issues of Registration and Suggestion in Trademark Law," see 7 Ga. St. U.L. Rev. 551

(1991). For article, "Acquisition of Trademark Rights Under United States and Georgia Law," see 7 Ga. St. B.J. 14 (2001).

### JUDICIAL DECISIONS

**Part similar to federal statute.** — This part provides for a civil action to remedy infringements and is, both in structure and purpose, similar to this part's federal counterpart. *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

**Registration provisions are permissive.** — Provisions concerning registration are permissive rather than mandatory. *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Trade name previously acquired by another.** — Registration will not operate to deprive another of previously acquired trade name. *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Cited in** *Howard Stores Corp. v. Howard Clothing, Inc.*, 308 F. Supp. 70 (N.D. Ga. 1969).

### RESEARCH REFERENCES

**ALR.** — Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 ALR 784; 28 ALR 114.

Right of manufacturer, producer, or wholesaler to control resale price, 19 ALR 925; 32 ALR 1087; 103 ALR 1331; 125 ALR 1335.

Application of principles of unfair competition to artistic or literary property, 19 ALR 949.

"Drive it yourself" and similar phrases in connection with business of renting automobiles as subject of trademark or protection upon ground of unfair competition, 43 ALR 213.

Trademark or tradename as asset in case of bankruptcy, insolvency, or assignment for benefit of creditors, 44 ALR 706.

Rights and remedies as between originator of uncopyrighted advertising plan or slogan, or his assignee, and another who uses or infringes the same, 104 ALR 1357; 157 ALR 1436.3

Conflict of laws, with respect to trademark infringement or unfair competition, including the area of conflict between federal and state law, 148 ALR 139.

Stockholders' rights to patent, copyright, or trademark owned by corporation on dissolution thereof, 30 ALR2d 938.

Trade dress simulation of cosmetic products as unfair competition, 86 ALR3d 505.

Unfair competition by imitation in sign or design of business place, 86 ALR3d 884.

Name appropriation by employer or former employer, 52 ALR4th 156.

### 10-1-440. Definitions; when trademark or service mark used in state.

(a) As used in this part, the term:

(1) "Applicant" means the person filing an application for registration of a trademark or service mark under this part and the legal representatives, successors, or assigns of the person filing an application for registration of a trademark or service mark under this part.

(2) "Person" means any individual, firm, partnership, corporation, association, union, or other organization.

(3) "Registrant" means the person to whom the registration of a trademark or service mark under this part is issued and the legal

representatives, successors, or assigns of the person to whom the registration of a trademark or service mark under this part is issued.

(4) “Service mark” means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify the services of one person and to distinguish them from the services of others.

(5) “Trademark” means any word, name, symbol, or device or any combination thereof adopted and used by a person to identify goods made or sold by him and to distinguish them from goods made or sold by others.

(b) For the purposes of this part, a trademark shall be deemed to be “used” in this state when it is placed in any manner on the goods or their containers or on the tags or labels affixed thereto and such goods are sold or otherwise distributed in this state.

(c) For the purposes of this part, a service mark shall be deemed to be “used” in this state when it is used to identify the services of one person and to distinguish them from the services of others and such services are sold or otherwise rendered in this state. (Ga. L. 1952, p. 134, § 6; Ga. L. 1963, p. 463, § 1.)

**Law reviews.** — For article, “Trademark Monopolies,” see 48 Emory L.J. 367 (1999). For article, “Post-Creation Checklist for

Georgia Business Entities,” see 9 Ga. St. B.J. 24 (2004).

### JUDICIAL DECISIONS

**“Trademark” distinguished from “trade name”.** — Provisions of the law restrict the meaning and function of a trademark to the identification of goods and their manufacturer. However, a trade name primarily identifies the owner or operator of a business and may also be used to identify the goods

handled by such owner. *Gordy v. Dunwoody*, 209 Ga. 627, 74 S.E.2d 886 (1953), later appeal, 210 Ga. 810, 83 S.E.2d 7 (1954), commented on in 17 Ga. B.J. 395 (1955).

**Cited in** *O’Jay Spread Co. v. Hicks*, 185 Ga. 507, 195 S.E. 564 (1938).

### OPINIONS OF THE ATTORNEY GENERAL

**“Goods” defined.** — The word “goods” as used in this section is not defined therein, but is used to mean wares, merchandise, and commodities bought and sold by merchants and traders. 1958-59 Op. Att’y Gen. p. 398.

**“Trademark” defined.** — It has been said by appellate courts in other jurisdictions that a “trademark” consists of the use in trade of a mark placed upon goods manufactured (or sold) by a particular person and placed in market with such marks for sale and trade and does not become a trademark until it is actually stamped on or otherwise becomes

affixed to goods to be sold. It may be broadly defined as a mark by which the wares of the owner are known in trade, and its objects are two-fold: first, to protect the party using it from competition of inferior articles; and, second, to protect the public from imposition of fraud, and this latter is one of the basic concepts of all trademark law. 1957 Op. Att’y Gen. p. 330.

**Word not used in trade nor used for protection not registerable as trademark.** — A holding company, owning outright certain corporations and the controlling stocks in

others, which manufactures, sells, or distributes for sale no commodity whatsoever may not register as a trademark a word used on a gummed label obviously intended for the applicant's own use and a director of subsidiaries for the applicant and such subsidiaries, where there is no indication, claim, or evidence of any kind that either of the items are sold, offered for sale, or distributed to any

one other than subsidiaries and no indication that they pay for them directly or indirectly, and there is no showing that the use of the name on either piece of material is designed to or does protect the manufacturer or the public against inferior goods of others in the marts of trade. 1958-59 Op. Att'y Gen. p. 398.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 1, 3.

**Am. Jur. Pleading and Practice Forms.** — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 2.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1, 173, 174.

**ALR.** — Protection of business or trading corporation against use of same or similar name by another corporation, 115 ALR 1241.

Granting of "naked" or unsupervised license to third party as abandonment of trademark, 118 ALR Fed. 211.

#### 10-1-441. Registration of marks — When marks ineligible.

A trademark or service mark shall be entitled to registration unless it:

- (1) Consists of or comprises immoral, deceptive, or scandalous matter; or
- (2) Consists of or comprises matter which may disparage or falsely suggest a connection with persons, living or dead, institutions, beliefs, or national symbols or bring them into contempt or disrepute; or
- (3) Consists of or comprises the flag or coat of arms or other insignia of the United States or of any state, county, or municipality or of any foreign nation or any simulation thereof, except that a county, municipality, or board of education shall be entitled to have registered its own service mark for use by that county, municipality, or board of education; or
- (4) Consists of or comprises the name, signature, or portrait of any living individual, except with his or her written consent; or
- (5) Consists of a mark which:
  - (A) When applied to the goods or services of the applicant, is merely descriptive or deceptively misdescriptive of them; or
  - (B) When applied to the goods or services of the applicant, is primarily geographically descriptive or deceptively misdescriptive of them; or
  - (C) Is primarily merely a surname; or



(6) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in this state or a trademark or service mark or trade name previously used in this state by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive; or

(7) Consists of or comprises a trademark or service mark which so resembles a trademark or service mark registered in the United States Patent Office by another and not abandoned as to be likely, when applied to the goods or services of the applicant, to cause confusion or mistake or to deceive;

provided, however, that, should the applicant prove that the applicant is the owner of a concurrent registration in the United States Patent Office of a trademark or service mark covering an area including this state, the applicant may register such trademark or service mark under this part. (Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 7; Ga. L. 1963, p. 463, § 2; Ga. L. 1988, p. 1458, § 1; Ga. L. 1993, p. 462, § 1; Ga. L. 1994, p. 97, § 10.)

**Law reviews.** — For article, "A Patent and Trademark Primer," see 15 Ga. St. B.J. 58 (1978).

### JUDICIAL DECISIONS

**Cited in** O'Jay Spread Co. v. Hicks, 185 Ga. 507, 195 S.E. 564 (1938); Mazdak Auto Towing & Serv., Inc. v. Midcontinental Group, Inc., 231 Ga. App. 859, 501 S.E.2d 44 (1998).

### OPINIONS OF THE ATTORNEY GENERAL

**Designs and plans** may not be registered as trademarks. 1952-53 Op. Att'y Gen. p. 269.

**Items neither sold nor designed to protect against inferior goods.** — A holding company, owning outright certain corporations and the controlling stocks in others, which manufactures, sells, or distributes for sale no commodity whatsoever may not register as a trademark a word used on a gummed label obviously intended for the applicant's own use and a directory of subsidiaries for the applicant and such subsidiaries, where there is no indication, claim, or evidence of any kind that either of the items are sold, offered for sale, or distributed to any one other than

subsidiaries and no indication that they pay for them directly or indirectly, and there is no showing that the use of the name on either piece of material is designed to or does protect the manufacturer or the public against inferior goods of others in the marts of trade. 1958-59 Op. Att'y Gen. p. 398.

**Confederate flag** may not be used as trademark. 1957 Op. Att'y Gen. p. 328.

**Changed trademark should be reregistered.** — Where a union label registered as a trademark has been changed somewhat, the label should be reregistered, showing all changes therein. 1952-53 Op. Att'y Gen. p. 514.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 72 et seq.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 148, 175.

**ALR.** — Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 ALR 1189; 44 ALR2d 1156.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 ALR3d 277.

Reverse confusion doctrine under state trademark law, 114 ALR5th 129.

Initial interest confusion doctrine under Lanham Trademark Act, 183 ALR Fed. 553.

Reverse confusion doctrine under Lanham Trademark Act, 187 ALR Fed. 271.

## 10-1-442. Registration of marks — Application; fee.

(a) Subject to the limitations set forth in this part, any person who adopts and uses a trademark or service mark in this state may file in the office of the Secretary of State, on a form to be furnished by the Secretary of State, an application for registration of such trademark or service mark setting forth, but not limited to:

(1) The name and business address of the person applying for such registration and, if a corporation, the state of incorporation;

(2) A description of the goods or services in connection with which the mark is used and the mode or manner in which the mark is used in connection with such goods or services and the class in which such goods or services fall; and

(3) The date when the trademark or service mark was first used anywhere, as well as the date when it was first used in this state by the applicant or his predecessor in business.

(b) The application shall be signed and verified by the applicant and shall be accompanied by a specimen or facsimile of such trademark or service mark in triplicate and a filing fee of \$15.00, payable to the Secretary of State. (Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 8; Ga. L. 1963, p. 463, § 3; Ga. L. 1983, p. 1470, § 1; Ga. L. 1987, p. 563, § 1.)

**Law reviews.** — For article, "A Patent and Trademark Primer," see 15 Ga. St. B.J. 58 (1978).

## JUDICIAL DECISIONS

**Registration cannot deprive another of vested right.** — The provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions thereof cannot operate to deprive another

of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or

other person, by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**Cited in** *O'Jay Spread Co. v. Hicks*, 185 Ga. 507, 195 S.E. 564 (1938); *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 64.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 147, 176, 177.

**ALR.** — Damages recoverable for wrongful registration of trademark, 26 ALR2d 1184.

**10-1443. Registration of marks — Classes of goods and services for purposes of registration; application limited to one class.**

(a) The following general classes of goods are established for convenience of administration of this part, but not to limit or extend the applicant's or registrant's rights; and a single application for registration of a trademark may include any or all goods upon which the trademark is actually being used comprised in a single class; but in no event shall a single application include goods upon which the trademark is being used which fall within different classes of goods. The classes are as follows:

- (1) Raw or partly prepared materials;
- (2) Receptacles;
- (3) Baggage, animal equipments, portfolios, and pocketbooks;
- (4) Abrasives and polishing materials;
- (5) Adhesives;
- (6) Chemicals and chemical compositions;
- (7) Cordage;
- (8) Smokers' articles, not including tobacco products;
- (9) Explosives, firearms, equipments, and projectiles;
- (10) Fertilizers;
- (11) Inks and inking materials;
- (12) Construction materials;
- (13) Hardware and plumbing and steamfitting supplies;
- (14) Metals and metal castings and forgings;
- (15) Oils and greases;



- (16) Paints and painters' materials;
- (17) Tobacco products;
- (18) Medicines and pharmaceutical preparations;
- (19) Vehicles;
- (20) Linoleum and oiled cloth;
- (21) Electrical apparatus, machines, and supplies;
- (22) Games, toys, and sporting goods;
- (23) Cutlery, machinery, and tools, and parts thereof;
- (24) Laundry appliances and machines;
- (25) Locks and safes;
- (26) Measuring and scientific appliances;
- (27) Horological instruments;
- (28) Jewelry and precious metal ware;
- (29) Brooms, brushes, and dusters;
- (30) Crockery, earthenware, and porcelain;
- (31) Filters and refrigerators;
- (32) Furniture and upholstery;
- (33) Glassware;
- (34) Heating, lighting, and ventilating apparatus;
- (35) Belting, hose, machinery packing, and nonmetallic tires;
- (36) Musical instruments and supplies;
- (37) Paper and stationery;
- (38) Prints and publications;
- (39) Clothing;
- (40) Fancy goods, furnishings, and notions;
- (41) Canes, parasols, and umbrellas;
- (42) Knitted, netted, and textile fabrics and substitutes therefor;
- (43) Thread and yarn;
- (44) Dental, medical, and surgical appliances;
- (45) Soft drinks and carbonated waters;

- (46) Foods and ingredients of foods;
- (47) Wines;
- (48) Malt beverages and liquors;
- (49) Distilled alcoholic liquors;
- (50) Merchandise not otherwise classified;
- (51) Cosmetics and toilet preparations;
- (52) Detergents and soaps.

(b) The following general classes of services are established for convenience of administration of this part, but not to limit or extend the applicant's or registrant's rights; and a single application for registration of a service mark may include any or all services in connection with which the service mark is actually being used comprised in a single class; but in no event shall a single application include services in connection with which the service mark is being used which fall within different classes of services. The classes are as follows:

- (1) Miscellaneous;
- (2) Advertising and business;
- (3) Insurance and financial;
- (4) Construction and repair;
- (5) Communication;
- (6) Transportation and storage;
- (7) Material treatment;
- (8) Education and entertainment. (Ga. L. 1952, p. 134, § 14; Ga. L. 1963, p. 463, § 9.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks Trade-Names, and Unfair Competition, and Tradenames, §§ 3, 36. §§ 6, 173, 174.  
**C.J.S.** — 87 C.J.S., Trade-Marks,

#### 10-1-444. Registration of marks — Certificate; use as evidence.

Upon compliance by the applicant with the requirements of this part, the Secretary of State shall cause a certificate of registration to be issued and delivered to the applicant. The certificate of registration shall be issued under the signature of the Secretary of State and the seal of the state and it shall show the name and business address and, if a corporation, the state of incorporation, of the person claiming ownership of the trademark or service mark; the date claimed for the first use of the trademark or service

mark anywhere and the date claimed for the first use of the trademark or service mark in this state; the class of goods or services and a description of the goods or services on which the trademark or service mark is used; a reproduction of the trademark or service mark; the registration date; and the term of the registration.

Any certificate of registration issued by the Secretary of State under the provisions of this Code section or a copy thereof duly certified by the Secretary of State shall be admissible in evidence as competent and sufficient proof of the registration of such trademark or service mark in any action or judicial proceedings in any court of this state. (Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 9; Ga. L. 1963, p. 463, § 4; Ga. L. 1982, p. 3, § 10.)

### JUDICIAL DECISIONS

**Registration cannot deprive another of vested right.** — The provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions thereof cannot operate to deprive another of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or

other person, by the use of similar trade-marks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. *Wombie v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**Cited in** *O'Jay Spread Co. v. Hicks*, 185 Ga. 507, 195 S.E. 564 (1938); *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 66, 67, 141, 142.  
**C.J.S.** — 87 C.J.S., Trade-Marks,

Trade-Names, and Unfair Competition, § 199 et seq.

### 10-1-445. Registration of marks — Duration; renewal; fee.

(a) Registration of a trademark or service mark under this part shall be effective for a term of ten years from the date of registration; and, upon application filed within six months prior to the expiration of such term on a form to be furnished by the Secretary of State, the registration may be renewed for a like term. A renewal fee of \$15.00, payable to the Secretary of State, shall accompany the application for renewal of the registration.

(b) A trademark or service mark registration may be renewed for successive periods of ten years in like manner.

(c) The Secretary of State shall notify registrants of trademarks or service marks under this part of the necessity of renewal within the year next preceding the expiration of the ten years from the date of registration by writing to the last known address of the registrants. (Ga. L. 1893, p. 134, § 3;



Civil Code 1895, § 1738; Civil Code 1910, § 1990; Code 1933, § 106-102; Ga. L. 1949, p. 949, § 1; Ga. L. 1952, p. 134, § 10; Ga. L. 1963, p. 463, § 5; Ga. L. 1983, p. 1470, § 2.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 66, 67. Trade-Names, and Unfair Competition, § 198.  
**C.J.S.** — 87 C.J.S., Trade-Marks,

#### 10-1-446. Assignment of mark and registration; recordation; fee; new certificate.

Any trademark or service mark and its registration under this part shall be assignable with the good will of the business in which the trademark or service mark is used or with that part of the good will of the business connected with the use of and symbolized by the trademark or service mark. Assignment shall be by instruments in writing duly executed and may be recorded with the Secretary of State upon the payment of a fee of \$15.00, payable to the Secretary of State, who, upon recording of the assignment, shall issue in the name of the assignee a new certificate for the remainder of the term of the registration or of the last renewal thereof. An assignment of any registration under this part shall be ineffective as against a subsequent purchaser for value without notice unless it is recorded with the Secretary of State prior to the subsequent purchase. (Ga. L. 1952, p. 134, § 11; Ga. L. 1963, p. 463, § 6; Ga. L. 1983, p. 1470, § 3.)

**Law reviews.** — For article, "Community Defense of Union Free Status," regarding broadening the legal recognition of the interest "good will," see 32 Mercer L. Rev. 679 (1981).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 14, 19. to use one's own name for business purposes to detriment of another using the same or a similar name, 47 ALR 1189; 44 ALR2d 1156.  
**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 206. Sale of business or of real estate upon which business is conducted as transferring good will by implication, in absence of covenant not to compete, 65 ALR2d 502.  
**ALR.** — Payment of stock subscriptions in good will, 24 ALR 1285.  
 Right, in absence of self-imposed restraint,

#### 10-1-447. Record of registrations and renewals to be kept by Secretary of State.

The Secretary of State shall keep for public examination a record of all trademarks or service marks registered or renewed under this part. (Ga. L. 1952, p. 134, § 12; Ga. L. 1963, p. 463, § 7.)

## RESEARCH REFERENCES

C.J.S. — 87 C.J.S., Trade-Marks,  
Trade-Names, and Unfair Competition,  
§ 149.

**10-1-448. Cancellation of registrations.**

(a) The Secretary of State shall cancel from the register:

(1) Any registration concerning which the Secretary of State shall receive a voluntary request for cancellation thereof from the registrant or the assignee of record;

(2) All registrations granted under this part and not renewed in accordance with the provisions of this part;

(3) Any registration concerning which a court of competent jurisdiction shall find that:

(A) The registered trademark or service mark has been abandoned;

(B) The registrant is not the owner of the trademark or service mark;

(C) The registration was granted improperly;

(D) The registration was obtained fraudulently; or

(E) The registered trademark or service mark is so similar to a trademark or service mark registered by another person in the United States Patent Office prior to the date of the filing of the application for registration by the registrant under this part, and not abandoned, as to be likely to cause confusion or mistake or to deceive; provided, however, that, should the registrant prove he is the owner of a concurrent registration of his trademark or service mark in the United States Patent Office covering an area including this state, the registration under this part shall not be canceled; or

(4) Any registration which a court of competent jurisdiction shall order canceled.

(b) A fee of \$15.00, payable to the Secretary of State, shall accompany any voluntary request for cancellation. (Ga. L. 1952, p. 134, § 13; Ga. L. 1963, p. 463, § 8; Ga. L. 1983, p. 1470, § 4.)

## JUDICIAL DECISIONS

Cited in *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 77, 78.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 150.

**ALR.** — Abandonment of trademark or trade name, 3 ALR2d 1226.

Reverse confusion doctrine under trademark law, 114 ALR5th 129.

When does product become generic term so as to warrant cancellation of registration of mark, pursuant to § 14 of Lanham Act (15 USCA § 1064), 156 ALR Fed. 131.

Reverse confusion doctrine under Lanham Trademark Act, 187 ALR Fed. 271.

**10-1-449. Damages for fraud or false representation in registering mark.**

Any person who shall for himself or on behalf of any person procure the filing or registration of any trademark or service mark in the office of the Secretary of State under the provisions of this part, by knowingly making any false or fraudulent representation or declaration, verbally or in writing, or by any other fraudulent means, shall be liable to pay all damages sustained in consequence of such filing or registration, to be recovered by or on behalf of the party injured thereby in any court of competent jurisdiction. (Ga. L. 1952, p. 134, § 15; Ga. L. 1963, p. 463, § 10.)

## JUDICIAL DECISIONS

**Cited** in *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 71.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 322.

**ALR.** — Doctrine of secondary meaning

in the law of trademarks and of unfair competition, 150 ALR 1067.

Damages recoverable for wrongful registration of trademark, 26 ALR2d 1184.

Reverse confusion doctrine under state trademark law, 114 ALR5th 129.

**10-1-450. Civil action for infringement of registered mark.**

Subject to Code Section 10-1-452, any person who shall:

(1) Use, without the consent of the registrant, any reproduction, counterfeit, copy, or colorable imitation of a trademark or service mark registered under this part in connection with the sale, offering for sale, or advertising of any goods or services on or in connection with which such use is likely to cause confusion or mistake or to deceive as to the source of origin of such goods or services; or

(2) Reproduce, counterfeit, copy, or colorably imitate any such trademark or service mark and apply such reproduction, counterfeit, copy, or



colorable imitation to labels, signs, prints, packages, wrappers, receptacles, or advertisements intended to be used upon or in connection with the sale or other distribution in this state of such goods or services;

shall be liable to a civil action by the owner of such registered trademark or service mark for liquidated damages in the amount of \$10,000.00, if such act has been committed with knowledge that the trademark or service mark has been registered under this part and such act has been committed without previously obtaining the consent of the owner thereof, and for any or all of the remedies provided in subsection (a) of Code Section 10-1-451, except that actual damages shall not be recoverable when liquidated damages are sought, and except that under paragraph (2) of this Code section the registrant shall not be entitled to recover profits or damages unless the acts have been committed with knowledge that such trademark or service mark is intended to be used to cause confusion or mistake or to deceive. (Ga. L. 1893, p. 134, § 4; Civil Code 1895, § 1739; Civil Code 1910, § 1991; Code 1933, § 106-103; Ga. L. 1952, p. 134, § 16; Ga. L. 1963, p. 463, § 11; Ga. L. 1988, p. 1458, § 2.)

**Law reviews.** — For article, "Corporate Software Piracy: Is Your Client (or Your Firm) Liable?," see 22 Ga. St. B.J. 30 (1985).

### JUDICIAL DECISIONS

**Part similar to federal statute.** — This statute provides for a civil action to remedy infringements and is, both in structure and purpose, similar to its federal counterpart. *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977).

**Actions involving trademarks or service marks** are limited to infringements of registered marks. *Miller & Meier & Assocs. v. Diedrich*, 174 Ga. App. 249, 329 S.E.2d 918, aff'd in part, rev'd in part on other grounds, 254 Ga. 734, 334 S.E.2d 308 (1985).

**Registration required.** — Registration of a

logo as a service mark or trademark is a prerequisite to relief under O.C.G.A. §§ 10-1-450 and 10-1-451. *Diedrich v. Miller & Meier & Assocs.*, 254 Ga. 734, 334 S.E.2d 308 (1985).

**Cited in** *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983); *Lone Star Steakhouse & Saloon v. Longhorn Steaks, Inc.*, 106 F.3d 355 (11th Cir. 1997); *Mazdak Auto Towing & Serv., Inc. v. Midcontinental Group, Inc.*, 231 Ga. App. 859, 501 S.E.2d 44 (1998).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 143.

**Am. Jur. Pleading and Practice Forms.** — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 78.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 322.

**ALR.** — Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 ALR 784; 28 ALR 114.

Right to protection against use of trademark or trade name beyond the territory in which plaintiff operates, 36 ALR 922.

Right, in absence of self-imposed restraint,

to use one's own name for business purposes to detriment of another using the same or a similar name, 47 ALR 1189; 44 ALR2d 1156.

Liability for innocent infringement of trademark or trade name, 96 ALR 651.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 ALR 1241.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Damages recoverable for wrongful registration of trademark, 26 ALR2d 1184.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 ALR5th 1.

Reverse confusion doctrine under state trademark law, 114 ALR5th 129.

Application of secondary meaning test in action for trade dress infringement under § 43(e) of Lanham Act (15 USCS § 1125(a)), 87 ALR Fed. 15.

Parody as trademark or tradename infringement, 92 ALR Fed. 25.

Admissibility and weight of consumer survey in litigation under trademark opposition, trademark infringement, and false designation of origin provisions of Lanham Act (15 USCS §§ 1063, 1114, and 1125), 98 ALR Fed. 20.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 ALR Fed. 407.

Liability as vicarious or contributory infringer under Lanham Act — Modern cases, 152 ALR Fed. 573.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after *Two Pesos*, 161 ALR Fed. 327.

Parody as trademark or tradename dilution or infringement, 179 ALR Fed. 181.

Application of doctrine of "reverse passing off" under Lanham Act, 194 ALR Fed. 175.

Lanham Act trademark infringement actions in internet and website context, 197 ALR Fed. 17.

### **10-1-451. Injunctions against infringement; recovery of profits and damages; destruction or disposal of counterfeit trademarks; seizure.**

(a) Any owner of a trademark or service mark registered under this part may proceed by action to enjoin the manufacture, use, display, or sale of any counterfeits or imitations thereof; and any court of competent jurisdiction may grant injunctions to restrain such manufacture, use, display, or sale as may be by the court deemed just and reasonable and may require the defendants to pay to such owner all profits derived from such wrongful manufacture, use, display, or sale, and all damages suffered by reason of such wrongful manufacture, use, display, or sale, or both profits and damages. The enumeration of any right or remedy in this part shall not affect a registrant's right to prosecute under any penal law of this state.

(b) Every person, association, or union of working men adopting and using a trademark, trade name, label, or form of advertisement may proceed by action; and all courts having jurisdiction thereof shall grant injunctions to enjoin subsequent use by another of the same or any similar trademark, trade name, label, or form of advertisement if there exists a likelihood of injury to business reputation or of dilution of the distinctive quality of the trademark, trade name, label, or form of advertisement of the prior user, notwithstanding the absence of competition between the parties or of confusion as to the source of goods or services, except that this Code section shall not deprive any party of any vested lawful rights acquired prior to March 4, 1955.

(c) If, in any action brought under this Code section, the court determines that a trademark or service mark is counterfeit, the court may order the destruction of all such trademarks or service marks and all goods, articles, or other matter bearing the trademarks or service marks, which are in the possession or control of the court or any party to the action; or, after obliteration of the counterfeit trademark or service mark, the court may order the disposal of any of those materials to the State of Georgia, a civil claimant, an eleemosynary institution, or any appropriate private person other than the person from whom the materials were obtained.

(d)(1) The court, upon motion or upon ex parte application by a plaintiff in an action to enjoin the manufacture, use, display, or sale of counterfeits, may order seizure of the counterfeit goods from persons manufacturing, displaying for sale, or selling the goods, upon a showing of good cause and a probability of success on the merits and upon the posting of bond. The amount of the bond shall be set in accordance with the probable recovery of damages and costs under subsection (e) of this Code section if it were ultimately determined that the goods seized were not counterfeit. If it appears from an ex parte application that there is good reason for proceeding without notification to the defendant, the court may, for good cause shown, waive the requirement of notice for the ex parte proceeding. The order of seizure shall be served at the time of seizure upon any person from whom seizure is effected. The order shall specifically set forth:

- (A) The date or dates on which the seizure is ordered to take place;
- (B) A description of the counterfeit goods to be seized;
- (C) The identity of the persons or class of persons to effect seizure;
- (D) A description of the location or locations at which seizure is to occur; and
- (E) A hearing date not more than ten court days after the last date on which seizure is ordered at which any person from whom goods are seized may appear and seek release of the seized goods.

(2) The order shall include a statement advising the person from whom the goods are seized that bond has been filed, informing the person of the right to object to the bond on the grounds that the surety or the amount of the bond is insufficient, and advising the person from whom the goods are seized that such objection to the bond shall be made within 30 days after the date of seizure.

(e)(1) Any person who causes seizure of goods which are not counterfeits shall be liable in an amount equal to the following:

- (A) Any damages proximately caused to any person having a financial interest in the seized goods by the seizure of goods which are not counterfeit;



(B) Costs incurred in defending against seizure of noncounterfeit goods; and

(C) Upon a showing that the person causing the seizure to occur acted in bad faith, expenses, including reasonable attorneys' fees expended in defending against the seizure of any noncounterfeit or noninfringing goods.

(2) A person seeking a recovery pursuant to this subsection may join any surety on a bond posted pursuant to subsection (d) of this Code section, and any judgment of liability shall bind the person liable and the surety jointly and severally, but the liability of the surety shall be limited to the amount of the bond.

(3) Any person entitled to seek recovery under this subsection may, within 30 days after the date of seizure, object to the bond on the grounds that the surety or the amount of bond is insufficient. (Ga. L. 1893, p. 134, § 3; Civil Code 1895, § 1739; Civil Code 1910, § 1991; Code 1933, § 106-103; Ga. L. 1952, p. 134, § 17; Ga. L. 1955, p. 453, § 1; Ga. L. 1963, p. 463, § 12; Ga. L. 1984, p. 944, § 1.)

**Law reviews.** — For article, "A Patent and Trademark Primer," see 15 Ga. St. B.J. 58 (1978). For article criticizing the judicial decisions in the trademark cases of *Armstrong Cork Co. v. World Carpets, Inc.*,

597 F.2d 496 (5th Cir. 1979) and *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252 (5th Cir. 1980), see 34 Mercer L. Rev. 915 (1983).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### DILUTION OF DISTINCTIVE QUALITY

##### General Consideration

**"Infringement" defined.** — An infringement upon the real name or trade name of an individual or corporation is such a colorable imitation of the name that the general public, in the exercise of ordinary care, might think that it is the name of the individual or corporation first appropriating the name. *Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc.*, 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, 225 Ga. 129, 166 S.E.2d 356 (1969).

In a suit to enjoin alleged trade name infringement, the test seems to be whether the public is likely to be deceived and a person of ordinary caution misled. *Gordy v. Dunwoody*, 210 Ga. 810, 83 S.E.2d 7 (1954), commented on in 17 Ga. B.J. 395 (1955).

**Basis of relief under O.C.G.A. § 10-1-451** is that use of same or similar name by another injures business reputation or dilutes distinctive quality of trade name even in absence of direct competition between parties or of confusion as to source of goods or services. *Giant Mart Corp. v. Giant Dist. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Registration required for relief.** — Registration of a logo as a service mark or trademark is a prerequisite to relief under O.C.G.A. §§ 10-1-450 and 10-1-451. *Diedrich v. Miller & Meier & Assocs.*, 254 Ga. 734, 334 S.E.2d 308 (1985).

**Registration cannot deprive another of vested right.** — The provisions as to registration were permissive and not mandatory, and a compliance by one with the provisions

**General Consideration (Cont'd)**

thereof cannot operate to deprive another of the use of a trade name or trademark previously acquired, although not thus registered, or to nullify the provisions of former Code 1933, § 37-712, that any attempt to encroach upon the business of a trader, or other person, by the use of similar trademarks, names, or devices, with the intention of deceiving and misleading the public, was a fraud for which equity will grant relief. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**Long use may give special meaning to words.** — While generic names, geographical names, and names composed of words which are merely descriptive are incapable of exclusive appropriation, words or names which have a primary meaning of their own, such as words descriptive of the goods, service, or place where they are made, or the name of the maker, may nevertheless, by long use in connection with the business of the particular trade, come to be understood by the public as designating the goods, service, or business of a particular trader. *Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc.*, 223 Ga. 837, 159 S.E.2d 52 (1968), later appeal, 225 Ga. 129, 166 S.E.2d 356 (1969).

Secondary meaning may attach to generic and geographical names and names composed of merely descriptive words which, by long use in connection with business or trade, come to be understood by public as designating goods, services, or business of a particular trader. *Giant Mart Corp. v. Giant Disc. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Long use may entitle words to protection.** — While geographical names and words which are merely descriptive are not generally the subject of exclusive appropriation as trademarks or trade names, such names and words when used so long and exclusively by a trader, manufacturer, or producer that the names and words are generally understood to designate a particular business or merchandise, may acquire a secondary significance or meaning indicative not only of the place of manufacture, but of the name of the manufacturer or producer, or of the character of the product, so that the name or title thus employed, including the geographical

name and descriptive words, may be the subject of protection against unfair competition in trade, and authorize equity to enjoin a newcomer competitor from the appropriation and use of a trade name or trademark bearing such resemblances to those of the pioneer as to be likely to produce uncertainty and confusion, and to pass off the goods or business of one as those of the other. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

A person by long and exclusive use may acquire a trade name; and when thus acquired, such trade name is as much descriptive of the manufacturer or producer as is the person's own name, and the infringement of such trade name of an individual will be enjoined by a court of equity when a proper case is made. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**To obtain injunction under O.C.G.A. § 10-1-451,** plaintiff must show, first, that trade name sought to be protected is one of such originality as to be capable of exclusive appropriation, or one not capable of exclusive appropriation but which has acquired secondary meaning. *Giant Mart Corp. v. Giant Disc. Foods, Inc.*, 247 Ga. 775, 279 S.E.2d 683 (1981).

**Subsequent knowing use of name presumed fraudulent.** — If the person first appropriating and using a name has a clear right to the name's use, the name's subsequent use by another, knowing of the right, is presumed by law to be fraudulent. *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**Direct market competition need not be alleged and shown.** — It is not an essential prerequisite to the granting of equitable relief in an action for infringement of a trade name that the plaintiff allege and show that the alleged infringer is in actual and direct market competition with the plaintiff in the sense that the parties deal in competitive goods or are engaged in a competitive business. *Kay Jewelry Co. v. Kapiloff*, 204 Ga. 209, 49 S.E.2d 19 (1948), commented on in *Ga. B.J.* 224 (1948).

**Confusingly similar names.** — Plaintiffs made requisite showing for injunction that trade name reacquired upon foreclosure of their security interest had acquired a secondary meaning and that defaulting buyers knowingly had adopted a confusingly similar

name, which had in fact confused plaintiffs' former customers. *Reis v. Ralls*, 250 Ga. 721, 301 S.E.2d 40 (1983).

**Infringement of trade names** — Chapter 11 debtor was entitled to a preliminary injunction under the Lanham Act, 11 U.S.C. § 1125(a), and O.C.G.A. §§ 10-1-373 and 10-1-451, against a competing user of the debtor's trade name "Reliable Heating and Air" because the debtor clearly demonstrated a substantial likelihood of success on the merits of the debtor's claims and demonstrated that the debtor would suffer irreparable harm if an injunction were not issued. *Reliable Air, Inc. v. Jape* (In re *Reliable Air, Inc.*), Bankr. , 2007 Bankr. LEXIS 3711 (Bankr. N.D. Ga. Sept. 14, 2007).

**Liability for use of trade names and labels of comic book characters** by singing telegram company established. *DC Comics Inc. v. Unlimited Monkey Bus., Inc.*, 598 F. Supp. 110 (N.D. Ga. 1984).

**Internet advertising.** — Because the plaintiff corporation's claim under Georgia's Anti-Dilution Act, O.C.G.A. § 10-1-451, would likely place no greater discovery burdens on the defendant corporation than would the development of the factual record upon the plaintiff's claims alleging that the defendant violated federal trademark laws by contracting with an Internet search engine for a sponsored link to the defendant's website each time an Internet user performed a search for the plaintiff's name, the defendant's motion to dismiss the O.C.G.A. § 10-1-451 claim was denied when the court denied the defendant's motion to dismiss the federal claims on the ground that the novel questions presented in the suit could not be determined as a matter of law at this early stage of the case. *Rescuecom Corp. v. Computer Troubleshooters USA, Inc.*, 464 F. Supp. 2d 1263 (N.D. Ga. 2005).

**Corporation was not required to prove actual damages** but could seek the award of profits illegally derived by the first purchaser's infringement by showing the first purchaser's gross sales and shifting the burden to the first purchaser to provide an accounting to show which sales, if any, were not derived from the infringement, along with deductible expenses, to show profits derived from the infringement; doing so promoted the statutory intent to make infringement unprofitable, to deprive the infringer of

unjust enrichment, and to deter similar activity. *DeCelles v. Morgan Cleaners & Laundry, Inc.*, 261 Ga. App. 690, 583 S.E.2d 462 (2003).

**Cited in** *Rolls-Royce Motors, Ltd. v. A & A Fiberglass, Inc.*, 428 F. Supp. 689 (N.D. Ga. 1977); *Scientific Applications, Inc. v. Energy Conservation Corp. of Am.*, 436 F. Supp. 354 (N.D. Ga. 1977); *Robert B. Vance & Assocs. v. Baronet Corp.*, 487 F. Supp. 790 (N.D. Ga. 1979); *Original Appalachian Artworks, Inc. v. Toy Loft, Inc.*, 489 F. Supp. 174 (N.D. Ga. 1980).

### Dilution of Distinctive Quality

**Term "distinctive quality"** in subsection (b) of former Code 1933, § 106-103 meant that the trade name must be one of such originality as to be capable of exclusive appropriation, or one not capable of exclusive appropriation but which acquired a secondary meaning in order to come within the protection of the law. *Dolphin Homes Corp. v. Tocome Dev. Corp.*, 223 Ga. 455, 156 S.E.2d 45 (1967).

**"Dilution of the distinctive quality"** under subsection (b) of former Code 1933, § 106-103 occurs where the use of the trademark by the subsequent user will lessen the uniqueness of the prior user's mark, with the possible future result that a strong mark may become a weak mark. *Amstar Corp. v. Domino's Pizza, Inc.*, 615 F.2d 252 (5th Cir.), cert. denied, 449 U.S. 899, 101 S. Ct. 268, 66 L. Ed. 2d 129 (1980).

**Required showing in dilution claims.** — In order to prevail under a dilution claim in which it is alleged that a defendant has used the same or similar marks in a way that creates an undesirable, unwholesome, or unsavory mental association with the plaintiff's mark, the plaintiff needs to show that the marks in question are similar and that the contested use is likely to injure the plaintiff's commercial reputation or dilute the distinctive quality of the plaintiff's marks. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986).

**Dilution claim evidence held sufficient for preliminary injunction.** — Evidence which included testimony indicating that any association of defendant's "Garbage Pail Kids" with plaintiff's "Cabbage Patch Kids" would disparage the wholesome image plaintiff at-



**Dilution of Distinctive Quality** (Cont'd)

tempted to present for plaintiff's doll products was sufficient to show that plaintiff was substantially likely to prevail on the merits as

to plaintiff's anti-dilution claim for purposes of obtaining a preliminary injunction. *Original Appalachian Artworks, Inc. v. Topps Chewing Gum, Inc.*, 642 F. Supp. 1031 (N.D. Ga. 1986).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 133, 140.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 307 et seq., 318 et seq.

**ALR.** — Right to protection against simulation of physical appearance or arrangement of place of business, or vehicle, 17 ALR 784; 28 ALR 114.

Right to protection against use of trade-mark or trade name beyond the territory in which plaintiff operates, 36 ALR 922.

Right of one to protection of trade name which he does not use, 48 ALR 1257.

Right to enjoin competitor from selling his produce to dealers with whom plaintiff has exclusive contract or in such form as to enable dealers to palm off competitor's produce on customers as that of plaintiff, 84 ALR 472.

Protection of business or trading corporation against use of same or similar name by another corporation, 115 ALR 1241.

Actual competition as necessary element of trademark infringement or unfair competition, 148 ALR 12.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Jurisdiction of state court over actions involving patents, 167 ALR 1114.

Damages recoverable for wrongful registration of trade-mark, 26 ALR2d 1184.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 ALR3d 277.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

World wide web domain as violating state trademark protection statute or state unfair trade practices act, 96 ALR5th 1.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 ALR Fed. 407.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after *Two Pesos*, 161 ALR Fed. 327.

What constitutes "famous mark" for purposes of federal Trademark Dilution Act, 15 U.S.C.A. § 1125(c), which provides remedies for dilution of famous marks, 165 ALR Fed. 625.

Application of doctrine of "reverse passing off" under Lanham Act, 194 ALR Fed. 175.

Lanham Act trademark infringement actions in internet and website context, 197 ALR Fed. 17.

**10-1-452. Common-law rights in marks not affected.**

Nothing in this part shall adversely affect the rights or the enforcement of rights in trademarks or service marks acquired in good faith at any time at common law. (Ga. L. 1952, p. 134, § 18; Ga. L. 1963, p. 463, § 13.)

**JUDICIAL DECISIONS**

**Confusion of names.** — Claims for service mark infringement under the federal Lanham Act, the Georgia Uniform Deceptive Trade Practices Act, O.C.G.A. § 10-1-370 et seq., and the Georgia law of unfair com-

petition turn on the same question — confusion of similar names. *Jellibeans, Inc. v. Skating Clubs of Ga., Inc.*, 716 F.2d 833 (11th Cir. 1983).

**Common law claim.** — Customer was de-

nied summary judgment as to a copyright owner's common law trademark infringement action because O.C.G.A. § 10-1-452 expressly preserved common law trademark rights and the owner produced sufficient

evidence to raise a question of fact on the claim as to the likelihood of confusion. *SCQuARE Int'l, Ltd. v. BBDO Atlanta, Inc.*, 455 F. Supp. 2d 1347 (N.D. Ga. 2006).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, §§ 14, 21, 26, 70, 81, 94.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, §§ 1, 154.

**ALR.** — Right of one to protection of tradename which he does not use, 48 ALR 1257.

Common-law copyright in the spoken word, 32 ALR3d 618.

### 10-1-453. Unauthorized and deceitful use of name or seal a misdemeanor.

Any firm, person, corporation, or association who shall use the name or seal of any other person, firm, corporation, or association, in and about the sale of goods or otherwise, not being authorized to use the same, knowing that such use is unauthorized, with intent to deceive the public in the sale of goods, shall be guilty of a misdemeanor. (Ga. L. 1893, p. 134, § 6; Ga. L. 1895, p. 63, § 2; Penal Code 1895, § 255; Ga. L. 1896, p. 108, § 4; Penal Code 1910, § 257; Code 1933, § 106-9904.)

### JUDICIAL DECISIONS

**Use of another's name with consent.** — By the express provisions of this section, the name of a person can be used by another in the conduct of the other's business with the consent of the person whose name is used. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

In absence of statute, the right to use the name of an individual in a corporate trade name without the individual's consent depends entirely on the law in relation to trademarks, trade names, and unfair competition, and for a corporation or an individual to adopt and use as a part of a trade name a personal surname is not unlawful as against an individual having the same surname but not engaged in the same business, even though no one of that name is connected with such corporation or individual, unless the name is adopted or used purposely to mislead the public as to the identity of the corporation with another establishment, and thus cause injury to the latter, or the adoption is prohibited by statute. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

**Use of surname.** — The right of a corporation to use the surname of another person with the person's consent is not prohibited by this section. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

**Use of trade name other than corporate name.** — Corporation may acquire right to use trade name other than corporate name in connection with the corporation's business. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

**Right to use own name.** — In the absence of license, contract, fraud, or estoppel, every man has the right to use the man's own name in any legitimate way. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

A natural person, in the absence of self-imposed restraint, has a right to the honest use of the person's surname in conducting any business, though such use may be detrimental to other individuals of the same name, or to corporations in the characters of which such name forms the whole or an integral part. *Tanner-Brice Co. v. Sims*, 174 Ga. 13, 161 S.E. 819 (1931).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Trademarks and Tradenames, § 104.

**C.J.S.** — 87 C.J.S. Trademarks, Trade-Names, and Unfair Competition, § 109.

**ALR.** — Right to protection in use of initials as a trademark or trade name, or upon the ground of unfair competition, 11 ALR 1286.

Right of one to protection of trade name which he does not use, 48 ALR 1257.

Validity and effect of contract, unconnected with transfer of any business or professional interest, purporting to grant exclusive right to use one's name or likeness for advertising purposes, 101 ALR 492.

Damages recoverable for wrongful registration of trademark, 26 ALR2d 1184.

Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 ALR3d 994.

Incorporation of company under particular name as creating exclusive right to such name, 68 ALR3d 1168.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

Right to publicize or commercially exploit deceased person's name or likeness as inheritable, 10 ALR4th 1193.

### 10-1-454. Forged or counterfeited trademarks, service marks, or copyrighted or registered designs; unauthorized reproductions.

(a) As used in this Code section, the term "forged or counterfeited trademark, service mark, or copyrighted or registered design" means any mark or design which is identical to, substantially indistinguishable from, or an imitation of a trademark, service mark, or copyrighted or registered design which is registered for those types of goods or services with the Secretary of State pursuant to this part or registered on the Principal Register of the United States Patent and Trademark Office or registered under the laws of any other state or protected by the federal Amateur Sports Act of 1978, 36 U.S.C. Section 380, whether or not the offender knew such mark or design was so registered or protected, if the use of such trademark, service mark, or copyrighted or registered design has not been authorized by the owner thereof. The unregistered symbols, emblems, trademarks, insignias, and words covered by the federal Amateur Sports Act of 1978, 36 U.S.C. Section 380, shall be afforded protection under the trademark law in the same manner as registered trademarks, service marks, and copyrighted or registered designs.

(b) Any person who knowingly and willfully forges or counterfeits any trademark, service mark, or copyrighted or registered design, without the consent of the owner of such trademark, service mark, or copyrighted or registered design, or who knowingly possesses any tool, machine, device, or other reproduction instrument or material with the intent to reproduce any forged or counterfeited trademark, service mark, or copyrighted or registered design shall be guilty of the offense of trademark, service mark, or copyrighted or registered design counterfeiting and, upon conviction, shall be punished as follows:

(1) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are



attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of \$100,000.00 or more, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than five nor more than 20 years and by a fine not to exceed \$200,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(2) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of \$10,000.00 or more but less than \$100,000.00, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than two nor more than ten years and by a fine not to exceed \$20,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(3) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, or to which the offender intended they be attached or affixed, or in connection with which the offender intended they be used, have, in the aggregate, a retail sale value of less than \$10,000.00, such person shall be guilty of a misdemeanor of a high and aggravated nature; or

(4) If a person who violates this subsection previously has been convicted of another violation of this subsection, such person shall be guilty of a felony and, upon conviction of the second or subsequent such violation, shall be punished by imprisonment for not less than ten nor more than 20 years and by a fine not to exceed \$200,000.00 or twice the retail sale value of the goods or services, whichever is greater.

(c) Any person who sells or resells or offers for sale or resale or who purchases and keeps or has in his or her possession with the intent to sell or resell any goods he or she knows or should have known bear a forged or counterfeit trademark or copyrighted or registered design or who sells or offers for sale any service which is sold or offered for sale in conjunction with a forged or counterfeit service mark or copyrighted or registered design, knowing the same to be forged or counterfeited, shall be guilty of the offense of selling or offering for sale counterfeit goods or services and, upon conviction, shall be punished as follows:

(1) If the goods or services sold or offered for sale to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are

used, have, in the aggregate, a retail sale value of \$10,000.00 or more, such person shall be guilty of a felony and, upon conviction, shall be punished by imprisonment for not less than one nor more than five years and by a fine not to exceed \$50,000.00 or twice the retail sale value of the goods or services, whichever is greater;

(2) If the goods or services to which the forged or counterfeit trademarks, service marks, or copyrighted or registered designs are attached or affixed, or in connection with which they are used, have, in the aggregate, a retail sale value of less than \$10,000.00, such person shall be guilty of a misdemeanor of a high and aggravated nature; or

(3) If a person who violates this subsection previously has been convicted of another violation of paragraph (1) of this subsection, such person shall be guilty of a felony and, upon conviction of the second or subsequent such violation, shall be punished by imprisonment for not less than five nor more than ten years and by a fine not to exceed \$100,000.00 or twice the retail sale value of the goods or services, whichever is greater.

(d)(1) The State of Georgia finds and declares that the citizens of this state have a right to receive those goods and services which they reasonably believe they are purchasing or for which they contract. The state further finds that the manufacture and sale of counterfeit goods or goods which are not what they purport to be and the offering of services through the use of counterfeit service marks constitutes a fraud on the public and results in economic disruption to the legitimate businesses of this state. In order to protect the citizens and businesses of this state it is necessary to take appropriate actions to remove counterfeit goods from the channels of commerce and prevent the manufacture, sale, and distribution of such goods or the offering of such services through the use of counterfeit service marks.

(2) For the purposes expressed in paragraph (1) of this subsection, a person who is convicted of or pleads nolo contendere to a felony offense under this Code section shall forfeit to the State of Georgia such interest as the person may have in:

(A) Any goods, labels, products, or other property containing or constituting forged or counterfeit trademarks, service marks, or copyrighted or registered designs or constituting or directly derived from gross profits or other proceeds obtained from such offense;

(B) Any property or any interest in any property, including but not limited to any reproduction equipment, scanners, computer equipment, printing equipment, plates, dies, sewing or embroidery equipment, motor vehicle, or other asset, used to commit a violation of this Code section; and

(C) Any property constituting or directly derived from gross profits or other proceeds obtained from a violation of this Code section.

(3) In any action under this Code section, the court may enter such restraining orders or take other appropriate action, including acceptance of performance bonds, in connection with any interest that is subject to forfeiture.

(4) The court shall order forfeiture of property referred to in paragraph (2) of this subsection if the trier of fact determines beyond a reasonable doubt that such property is subject to forfeiture.

(5) The provisions of subsection (u) of Code Section 16-13-49 shall apply for the disposition of any property forfeited under this subsection, provided that any property containing a counterfeit trademark, service mark, or copyrighted or registered design shall be destroyed unless the owner of the trademark, service mark, or copyrighted or registered design gives prior written consent to the sale of such property or such trademark, service mark, or copyrighted or registered design is obliterated or removed from such property prior to the disposition thereof. Any forfeited goods which are hazardous to the health, welfare, or safety of the public shall be destroyed. In any disposition of property under this subsection, a person who has been convicted of or who has entered a plea of nolo contendere to a violation of this Code section shall not be permitted to acquire property forfeited by such person.

(6) The procedure for forfeiture and disposition of forfeited property under this subsection shall be as provided for forfeitures under Code Section 16-13-49.

(e) An owner, officer, employee, or agent who provides, rents, leases, licenses, or sells real property upon which a violation of this Code section occurs shall not be subject to a criminal penalty pursuant to this Code section unless he or she sells or possesses for sale articles such person knows bear a counterfeit trademark or copyrighted or registered design or offers services through the use of a counterfeit service mark or copyrighted or registered design in violation of this Code section. This subsection shall not be construed to abrogate or limit any civil rights or remedies for a trademark or service mark violation. (Code 1981, § 10-1-454, enacted by Ga. L. 1996, p. 673, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, “trademark” was substituted for “trade mark” in paragraph (d)(5).

PART 2

NAMES AND EMBLEMS OF FRATERNAL, CHARITABLE, AND OTHER ORGANIZATIONS

**Cross references.** — Corporations organized for religious, fraternal, or charitable purposes generally, § 14-5-40 et seq.



**10-1-470. Imitation of name or emblem prohibited; priority of right to use name.**

No person or organization shall assume, use, adopt, become incorporated under, or continue to use the name and style or emblems of any benevolent, fraternal, social, humane, or charitable organization previously existing in this state, and which has been incorporated under the laws of this or any other state or of the United States, or a name and style or emblem so nearly resembling the name and style of such incorporated organization as to be a colorable imitation thereof. In all cases where two or more of such societies, associations, or corporations claim the right to the same name or to names substantially similar as above provided, the organization which was first organized and used the name and first became incorporated under the laws of the United States or of any state, whether incorporated in this state or not, shall be entitled in this state to the prior and exclusive use of such name; and the rights of such societies, associations, or corporations and of their individual members shall be fixed and determined accordingly. (Ga. L. 1909, p. 139, § 1; Civil Code 1910, § 1993; Code 1933, § 106-201.)

**JUDICIAL DECISIONS**

**Constitutionality.** — Part is not violative of fourteenth amendment of the Constitution of the United States. *Emory v. Grand United Order of Odd Fellows*, 140 Ga. 423, 78 S.E. 922 (1913).

**Part creates new remedy without abrogating existing one.** — The enactment of this part for the protection of such organizations as are named therein against the infringement and unauthorized use of their names and emblems merely created a new remedy for an existing right and did not expressly, or by necessary implication, abrogate the pre-existing remedy. *Supreme Grand Lodge v. Most Worshipful Prince Hall Grand Lodge*, 209 F.2d 156 (5th Cir.), cert. denied, 347 U.S. 953, 74 S. Ct. 679, 98 L. Ed. 1099 (1954).

**Voluntary associations.** — Former Civil Code 1910, §§ 1933 and 1934 were for the protection of any benevolent or other organization which was incorporated, against others using or adopting its name, style, or emblems, and the statutes cannot be invoked by voluntary associations. *Faisan v. Adair*, 144 Ga. 797, 87 S.E. 1080, 1918A Ann. Cas. 243 (1916), later appeal, 148 Ga. 403, 96 S.E. 871 (1918), cert. denied, 248 U.S. 583, 39 S. Ct. 136, 63 L. Ed. 432 (1919);

*Methodist Episcopal Church S., Inc. v. Decell*, 60 Ga. App. 843, 5 S.E.2d 66 (1939).

**Exclusive right to use name must be shown.** — Under this part, unless the plaintiffs have established that the plaintiffs are entitled to the exclusive use of the name or words in question, the plaintiffs are not entitled to the equitable relief sought. To show that the plaintiffs have obtained a charter, or have organized and are using that name, is not sufficient. Plaintiffs must not only show that the plaintiffs have the right to use the name in question, but that the plaintiffs have the exclusive right to so use the name. *Independent Order of Good Samaritans & Daughters v. Mack*, 139 Ga. 835, 78 S.E. 336 (1913).

**Right to use name depends upon priority of incorporation.** — The right to the exclusive use of a particular name as between incorporated associations organized for beneficial and charitable purposes, etc., depends upon priority of the Act of incorporation, whether the charter is derived from this state, the United States, or any other state in the Union. A fraternal order by adopting the same name which was previously used by a fraternal association, acquires no additional right to the use of the name by incorpora-

tion. Incorporation in this state does not give the fraternal corporation an exclusive right to use the corporate name as against prior use of the same name by a fraternal association incorporated under the laws of a sister state. *Graves v. District Grand Lodge No. 18*, 155 Ga. 147, 116 S.E. 613 (1923).

**Name held colorable imitation.** — The name "Ancient Order of Odd Fellows Leeds Unity" is substantially similar to and a colorable imitation of the name "The Grand United Order of Odd Fellows in America." *Emory v. Grand United Order of Odd Fellows*, 140 Ga. 423, 78 S.E. 922 (1913).

**Subsequent use of appropriated name presumed fraudulent.** — If the association or corporation first appropriating and using the name has a clear right to the name's use, the name's subsequent use by another corporation knowing of the right is presumed to be fraudulent. *Graves v. District Grand Lodge No. 18*, 161 Ga. 110, 129 S.E. 783 (1925).

**Burden of proving right to exclusive use of the distinctive name and words in question is upon the organization asserting the right.** *Independent Order of Good Samaritans & Daughters v. Mack*, 139 Ga. 835, 78 S.E. 336 (1913) (injunction denied).

**Sufficiency of evidence.** — Where the court was authorized to find from the evidence that the plaintiffs' order existed in this state and had been incorporated under the laws of this state prior to the date upon

which the defendants' order sought to organize and become incorporated, and that so far as the record disclosed there was no other order of a similar name having a prior existence and incorporation to that of the plaintiffs in this state, under former Code 1933, § 106-202, the plaintiffs were entitled to injunctive relief. *Emory v. Grand United Order of Odd Fellows*, 140 Ga. 423, 78 S.E. 922 (1913).

In a case where it is charged that one beneficial incorporated association is using a name which by prior use appertains to another fraternal organization, mere proof by the plaintiff that the defendant was using the name which the plaintiff had adopted to distinguish the plaintiff from similar organizations would not entitle the plaintiff to relief. *Graves v. District Grand Lodge No. 18*, 161 Ga. 110, 129 S.E. 783 (1925).

In order for a plaintiff to obtain the aid of this section, it must appear that such plaintiff is: (1) an incorporated association; (2) that it is a benevolent, etc., organization previously existing in this state; and (3) that the defendants propose to use, or are using, the name and style or emblems of such incorporated organization, as so nearly resemble the same as to be a colorable imitation. *Methodist Episcopal Church S., Inc. v. Decell*, 60 Ga. App. 843, 5 S.E.2d 66 (1939).

**Cited in** *Martin Luther King, Jr. Ctr. for Social Change, Inc. v. American Heritage Prods., Inc.*, 508 F. Supp. 854 (N.D. Ga. 1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.

**Am. Jur. Pleading and Practice Forms.** — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 78.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 22.

**ALR.** — Application of principles of unfair competition to artistic or literary property, 19 ALR 949.

Right to enjoy use of name of defunct corporation, 27 ALR 1024.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 47 ALR 1189; 44 ALR2d 1156.

Right of automobile association to exclusive use of name or insignia, 83 ALR 712.

Right of benevolent or fraternal society or organization to protection against use of same or similar name, insignia, or ritual by another organization, 76 ALR2d 1396.

Right to protection of corporate name, as between domestic corporation and foreign corporation not qualified to do business in state, 26 ALR3d 994.

Right of charitable or religious association or corporation to protection against use of same or similar name by another, 37 ALR3d 277.

**10-1-471. Injunction against infringement.**

Whenever there shall be an actual or threatened violation of Code Section 10-1-470, the organization entitled to the exclusive use of the name in question under the terms of said Code section shall have the right to apply to the proper court for an injunction to restrain the infringement of its name and the use of its emblems; and, if it shall be made to appear to the court that the defendants are in fact infringing or about to infringe on the name and style of a previously existing benevolent, fraternal, social, humane, or charitable organization in the manner prohibited in said Code section or that the defendant or the defendants are wearing or using the badge, insignia, or emblems of said organization without the authority thereof and in violation of said Code section, an injunction may be issued by the court under the principles of equity without requiring proof that any person has been in fact misled or deceived by the infringement of such name or the use of such emblem. (Ga. L. 1909, p. 139, § 2; Civil Code 1910, § 1994; Code 1933, § 106-202.)

**JUDICIAL DECISIONS**

**Part creates new remedy without abrogating existing remedy.** — The enactment of this part for the protection of such organizations as are named therein against the infringement and unauthorized use of their names and emblems merely created a new remedy for an existing right, and did not expressly, or by necessary implication, abrogate the preexisting remedy. *Supreme Grand Lodge v. Most Worshipful Prince Hall Grand Lodge*, 209 F.2d 156 (5th Cir.), cert. denied, 347 U.S. 953, 74 S. Ct. 679, 98 L. Ed. 1099 (1954).

**Voluntary associations.** — Former Civil Code 1910, §§ 1993 and 1994 were for the protection of any benevolent or other organization which was incorporated, against others using or adopting its name, style, or emblems, and the statutes cannot be invoked by voluntary associations. *Faisan v. Adair*, 144 Ga. 797, 87 S.E. 1080, 1918A Ann. Cas. 243 (1916), later appeal, 148 Ga. 403, 96 S.E. 871 (1918), cert. denied, 248 U.S. 583, 39 S. Ct. 136, 63 L. Ed. 432 (1919); *Methodist Episcopal Church S., Inc. v. Decell*, 60 Ga. App. 843, 5 S.E.2d 66 (1939).

**Infringement will be enjoined.** — Equity will enjoin a corporation or individuals that are using the name, insignia, and emblems

of an existing benevolent fraternal association to the injury of the latter. Under the facts of this case there was no abuse of discretion in granting the injunction. *Faisan v. Adair*, 144 Ga. 797, 87 S.E. 1080, 1918A Ann. Cas. 243 (1916), later appeal, 148 Ga. 403, 96 S.E. 871 (1918), cert. denied, 248 U.S. 583, 39 S. Ct. 136, 63 L. Ed. 432 (1919).

**Including use of name.** — When it is made to appear that the name in question is being used, or indeed if it is shown that it can be used, to mislead the public and induce the belief that the association which is using the name which another is justly entitled to use, the defendant should be enjoined from the use of this name in toto, and not merely partially enjoined. *Graves v. District Grand Lodge No. 18*, 161 Ga. 110, 129 S.E. 783 (1925).

**Use of ritual, passwords, and tokens.** — It was error to omit or refuse to enjoin the use by the defendant of the ritual, passwords, signs, tokens, etc., of the national order. *Graves v. District Grand Lodge No. 18*, 161 Ga. 110, 129 S.E. 783 (1925).

**Addition of suffix "Incorporated" is not sufficient relief.** *Graves v. District Grand Lodge No. 18*, 161 Ga. 110, 129 S.E. 783 (1925).



RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.

**Am. Jur. Pleading and Practice Forms.** — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 78.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 22.

**ALR.** — Right to enjoin use of name of defunct corporation, 27 ALR 1024.

Right of one to protection of trade name which he does not use, 48 ALR 1257.

Doctrine of secondary meaning in the law of trademarks and of unfair competition, 150 ALR 1067.

Right, in absence of self-imposed restraint, to use one's own name for business purposes to detriment of another using the same or a similar name, 44 ALR2d 1156.

Use of "family name" by corporation as unfair competition, 72 ALR3d 8.

"Post-sale confusion" in trademark or trade dress infringement actions under § 43 of the Lanham Trade-Mark Act (15 USCA § 1125), 145 ALR Fed. 407.

When is trade dress "inherently distinctive" for purposes of trade dress infringement actions under § 43(a) of Lanham Act (15 USCA § 1125(a)) — Cases after Two Pesos, 161 ALR Fed. 327.

10-1-472. Unauthorized use of emblem or name or false claim of membership a misdemeanor.

Any person who shall wear a badge, button, or other emblem or shall use the name or claim to be a member of any benevolent, fraternal, social, humane, or charitable organization which is entitled to the exclusive use of such name and emblems under Code Section 10-1-470, either in the identical form or in such near resemblance thereto as to be a colorable imitation of such emblem or name, unless entitled to do so under the laws, rules, and regulations of such organization, shall be guilty of a misdemeanor. (Ga. L. 1909, p. 139, § 3; Penal Code 1910, § 258; Code 1933, § 106-9905.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 36 Am. Jur. 2d, Fraternal Orders and Benefit Societies, §§ 24, 25.

**C.J.S.** — 87 C.J.S., Trade-Marks, Trade-Names, and Unfair Competition, § 22.

PART 3

REGISTRATION OF BUSINESSES USING TRADE NAMES

**Cross references.** — Selection and reservation of corporate names, § 14-2-401 et seq.

**Law reviews.** — For article, "Acquisition of Trademark Rights Under United States and Georgia Law," see 7 Ga. St. B.J. 14 (2001).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
EFFECT OF NONCOMPLIANCE

### General Consideration

**General Assembly repealed the Trade Name Act of 1929** (Ga. L. 1929, p. 233) by the passage of Ga. L. 1937, p. 804. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937); *Bowers v. Keller*, 185 Ga. 435, 195 S.E. 447, answer conformed to, 57 Ga. App. 554, 196 S.E. 241 (1938).

**Purpose.** — Evident purpose of this part is to enable persons making contracts with those trading under a fictitious trade name to know with whom they are dealing. *Maxwell v. Pierce*, 183 Ga. 856, 189 S.E. 847 (1937).

**Part strictly construed.** — Since this part imposes a hitherto unrecognized restriction upon the right to contract, the part's terms will be strictly construed. *Maxwell v. Pierce*, 183 Ga. 856, 189 S.E. 847 (1937).

**Applicability to corporation using trade name.** — If a corporation transacts business in a trade name or a name or style other than its true corporate name, it is amenable to the requirements and prohibitions of this part the same as others. *Constitution Publishing Co. v. Lyon*, 52 Ga. App. 434, 183 S.E. 653 (1936).

**"Company" may be used in individual's trade name.** — Under this part, the appellation, "company" may be used by an individual and is as appropriate to unincorporated associations as to corporations. An individual may use the word "company" as a part of the individual's trade name. *Dixie Queen Produce Co. v. Brown*, 100 Ga. App. 150, 110 S.E.2d 421 (1959).

**Allegation of partnership as evidenced by registration must be denied.** — Admissions in the answer of allegations in the petition are taken as true, and accordingly, if two or more individuals are sued jointly in connection with the operation of a business under a trade name, and such individuals file an answer admitting that the individuals jointly operate such business, file no denial of partnership, but on the contrary file a joint answer as partners, and the petition is later amended alleging such partnership as evidenced by trade name registration under this part, the defendants by the defendant's pleadings have admitted the existence of such partnership and are estopped to produce evidence to the contrary. *Petkas v. Wright Co.*, 87 Ga. App. 189, 73 S.E.2d 224 (1952).

### Effect of Noncompliance

**Noncompliance does not prohibit property ownership.** — This part does not prohibit ownership of property by persons who may have acquired title under a trade name that has not been registered. *Maxwell v. Pierce*, 183 Ga. 856, 189 S.E. 847 (1937).

**Liability under contract.** — A defendant corporation doing business under a trade name which has not registered as required by this part cannot avoid liability under its contract which is the subject matter of the suit upon the ground of the defendant's not having registered as required by this part. *Atlanta Butchers Abattoir & Stock Yard Co. v. Reaves*, 54 Ga. App. 138, 187 S.E. 162 (1936).

**Forfeiture of lease.** — If lease was made to plaintiff and plaintiff's partner in their individual names, the failure of the plaintiff to register plaintiff's trade name in compliance with this part, although plaintiff ran a business on the premises rented from the defendant under the trade name, would not entitle defendant to declare the lease forfeited, and to evict the plaintiff for that reason alone. *Hudgens v. Douglas*, 56 Ga. App. 877, 194 S.E. 398 (1937).

**Action for conversion of property.** — Partners doing business under a trade name that has not been registered as required by law, who have bought and paid for personal property and have taken from the owner a bill of sale therefor in such trade name, may maintain an action in the trade name against a tort-feasor who has seized and converted the property to the tort-feasor's own use. *Maxwell v. Pierce*, 183 Ga. 856, 189 S.E. 847, answer conformed to, 55 Ga. App. 422, 190 S.E. 367 (1937).

**Suit by lessee for trespass.** — If lease was made to the plaintiff and the plaintiff's partner in their individual names, the failure of the plaintiff to register the plaintiff's trade name in compliance with this part, although plaintiff ran a business on the premises rented from defendant under the trade name, would not prevent the plaintiff from bringing a tort suit against the defendant for damages growing out of certain alleged acts of trespass committed by defendant if the plaintiff was otherwise entitled to bring such a suit. The failure to register has no causal relation to the injury. *Hudgens v.*

Douglas, 56 Ga. App. 877, 194 S.E. 398 (1937).

**Enforcement of note and conditional sale contract.** — The fact that a promissory note and conditional sale contract are taken by the payee in a trade name which the payee has failed to register as required by law will not prevent the enforcement of such note and contract in the hands of a holder in due course. *Southern Sec. Co. v. American Disct.*, 184 Ga. 82, 190 S.E. 350, answer conformed to, 55 Ga. App. 736, 191 S.E. 258 (1937).

**Registration essential to acquiring interest in trade name.** — Compliance with the provisions of this part as to registration in the office of the clerk of the superior court is

essential to the right of a person to conduct business under another or assumed name, and to acquire such interest in the name as will be protected by a court of equity. *National Brands Stores, Inc. v. Muse & Assocs.*, 183 Ga. 88, 187 S.E. 84 (1936).

**Costs cast on plaintiff not registering.** — Since the evidence showed conclusively that the plaintiff had not registered the plaintiff's trade name at the time of filing suit with the clerk of the superior court of the county of the plaintiff's residence, the costs of court included within the judgment must be cast against the plaintiff. *Bancroft v. Conyers Realty Co.*, 63 Ga. App. 106, 10 S.E.2d 286 (1940).

**10-1-490. Business using trade, partnership, or other name not showing ownership to file registration statement; indexing; fee.**

(a) Every person, firm, or partnership carrying on in this state any trade or business under any trade name or partnership name or other name which does not disclose the individual ownership of the trade, business, or profession carried on under such name shall, within 30 days from March 29, 1937, or thereafter before commencing to do business, file in the office of the clerk of the superior court of the county in which the business is chiefly carried on or, in the case of a domestic corporation using any name other than its corporate name, in the county of its legal domicile, a registration statement, verified by affidavit, setting forth the name or names and addresses of the person, persons, firm, or partnership owning and carrying on said trade or business and stating the nature of the business being carried on and the trade, partnership, or other name used and shall, upon any change of ownership, likewise file a new and amended statement of registration. Notice of such filing giving the names and addresses of each person, firm, or partnership to engage in business under such trade name or partnership name shall be published in the paper in which the sheriff's advertisements are printed once a week for two weeks. No person, firm, or partnership already registered shall be required to reregister except in the event of a change of ownership.

(b) The clerk shall register the same by filing the verified statement in his office and shall keep an alphabetical index of all such registrations in a permanent record book to be kept in his office, the index to show the trade, partnership, or other name registered and in connection therewith the names of the owners. The applicant for registration shall accompany each registration statement with the fee prescribed by Code Section 15-6-77, relating to fees of clerks of the superior courts, as amended. (Ga. L. 1929, p. 233, §§ 1-3; Code 1933, §§ 106-301, 106-302; Ga. L. 1937, p. 804, §§ 1, 2; Ga. L. 1943, p. 398, § 1; Ga. L. 1970, p. 497, § 9; Ga. L. 1981, p. 872, § 2; Ga. L. 1989, p. 14, § 10.)



**Law reviews.** — For article, "Post-Creation Checklist for Georgia Business Entities," see 9 Ga. St. B.J. 34 (2004).

### JUDICIAL DECISIONS

**Affidavit must be made by person operating under trade name.** — This section, requiring registration, in the office of the clerk of the superior court of persons doing business under a trade name by filing an affidavit signed by the person doing business, in which is set forth the name and address of the true owner of the business, requires that the affidavit be made by the person who operates under the trade name referred to in the affidavit. *Laurens Glass Works v. Childs*, 49 Ga. App. 590, 176 S.E. 665 (1934).

**Affidavit does not create presumption against prior registration.** — Evidence that the members of a partnership filed an affidavit in the office of the clerk of the superior court to register a partnership trade name does not create a presumption of fact that such trade name had not been previously registered. *Butler v. Ragsdale*, 54 Ga. App. 565, 188 S.E. 578 (1936).

**Cited in** *Dunn & McCarthy, Inc. v. Pinkston*, 179 Ga. 31, 175 S.E. 4 (1934); *Prater v. Larabee Flour Mills Co.*, 180 Ga. 581, 180 S.E. 235 (1935); *Smith v. State*, 52 Ga. App. 207, 182 S.E. 858 (1935); *Charles v. Sterling Sec. & Brokerage Co.*, 182 Ga. 480, 185 S.E. 807 (1936); *Mobley v. Bailey*, 52 Ga.

App. 578, 184 S.E. 417 (1936); *Alexander v. Bremen*, 53 Ga. App. 676, 187 S.E. 141 (1936); *Stephens v. Bibb Inv. Co.*, 54 Ga. App. 321, 187 S.E. 709 (1936); *Carter v. Solomon*, 54 Ga. App. 517, 188 S.E. 545 (1936); *Stewart v. Darby Banking Co.*, 183 Ga. 888, 190 S.E. 28 (1937); *Slaten v. College Park Cem. Co.*, 185 Ga. 27, 193 S.E. 872 (1937); *Cary v. State*, 55 Ga. App. 167, 189 S.E. 625 (1937); *West v. Frick Co.*, 55 Ga. App. 854, 192 S.E. 55 (1937); *National Union Fire Ins. Co. v. Jenkins*, 56 Ga. App. 476, 193 S.E. 90 (1937); *Walker v. Abbot*, 57 Ga. App. 381, 195 S.E. 450 (1938); *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951); *Multiple Listing Serv., Inc. v. Metropolitan Multi-List, Inc.*, 223 Ga. 837, 159 S.E.2d 52 (1968); *Howard Stores Corp. v. Howard Clothing, Inc.*, 308 F. Supp. 70 (N.D. Ga. 1969); *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980); *Brooks v. Maryville Loan & Fin. Co.*, 679 F.2d 837 (11th Cir. 1982); *Loeb v. Schafer Bros. (In re Austin Group, Inc.)*, 80 Bankr. 255 (Bankr. N.D. Ga. 1987); *Crolley v. Haygood Contracting, Inc.*, 201 Ga. App. 700, 411 S.E.2d 907 (1991); *Stone v. Allen*, 201 Ga. App. 842, 412 S.E.2d 605 (1991).

### OPINIONS OF THE ATTORNEY GENERAL

**Use of trade name by corporation.** — Corporation may do business in Georgia under trade name. 1945-47 Op. Att'y Gen. p. 652.

**Branch offices under different names.** —

Licensed real estate broker may establish branch offices under different names, provided that the broker complies with this part. 1952-53 Op. Att'y Gen. p. 408.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 23A Am. Jur. Pleading and Practice Forms, Trademarks and Tradenames, § 2.

**ALR.** — Construction and effect of statutes as to doing business under an assumed or fictitious name or designation not showing the names of the persons interested, 45 ALR 198; 42 ALR2d 516.

"Business sign" statute as affecting order of priority among creditors of person transacting business, 124 ALR 169.

Right to use firm name on dissolution of partnership, 173 ALR 444.

Incorporation of company under particular name as creating exclusive right to such name, 68 ALR3d 1168.

**10-1-491. Contracts of unregistered businesses valid; costs to be paid if name not registered.**

The effect of this part shall be that no contract or undertaking entered into by any person, firm, or corporation, whether heretofore or hereafter entered into, shall be invalidated or declared illegal on the ground that the same was entered into in a trade or partnership name not filed or registered in accordance with the laws in force at the time such contract or undertaking was entered into; but all such contracts and undertakings are expressly validated as against any such objection; and no action heretofore or hereafter instituted by any such person, firm, partnership, or corporation, whether sounding in contract or tort, shall be defeated because of any such failure to register. But the party who has failed to register his trade or partnership name at the time action is filed, as required by this part, shall be cast with court costs. (Ga. L. 1937, p. 804, § 5.)

**JUDICIAL DECISIONS**

**Ga. L. 1937, p. 804, § 5 applies to contract made before the statute's enactment** by any person or partnership conducting or transacting a business in this state under an assumed or fictitious or trade name, other than the real name or names of the individual or individuals conducting or transacting such business without having registered in the office of the clerk of the superior court as required by former Code 1933, §§ 106-301 and 106-302. *Walker v. Abbot*, 57 Ga. App. 381, 195 S.E. 450 (1938).

**Section bars defense of noncompliance in action on contract.** — If a suit was filed on a contract entered into between the plaintiff and the defendant in connection with and while the plaintiff was operating a business under an assumed or fictitious name, without having registered that name as required by Ga. L. 1929, p. 233, and the defendant filed a pleading setting up these facts as a defense to the suit, and the judge sustained such defense and entered a judgment of nonsuit, and thereafter the plaintiff brought the case to the Court of Appeals, properly presented the question whether the court erred in sustaining such defense, and it appeared that since the judgment of the trial court, and while the case was in process of being brought to the Court of Appeals, the Legislature, by Ga. L. 1937, p. 804, repealed Ga. L. 1929, p. 233, and expressly provided by Ga. L. 1937, p. 804, § 5 no suit or action heretofore or hereafter instituted by any

such person, firm, partnership, or corporation, whether sounding in contract or tort, should be defeated because of any such failure to register, the Court of Appeals, under Ga. L. 1937, p. 804, should have applied Ga. L. 1937, p. 804, § 5 and reversed the judgment, not because the judge erred at the time of its rendition, but because it had subsequently become erroneous by operation of Ga. L. 1937, p. 804, § 5. *Bowers v. Keller*, 185 Ga. 435, 195 S.E. 447, answer conformed to, 57 Ga. App. 554, 196 S.E. 241 (1938).

**Retroactive application of section not unconstitutional.** — Section 5 of Ga. L. 1937, p. 804, providing that no contract should be invalidated on the ground that it was entered into in an unregistered trade or partnership name, was not violative of the constitutional prohibition against enactment of retroactive laws as applied to a note which had become barred under Ga. L. 1929, p. 233. *Bullard v. Holman*, 184 Ga. 788, 193 S.E. 586 (1937).

Ga. L. 1937, p. 804, § 5 is not unconstitutional as applied to a note which was subject to defense under Ga. L. 1929, p. 233, relating to trade names, and was executed before the passage of Ga. L. 1937, p. 804. *Sweat & Gaskins v. Williamson*, 185 Ga. 495, 195 S.E. 408 (1938).

**Undertaking by individual in fictitious or trade name** is obligation of individual. *National Cash Register Co. v. Sikes*, 94 Ga. App. 391, 94 S.E.2d 782 (1956).

**Section binds sole proprietor who contracts in unregistered trade name.** *Goger v. United States* (In re Eady), 4 Bankr. 1 (Bankr. N.D. Ga. 1979).

**Use of trade name on security agreement.** — Fact that title-retention contract was signed in a trade name by the owner of such business does not in anyway invalidate the contract. *National Cash Register Co. v. Sikes*, 94 Ga. App. 391, 94 S.E.2d 782 (1956).

**Recording security agreement gives constructive notice of trade name.** — A title-retention contract signed by the purchaser in the purchaser's trade name by the purchaser in the purchaser's individual name is entitled to record where it otherwise meets the requirements of statute, and after being duly recorded constitutes constructive notice of the right and interest of the vendor therein as against the purchase of the property at a judicial sale on execution issued against the purchaser in the purchaser's individual capacity. *National Cash Register Co. v. Sikes*, 94 Ga. App. 391, 94 S.E.2d 782 (1956).

**Use of fictitious names in financing statements.** — While this section has the effect of binding those persons who contract in fictitious names to the contract so executed, it does not have the effect of saying that financing statements given in fictitious names are sufficient to notify subsequent creditors of the identity of the party using the fictitious

name. Were a court to hold otherwise, the purpose of the statutory scheme of requiring a security interest to be perfected by filing a financing statement — to give notice to future creditors of the debtor — would be seriously undermined. *In re Firth*, 363 F. Supp. 369 (M.D. Ga. 1973); *Goger v. United States* (In re Eady), 4 Bankr. 1 (Bankr. N.D. Ga. 1979).

**Burden of proving registration.** — O.C.G.A. § 10-1-491 places no burden on party using trade name to prove that the party has been registered. *Barker v. Century 21-Atlanta E. Realty, Inc.*, 162 Ga. App. 828, 293 S.E.2d 76 (1982).

**Contract entered in unregistered trade name deemed valid.** — O.C.G.A. § 10-1-491 expressly provides that a contract entered into in a trade name is valid notwithstanding the failure to register the trade name with the superior court clerk; the only penalty is that the nonregistering party will have to bear court costs. *Brooks v. Maryville Loan & Fin. Co.*, 679 F.2d 837 (11th Cir. 1982).

**Cited in** *Mobley v. Bailey*, 52 Ga. App. 578, 184 S.E. 417 (1936); *Slaten v. College Park Cem. Co.*, 185 Ga. 27, 193 S.E. 872 (1937); *Wright v. Cannon*, 185 Ga. 363, 195 S.E. 168 (1938); *Bancroft v. Conyers Realty Co.*, 63 Ga. App. 106, 10 S.E.2d 86 (1940); *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951); *Mayeske v. Ferguson*, 93 Ga. App. 841, 93 S.E.2d 190 (1956).

## 10-1-492. Exemption of corporations, limited or professional partnerships, or limited liability companies.

This part shall not apply to corporations doing business under their corporate names, to limited partnerships doing business under their limited partnership names, or to limited liability companies doing business under their limited liability company names which have been filed for record pursuant to Chapter 9, 9A, or 11 of Title 14, as amended, or to persons practicing any profession under a partnership name. (Ga. L. 1929, p. 233, § 4; Code 1933, § 106-304; Ga. L. 1937, p. 804, §§ 1, 6; Ga. L. 1943, p. 398, § 1; Ga. L. 1973, p. 480, § 1; Ga. L. 1981, p. 872, § 2; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 931, § 17; Ga. L. 1994, p. 161, § 1.)

**Editor's notes.** — Ga. L. 1989, p. 14, § 10, was superseded by Ga. L. 1989, p. 931, § 17, which was enacted later.

**Law reviews.** — For note on 1989 amendment to this Code section, see 6 Ga. St. U.L. Rev. 184 (1989).



## JUDICIAL DECISIONS

**Cited** in *National Brands Stores, Inc. v. Muse & Assocs.*, 183 Ga. 88, 187 S.E. 84 (1936); *Constitution Publishing Co. v. Lyon*, 52 Ga. App. 434, 183 S.E. 653 (1936); *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

**10-1-493. Penalty for failing to register.**

Any person, firm, partnership, or corporation carrying on any trade or business subject to registration under Code Section 10-1-490 without filing such registration as required by Code Section 10-1-490 shall be guilty of a misdemeanor but shall suffer no other or further penalty or forfeiture on account of any such failure to register, except costs as provided in Code Section 10-1-491. (Ga. L. 1929, p. 233, § 5; Code 1933, § 106-9906; Ga. L. 1937, p. 804, § 3.)

## JUDICIAL DECISIONS

**Cited** in *Dunn & McCarthy, Inc. v. Pinkston*, 179 Ga. 31, 175 S.E. 4 (1934); *Mobley v. Bailey*, 52 Ga. App. 578, 184 S.E. 417 (1936); *Gower v. Ozmer*, 55 Ga. App. 81, 189 S.E. 540 (1936); *Maxwell v. Pierce*, 183 Ga. 856, 189 S.E. 847 (1937); *Womble v. Parker*, 208 Ga. 378, 67 S.E.2d 133 (1951).

## ARTICLE 17

## RIGHTS IN WORKS OF FINE ART

**Editor's notes.** — A former Article 17, containing §§ 10-1-510 through 10-1-514 and based on Ga. L. 1973, p. 336, § 1, relating to multilevel distribution companies, was repealed by Ga. L. 1988, p. 1868, § 2. For similar provisions, see § 10-1-410 et seq.

**10-1-510. Conveyance of rights in works of fine art; statement of customer's right or license authorizing duplication; liability.**

(a) As used in this Code section, the term:

(1) "Artist" means the creator of a work of fine art.

(2) "Customer" means a person who contracts to have a printer duplicate a work of fine art.

(3) "Duplicate" means to print, copy, or otherwise reproduce.

(4) "Fine art" means a painting, sculpture, drawing, photograph, craft work, fiber art, or work of graphic art, except a work that a customer had specifically created as a work for hire pursuant to federal copyright laws.

(5) "Fine print" includes, but is not limited to, an engraving, etching, woodcut, lithograph, monoprint, or serigraph but does not include industrial designs.

(6) “Industrial design” means the aesthetic appearance of an article used in commerce.

(6.1) “Person” means an individual, partnership, corporation, association, entity, or other group, however organized.

(7) “Printer” means a person who contracts to duplicate a work of fine art for a customer.

(8) “Work of fine art” means any work of visual or graphic art of any media, including, but not limited to, fine art, fine print, or film.

(b) Whenever a work of fine art is sold or otherwise transferred by or on behalf of the artist who created it, or the heirs or personal representatives thereof, the right of reproduction thereof is reserved to the grantor until the right passes into the public domain pursuant to federal copyright laws unless the right is sooner expressly transferred by an instrument, note, or memorandum in writing signed by the owner of the rights conveyed or the duly authorized agent thereof. Nothing contained in this Code section is intended to prohibit the fair use, as defined in the federal copyright law (17 U.S.C. Section 107), of such work of fine art.

(c) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, or display publicly a work of fine art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, ownership of the physical work of fine art shall remain with and be reserved to the artist or owner, as the case may be, unless such right of ownership is expressly transferred by an instrument, note, memorandum, or other writing signed by the artist, the owner, or the duly authorized agent thereof.

(d) Whenever an exclusive or nonexclusive conveyance of any right to reproduce, prepare derivative works based on, distribute copies of, or publicly display a work of fine art is made by or on behalf of the artist who created it or the owner at the time of the conveyance, any ambiguity with respect to the nature or extent of the rights conveyed shall be resolved in favor of the reservation of rights by the artist or owner unless in any given case the federal copyright law (17 U.S.C. Section 1, et seq.) provides the contrary.

(e) Whenever a customer shall present to a printer for duplication information or images that include a work of fine art stored or duplicated as electronic data or in any digital form or that is transmitted to the printer as electronic data or in any digital form, it shall be the sole responsibility of the customer to provide a signed statement in compliance with the provisions of subsection (h) of this Code section to the printer that the customer has the legal right or license authorizing such duplication or that those rights have passed into the public domain pursuant to federal copyright laws.

(f) Except as provided in subsection (e) of this Code section, no printer shall enter into any agreement with any customer to duplicate a work of fine art when that customer's aggregate paid and unpaid obligations to that printer for all such prior or current duplications of that work of fine art exceed \$2,000.00 unless the printer obtains, at the time such aggregate obligation first exceeds \$2,000.00, a signed statement from the customer that the customer has the legal right or license authorizing such duplication or that those rights have passed into the public domain pursuant to federal copyright laws.

(g) Any printer who duplicates a work of fine art in reliance upon a statement obtained pursuant to subsection (e) or (f) of this Code section will incur no liability for damages under subsection (j) of this Code section.

(h) The statement required by subsections (e) and (f) of this Code section:

(1) Does not have to be sworn;

(2) May be included on the invoice, purchase order, proposed form, or other document;

(3) May be signed one time and kept on file for all duplications for the same customer;

(4) May be signed by any employee or agent of the customer on the customer's behalf; and

(5) Shall be in substantially the following form:

"STATEMENT

The undersigned customer has obtained in writing the legal right or license which authorizes the duplication of the work of fine art which has been requested by the undersigned or those rights have passed into the public domain pursuant to federal copyright law. A printer to whom this statement is presented may rely upon it in performing the requested duplication of the work of fine art.

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(Customer's Signature)

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(Date)"

(i) Except for subsection (e) of this Code section, this Code section applies to sales, transfers, and conveyances made on or after July 1, 1990, and applies to agreements to duplicate a work of fine art made on or after July 1, 1991. Subsection (e) of this Code section applies to agreements made on or after July 1, 1996, to duplicate fine art stored, transmitted, or duplicated as electronic data or in a digital form.

(j) Any person who violates subsection (e) or (f) of this Code section or who signs the statement provided for therein knowing it to be false shall be



civilly liable therefor and the person damaged thereby may recover trebled actual damages, court costs, and attorney's fees. (Code 1981, § 10-1-510, enacted by Ga. L. 1990, p. 164, § 1; Ga. L. 1991, p. 1161, § 1; Ga. L. 1996, p. 662, §§ 1, 2; Ga. L. 2000, p. 136, § 10.)

**Code Commission notes.** — Pursuant to substituted for "et. seq." near the end of Code Section 28-9-5, in 1990, "et seq." was subsection (d).

### RESEARCH REFERENCES

**ALR.** — What constitutes derivative work under the Copyright Act of 1976, 149 ALR Fed. 527.

## ARTICLE 17A

### CONSIGNMENT OF ART

#### 10-1-520. Short title.

This article shall be known and may be cited as the "Georgia Consignment of Art Act." (Code 1981, § 10-1-520, enacted by Ga. L. 1995, p. 267, § 1.)

#### 10-1-521. Definitions.

As used in this article, the term:

(1) "Art dealer" means a person engaged in the business of selling works of art, other than a person exclusively engaged in the business of selling goods at public auction, and other than a nonprofit organization.

(2) "Artist" means the person who creates a work of art, or, if such person is deceased, such person's heir, legatee, or personal representative.

(3) "Consignment" means that no title to, estate in, or right to possession of the work of art superior to that of the consignor shall vest in the consignee, notwithstanding the consignee's power or authority to transfer and convey to a third person all of the right, title, and interest of the consignor in and to such work of art.

(4) "Cooperative" means an association or group of artists which:

(A) Engages in the business of selling only works of art which are produced or created by such artists;

(B) Jointly owns, operates, and markets such business; and

(C) Accepts such works of art from its members on consignment.

(5) "Person" means an individual, partnership, corporation, association, entity, or other group, however organized.

(6) “Value of the work of art” means an amount agreed upon by written contract as the monetary worth of a work of art which amount shall be used in determining damages in the instance of a violation of this article by an art dealer and shall not be used for any other purpose.

(7) “Work of art” means an original art work which is:

(A) A visual rendition, including a painting, drawing, sculpture, mosaic, or photograph;

(B) A work of calligraphy;

(C) A work of graphic art, including an etching, lithograph, offset print, or silk screen;

(D) A craft work in materials, including clay, textile, fiber, wood, metal, plastic, or glass; or

(E) A work in mixed media, including a collage or a work consisting of any combination of subparagraphs (A) through (D) of this paragraph. (Code 1981, § 10-1-521, enacted by Ga. L. 1995, p. 267, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1995, a hyphen was deleted from “nonprofit” in paragraph (1) and from “Cooperative” in paragraph (4).

#### **10-1-522. Delivery of artwork to dealer for exhibition or sale in exchange for compensation constituting consignment.**

Notwithstanding any custom, practice, or usage of the trade to the contrary, whenever an artist delivers or causes to be delivered a work of art of the artist’s own creation to an art dealer in this state for the purpose of exhibition or sale, or both, on a commission, fee, or other basis of compensation, the delivery to and acceptance of such work of art by the art dealer shall constitute a consignment, unless the delivery to the art dealer is pursuant to an outright sale for which the artist receives or has received full compensation for the work of art upon delivery. (Code 1981, § 10-1-522, enacted by Ga. L. 1995, p. 267, § 1.)

#### **10-1-523. Written contract required for consignment of work of art; violation by art dealer rendering artist’s obligation voidable.**

(a) An art dealer may accept a work of art on a fee, commission, or other compensation basis on consignment from the artist who created the work of art only if prior to or at the time of acceptance the art dealer enters into a written contract with the artist establishing:

(1) The value of the work of art;

(2) The time within which the proceeds of the sale are to be paid to the artist if the work of art is sold; and

(3) The minimum price for the sale of the work of art.

(b) If an art dealer violates this Code section, a court may, at the request of the artist, void the obligation of the artist to that art dealer or to a person to whom the obligation is transferred other than a holder in due course. (Code 1981, § 10-1-523, enacted by Ga. L. 1995, p. 267, § 1.)

#### **10-1-524. Effects of consignment.**

A consignment of a work of art shall result in all of the following:

(1) The art dealer, after delivery of the work of art, shall constitute an agent of the artist for the purpose of sale or exhibition of the consigned work of art within this state;

(2) The work of art shall constitute property held in trust by the consignee for the benefit of the consignor and shall not be subject to claim by a creditor of the consignee;

(3) The consignee shall be responsible for the loss of, or damage to, the work of art; and

(4) The proceeds from the sale of the work of art shall constitute funds held in trust by the consignee for the benefit of the consignor. Such proceeds shall first be applied to pay any balance due to the consignor, unless the consignor expressly agrees otherwise in writing. (Code 1981, § 10-1-524, enacted by Ga. L. 1995, p. 267, § 1.)

#### **10-1-525. Art received as consignment to remain trust property; not subject or subordinate to claims, liens, or security interests.**

(a) A work of art received as a consignment shall remain trust property, notwithstanding the subsequent purchase thereof by the consignee directly or indirectly for the consignee's own account, until the price is paid in full to the consignor. If such work is thereafter resold to a bona fide purchaser before the consignor has been paid in full, the proceeds of the resale received by the consignee shall constitute funds held in trust for the benefit of the consignor to the extent necessary to pay any balance still due to the consignor and such trusteeship shall continue until the fiduciary obligation of the consignee with respect to such transaction is discharged in full.

(b) No such trust property or trust funds shall be or become subject or subordinate to any claims, liens, or security interests of any kind or nature whatsoever of the consignee's creditors, anything in Code Section 11-2-326 or any other provision of Title 11 to the contrary notwithstanding. (Code 1981, § 10-1-525, enacted by Ga. L. 1995, p. 267, § 1.)

**Code Commission notes.** — Pursuant to deleted following “whatsoever” in subsection 28-9-5, in 1995, a comma was tion (b).



**10-1-526. Contractual waiver of liability for works of art consigned to cooperative.**

Any cooperative may contract with its members to waive liability for the loss of or damage to works of art consigned to such cooperative. Any other provision of a contract or an agreement whereby the consignor purports to waive any provision of this article is void. (Code 1981, § 10-1-526, enacted by Ga. L. 1995, p. 267, § 1.)

**10-1-527. Use or display of work of art or photograph thereof.**

An art dealer who accepts a work of art on a fee, commission, or other compensation basis on consignment from the artist who created the work of art may use or display the work of art or a photograph of the work of art or permit the use or display of the work of art or a photograph of the work of art only if:

(1) Notice is given to users or viewers that the work of art is the work of the artist; and

(2) The artist gives prior written consent to the particular use or display. (Code 1981, § 10-1-527, enacted by Ga. L. 1995, p. 267, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1995, a comma was deleted following “a work of art” preceding “on a fee” near the beginning.

**10-1-528. Applicability to contracts executed prior to July 1, 1995.**

This article shall not apply to a written contract executed prior to July 1, 1995, unless either the parties agree by mutual written consent that this article shall apply or such contract is extended or renewed after July 1, 1995. (Code 1981, § 10-1-528, enacted by Ga. L. 1995, p. 267, § 1.)

**10-1-529. Liability for violations by art dealers.**

Any art dealer who violates this article is liable to the artist in an amount equal to:

(1) Fifty dollars; and

(2) The actual damages, if any, including the incidental and consequential damages sustained by the artist by reason of the violation and reasonable attorney’s fees. (Code 1981, § 10-1-529, enacted by Ga. L. 1995, p. 267, § 1.)

## ARTICLE 17B

## GEORGIA MUSEUM PROPERTY

**10-1-529.1. Short title.**

This article shall be known and may be cited as the “Georgia Museum Property Act.” (Code 1981, § 10-1-529.1, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.2. Definitions.**

As used in this article, the term:

(1) “Archives repository” means a nonprofit organization or a public agency whose primary functions include selecting, preserving, and making available records of historical or enduring value and that is open to the public on a regular basis. Archives repository does not include a public library.

(2) “Loan” means the placement of property with a museum or archives repository that is not accompanied by a transfer of title of the property to the museum or archives repository and for which there is some record that the owner intended to retain title to the property. Loan does not include transfers between museums, between archives repositories, or between museums and archives repositories unless the transferring institution specifically provides in writing that the transfer is a loan under this article.

(3) “Museum” means a nonprofit organization or a public agency that is operated primarily for the purpose of collecting, cataloging, preserving, or exhibiting property of educational, scientific, historic, cultural, or aesthetic interest and that is open to the public on a regular basis. Museum does not include a public library.

(4) “Property” means personal property. (Code 1981, § 10-1-529.2, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.3. Accuracy of museum or archive records.**

(a) Each museum or archives repository shall keep accurate records of all property on loan to the museum or archives repository, including the name and address of the owner, if known, and the beginning and ending date of the loan period. At the time that a person makes a loan to a museum or archives repository, the museum or archives repository shall give the owner of the property a copy of this article. If a museum or archives repository is notified of a change in the ownership of any property loaned to a museum or archives repository, the museum or archives repository shall

inform the new owner of the provisions of the loan agreement and shall send the new owner a copy of this article. Not less than 90 days before a museum or archives repository changes its address or dissolves, the museum or archives repository shall notify all owners of that change of address or dissolution. If a museum or archives repository becomes the owner of property under Code Section 10-1-529.4 or 10-1-529.5, the museum or archives repository shall maintain any records that the museum or archives repository has regarding the property for not less than two years after the date on which the museum or archives repository becomes the owner of the property.

(b) The owner of property loaned to a museum or archives repository shall provide the museum or archives repository with written notice of any change of the owner's address, of the owner's designated agent, of the designated agent's address, and of the name and address of the new owner if there is a change in the ownership of the property loaned to the museum or archives repository. (Code 1981, § 10-1-529.3, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.4. Abandonment of property loaned to a museum or archives repository; museum acquisition of abandoned property.**

(a) Property loaned to a museum or archives repository whose loan has an expiration date is abandoned when there has not been written contact between the owner and the museum or archives repository for at least seven years after that expiration date. If the loan has no expiration date, the property is abandoned when there has not been written contact between the owner and the museum or archives repository or their successors or assigns for at least seven years after the museum or archives repository took possession of the property.

(b)(1) If a museum or archives repository wishes to acquire title to abandoned property, the museum or archives repository shall, not less than 60 days after property is abandoned under subsection (a) of this Code section, send a notice by certified mail or statutory overnight delivery to the owner's last known address. A copy of such notice shall be simultaneously sent to any known lienholder at such lienholder's last known address. The notice shall contain all of the following:

(A) A statement that the loan is terminated and that the property is abandoned;

(B) A description of the property;

(C) A statement that the museum or archives repository will become the owner of the property if the present owner does not submit a written claim to the property to the museum or archives repository within 60 days after receipt of the notice; and



(D) A statement that the museum or archives repository will make arrangements with the owner to return the property to the owner or dispose of the property as the owner requests if the owner submits a written claim to the property to the museum or archives repository within 60 days after receipt of the notice.

(2) The notice provided for in subsection (a) of this Code section shall be substantially in the following form:

NOTICE OF ABANDONMENT OF PROPERTY

To: \_\_\_\_\_ (name of owner)  
\_\_\_\_\_ (address of owner)

Please be advised that the loan agreement is terminated for the following property (describe the property in sufficient detail to identify the property):

\_\_\_\_\_  
\_\_\_\_\_

The above-described property that you loaned to \_\_\_\_\_ (name and address of museum or archives repository) will be considered abandoned by you and will become the property of \_\_\_\_\_ (name of museum or archives repository) if you fail to submit to the museum or archives repository a written claim to the property within 60 days after receipt of this notice. If you do submit a written claim to the property within 60 days after receipt of this notice, \_\_\_\_\_ (name of museum or archives repository) will arrange to return the property to you or dispose of the property as you request. The cost of returning the property to you or disposing of the property is your responsibility unless you have made other arrangements with the museum or archives repository. \_\_\_\_\_ (name of person to contact at museum or archives repository and address of museum or archives repository).

(c) If the notice sent by the museum or archives repository under subsection (b) of this Code section is returned to the museum or archives repository undelivered, the museum or archives repository shall give notice of the abandoned property by publication once a week for two consecutive weeks in the official county organs of the county in which the museum or archives repository is situated and the county of the owner's last known address, and on the organization's website, if applicable, containing the following:

- (1) The name and last known address of the present owner;

(2) A description of the property;

(3) A statement that the property is abandoned and that the museum or archives repository will become the owner of the property if no person can prove ownership of the property;

(4) A statement that a person claiming ownership of the property shall notify the museum or archives repository in writing of that claim within 60 days after publication of the last legal notice; and

(5) The name and mailing address of the person who may be contacted at the museum or archives repository if a person wants to submit a written claim to the property.

(d) If the museum or archives repository receives a timely written claim for the property from the owner or the owner's agent in response to the notice provided under subsection (b) or (c) of this Code section the museum or archives repository shall return the property to the owner or dispose of the property as the owner requests. The owner shall advise the museum or archives repository in writing as to how the property shall be disposed of or returned to the owner. Costs of returning the property or disposing of the property shall be the responsibility of the owner unless the owner and the museum or archives repository have made other arrangements.

(e) If the museum or archives repository receives a timely written claim for the property from a person other than the person who loaned the property to the museum or archives repository in response to the notice provided under subsection (b) or (c) of this Code section, the museum or archives repository shall, within 60 days after receipt of the written claim, determine if the claim is valid. A claimant shall submit proof of ownership with the claim. If more than one person submits a timely written claim, the museum or archives repository may delay its determination of ownership until the competing claims are resolved by agreement or legal action. If the museum or archives repository determines that the claim is valid or if the competing claims are resolved by agreement or judicial action, the museum or archives repository shall return the property to the claimant submitting the valid claim or dispose of the property as the valid claimant requests. Costs of returning the property or disposing of the property shall be the responsibility of the valid claimant.

(f) If the museum or archives repository does not receive a timely written claim to the property or if the museum or archives repository determines that no valid timely claim to the property was submitted, the museum or archives repository becomes the owner of the property. The museum or archives repository becomes the owner of the property on the day after the period for submitting a written claim ends or on the day after the museum or archives repository determines that no valid timely written claim was submitted. The museum or archives repository owns the property free from

all claims. (Code 1981, § 10-1-529.4, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.5. Acquisition of undocumented property.**

(a) Property in the possession of a museum or archives repository which the museum or archives repository has reason to believe may be on loan and for which the museum or archives repository does not know the owner or have any reasonable means of determining the owner becomes the property of the museum or archives repository if no person has claimed the property within seven years after the museum or archives repository or a predecessor or assignor of such museum or archives repository took possession of the property. The museum or archives repository becomes the owner of the property on the day after the seven-year period ends and after following the notification process outlined in subsection (b) of this Code section free from all claims.

(b) The museum or archives repository that wishes to acquire title to undocumented property described in subsection (a) of this Code section shall provide public notice in the manner described in Code Section 10-1-529.4.

(c) On or after July 1, 2006, property that:

- (1) Is found in or on property controlled by the museum;
- (2) Is from an unknown source; and
- (3) Might reasonably be assumed to have been intended as a gift to the museum

is conclusively presumed to be a gift to the museum if ownership of the property is not claimed by a person within 90 days of its discovery. (Code 1981, § 10-1-529.5, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.6. Application of conservation measures to property on loan to museum or archives.**

(a) Unless there is a written loan agreement to the contrary, a museum or archives repository may apply conservation measures to property on loan to the museum or archives repository without the lender's permission or formal notice if action is required to protect the property on loan or other property in the custody of the museum or archives repository or the property on loan is a hazard to the health and safety of the public or the museum or archives repository staff, and either:

- (1) The museum or archives repository is unable to reach the lender at the lender's last known address within three days before the time the museum or archives repository determines action is necessary; or



(2) The lender does not respond or will not agree to the protective measures the museum or archives repository recommends and does not terminate the loan and retrieve the property within three days.

(b) If a museum or archives repository applies conservation measures to property under this article, or with the agreement of the lender, unless the agreement provides otherwise, the museum or archives repository acquires a lien on the property in the amount of the costs incurred by the museum or archives repository.

(c) The museum or archives repository is not liable for injury to or loss of the property if the museum or archives repository:

(1) Had a reasonable belief at the time the action was taken that the action was necessary to protect the property on loan or other property in the custody of the museum or archives repository or that the property on loan was a hazard to the health and safety of the public or the museum or archives repository staff; and

(2) Exercised reasonable care in the choice and application of conservation measures. (Code 1981, § 10-1-529.6, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

**10-1-529.7. American Indian human remains and burial objects excluded.**

This article shall not apply to objects held by museums pursuant to Part 1 of Article 7 of Chapter 12 of Title 44, relating to American Indian human remains and burial objects held by museums. (Code 1981, § 10-1-529.7, enacted by Ga. L. 2006, p. 720, § 2/SB 195.)

ARTICLE 18

AUCTIONEERS

**10-1-530. Liability for sale of stolen horse or mule.**

Any auctioneer who may sell or dispose of any horse or mule shall be held responsible to the purchaser for damages in the event it is shown and proved that the horse or mule so sold by him was stolen. (Ga. L. 1865-66, p. 260, § 1; Code 1868, § 1439; Code 1873, § 1426; Code 1882, § 1426; Civil Code 1895, § 3563; Civil Code 1910, § 4143; Code 1933, § 96-502.)

**Cross references.** — Regulation of business of auctioneers generally, Ch. 6, T. 43.

**Administrative rules and regulations.** — Rules governing Georgia Auctioneers Com-

mission, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Auctioneers Commission, Chapters 55-1 through 55-9.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 7 Am. Jur. 2d, Auctions and Auctioneers, §§ 69, 70.

**Am. Jur. Pleading and Practice Forms.** — 2C Am. Jur. Pleading and Practice Forms, Auctions and Auctioneers, § 2.

**C.J.S.** — 7A C.J.S., Auctions and Auctioneers, § 24.

**ALR.** — Withdrawal of property from auction sale, 37 ALR2d 1049.

## ARTICLE 19

## SUNDAY MOTION PICTURE SHOWS AND ATHLETIC EVENTS

## 10-1-550 through 10-1-555.

Repealed by Ga. L. 2005, p. 622, § 1/SB 287, effective July 1, 2005.

**Editor's notes.** — Ga. L. 2005, p. 622, § 1, repealed this article, relating to Sunday Motion Picture Shows and Athletic Events. This

article was based on Ga. L. 1949, p. 1007, §§ 1-6; Ga. L. 1982, p. 3, § 10.

## ARTICLE 20

## COMMON DAY OF REST

**Cross references.** — Status of Sunday as religious holiday, § 1-4-2. Requiring inmates

to do unnecessary work on Sunday, § 42-5-40.

## JUDICIAL DECISIONS

**As to constitutionality of article,** see *Rutledge v. Gaylord's, Inc.*, 233 Ga. 694, 213 S.E.2d 626 (1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 73 Am. Jur. 2d, Sundays and Holidays, § 1 et seq.

**C.J.S.** — 83 C.J.S., Sunday, § 1 et seq.

**ALR.** — Violation of Sunday law as ground for civil action for damages, 11 ALR 1220.

Power of municipality to require closing on Sunday of amusements not forbidden on that day by state law, 18 ALR 738.

Power of municipal corporation to legislate as to Sunday observance, 29 ALR 397; 37 ALR 575.

Constitutionality of discrimination by Sunday law or ordinance as between different kinds of business, 46 ALR 290; 119 ALR 752.

Sports, games, or amusements as work, labor, avocation, business, or the like, within Sunday laws, 50 ALR 1050; 56 ALR 813.

Discrimination as between localities in Sunday law, 62 ALR 642.

Validity of administrative proceedings conducted on Sunday or holiday, 26 ALR2d 996.

Injunction to prevent violation of Sunday law, 76 ALR2d 874.

Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 ALR4th 246.

**10-1-570. Short title.**

This article shall be known and may be cited as “The Common Day of Rest Act of 1974.” (Ga. L. 1974, p. 186, § 13.)

**10-1-571. Definitions.**

As used in this article, the term:

(1) “Two consecutive days of Saturday and Sunday” means the time between 12:00 Midnight on Friday and 12:00 Midnight on Saturday and from 12:00 Midnight on Saturday to 12:00 Midnight on Sunday.

(2) “Two rest days” means the time between 12:00 Midnight on Friday and 12:00 Midnight on Saturday and from 12:00 Midnight on Saturday to 12:00 Midnight on Sunday. (Ga. L. 1974, p. 186, § 2.)

**10-1-572. Legislative intent.**

The purpose of this article is to promote the health, recreation, welfare, repose, and religious liberty of each individual of this state. This article is not designed to be discriminatory in any way or to any group but rather to provide the public with necessary benefits and services at all times, while at the same time protecting the lawful humanitarian, social, and religious rights of each individual. (Ga. L. 1974, p. 186, § 1.)

**10-1-573. Employees to be given benefit of day of rest.**

Any business or industry which operates on either of the two rest days (Saturday or Sunday) and employs those whose habitual day of worship has been chosen by the employer as a day of work shall make all reasonable accommodations to the religious, social, and physical needs of such employees so that those employees may enjoy the same benefits as employees in other occupations. (Ga. L. 1974, p. 186, § 6.)

**10-1-574. General exemptions from article.**

This article is not applicable to and shall not prohibit:

(1) Casual transactions between persons, none of whom are thereby carrying on a business or business transactions;

(2) Agricultural operations such as farming, animal and poultry husbandry, forestry, and allied activity;

(3) The conduct of the businesses and activities referred to in Code Sections 10-1-575 and 10-1-576;



(4) The practice of the healing arts by persons licensed or otherwise authorized to practice the healing arts under the laws of Georgia. (Ga. L. 1974, p. 186, § 10.)

**10-1-575. Charitable or religious activities exempt.**

The prohibitions of this article are not applicable to a person, nonprofit organization, or nonprofit corporation if its activity is conducted solely for charitable or religious purposes. (Ga. L. 1974, p. 186, § 7.)

**10-1-576. Governmental departments, agencies, and employees exempt.**

The prohibitions of this article are not applicable to any federal, state, county, municipal, or other local government department or agency in the conduct of its official duties nor to the employees thereof in the discharge of their official employment. (Ga. L. 1974, p. 186, § 8.)

ARTICLE 21

BUYING SERVICES

OPINIONS OF THE ATTORNEY GENERAL

Article does not apply to cocktail lounges selling memberships for certain fee that will permit patrons buying such memberships to escape the normal cover charge required of customers entering the cocktail lounge. 1976 Op. Att'y Gen. No. 76-94.

**10-1-590. Short title.**

This article shall be known and may be cited as the "Buying Services Act of 1975." (Ga. L. 1975, p. 529, § 1.)

**10-1-591. Definitions.**

As used in this article, the term:

(1) "Administrator" means the administrator appointed pursuant to subsection (a) of Code Section 10-1-395 or his delegate.

(2) "Business day" means any day other than a Saturday, Sunday, or legal holiday.

(3) "Buying service," "buying club," or "club" means any corporation, partnership, unincorporated association, or other business enterprise which is organized with the primary purpose of providing benefits to members from the cooperative purchase of service or merchandise and which desires to effect such purpose through direct solicitation or other business activity in this state.

(4) “Contract” means any contract or agreement by which a person becomes a member of a buying service or club.

(5) “Member” means any natural person who is entitled to any of the benefits of a buying service or buying club. (Ga. L. 1975, p. 529, § 2; Ga. L. 1979, p. 643, § 1; Ga. L. 1982, p. 1073, §§ 1, 3.)

#### **10-1-592. Buying services and clubs to obtain licenses.**

No buying service or club nor any officer, official, employee, or agent thereof shall sell, advertise, or solicit the sale or purchase of memberships or contracts within this state without having first obtained a license to do business in this state from the administrator. (Ga. L. 1975, p. 529, § 3; Ga. L. 1982, p. 1073, §§ 2, 4.)

#### **10-1-593. Conditions of licensure; bonds.**

As a condition to the issuance or retention of a license required by this article, each buying service or club shall:

(1) Comply with such reasonable conditions for the issuance of a license as may be required by the administrator pursuant to this article;

(2) Maintain a bond in the amount of \$25,000.00 with a surety company duly authorized to do business in this state or post a cash bond in such amount, payable to the Governor of this state; in either case, such bond shall be for the use and benefit of any person who has entered into a contract for membership in a buying service or club. Such bond shall be conditioned to pay all losses, damages, and expenses that may be sustained by such member by reason of any fraudulent misrepresentation or by reason of any breach of contract by the club; and

(3) Furnish, if the buying service or club operates buying service activities at more than one physical location in this state, a surety bond for each location of buying service activity, each bond to be in the amount and subject to the conditions stated in paragraph (2) of this Code section. (Ga. L. 1975, p. 529, § 4; Ga. L. 1979, p. 643, § 2; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1984, p. 22, § 10.)

#### **10-1-594. Application for license; renewal; fee.**

(a) Application for a license as a buying service or club shall be made on forms prescribed by the administrator and shall contain such information and supporting documents as he may require.

(b) Licenses shall be issued for a period of one year and shall be renewable within 90 days preceding the expiration thereof.

(c) The fee for a license or for the renewal thereof shall be \$50.00, payable to the administrator for deposit by the Office of Treasury and Fiscal

Services in the general fund of the state. (Ga. L. 1975, p. 529, § 5; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1993, p. 1402, § 18.)

**10-1-595. Revocation, suspension, and nonrenewal of licenses; grounds; notice and hearing.**

(a) Licenses issued under this article may be revoked, suspended, or not renewed by the administrator for:

(1) Any violation of the substantive provisions of this article;

(2) A violation of any rule or regulation issued by the administrator pursuant to this article; or

(3) A violation of any law of this state.

(b) Licenses shall be revoked or suspended by the administrator only following notice and hearing pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1975, p. 529, § 6; Ga. L. 1982, p. 1073, §§ 2, 4.)

**10-1-596. Contracts of membership; approval of form by administrator; effect of noncompliance.**

No contract of membership shall be used by any buying service or club unless such contract is first approved by the administrator as to form. Any contract or agreement used in violation of this Code section shall be null, void, and of no effect. (Ga. L. 1975, p. 529, § 7; Ga. L. 1982, p. 1073, §§ 2, 4.)

**10-1-597. Contracts of membership; right of cancellation; how exercised; entitlement to refund; right not waivable.**

(a) Any person who has elected to become a member of a club may cancel such membership by giving written notice of cancellation any time before 12:00 Midnight of the third business day following the date on which membership was attained.

(b) Notice of cancellation may be given personally or by mail. If given by mail, the notice is effective upon deposit in a mailbox, properly addressed and postage prepaid. Notice of cancellation need not take a particular form and is sufficient if it indicates, by any form of written expression, the intention of the member not to be bound by the contract.

(c) Cancellation shall be without liability on the part of the member. The member will be entitled to a total refund, within ten days after notice of cancellation is given, of the entire consideration paid for the contract.

(d) Rights of cancellation may not be waived or otherwise surrendered. (Ga. L. 1975, p. 529, § 8.)



**10-1-598. Contracts of membership; requirements; notice; effect of non-compliance.**

(a) A copy of every contract shall be delivered to the member at the time the contract is signed.

(b) Every contract must be in writing, must be signed by the member, must designate the date on which the member signed the contract, and must state, clearly and conspicuously in boldface type of a minimum size of 14 points, the following:

**“MEMBER’S RIGHT TO CANCEL**

If you wish to cancel this contract, you may cancel by delivering or mailing a written notice to the club. To prove that you canceled, it is recommended that you send the notice by certified mail or statutory overnight delivery. The notice must say that you do not wish to be bound by the contract and must be delivered or mailed before 12:00 Midnight of the third business day after you sign this contract. The notice must be delivered or mailed to: (insert name and mailing address of club). If you cancel, the club will return, within ten days of the date on which you give notice of cancellation, a total refund. It is recommended that you mail the notice of cancellation by certified mail or statutory overnight delivery, return receipt requested; check with your post office as to the time when you will be able to mail a certified letter. Be sure to keep a photocopy of the notice of cancellation which you mail.”

(c) Every contract which does not contain the notice specified in subsection (b) of this Code section may be canceled by the member at any time, without liability, by giving notice of cancellation by any means. Nothing contained in this Code section shall be construed to require that a member’s cancellation notice be sent by certified mail or statutory overnight delivery in order to effect a cancellation. (Ga. L. 1975, p. 529, § 9; Ga. L. 1983, p. 3, § 8; Ga. L. 1987, p. 1347, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor’s notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July, 1, 2000.

**10-1-599. Contracts of membership; authorized duration; notice thereof.**

No contract shall be valid for a term longer than 18 months from the date upon which the contract is signed. However, a club may allow a member to convert his contract into a contract for a period longer than 18 months after the member has been a member of the club for a period of at least six months. The duration of the contract shall be clearly and conspicuously disclosed in the contract in boldface type of a minimum size of 14 points. (Ga. L. 1975, p. 529, § 10; Ga. L. 1984, p. 22, § 10.)

**10-1-600. Records to be kept; inspection thereof.**

(a) Each buying service or club licensed in this state shall keep and maintain:

- (1) Accurate accounts, books, and records of all transactions in this state;
- (2) Copies of all agreements;
- (3) Dates and amounts of payments made and accepted thereon; and
- (4) The names and addresses of all members in this state.

(b) Such accounts, books, and records shall be open for inspection by the administrator or his delegates during normal business hours on all normal business days. (Ga. L. 1975, p. 529, § 11; Ga. L. 1982, p. 1073, §§ 2, 4.)

**10-1-601. Rules and regulations; orders.**

The administrator is authorized to promulgate, adopt, and issue rules, regulations, and orders necessary or convenient to carry out the provisions and purposes of this article. Any such rules of a substantive nature shall be promulgated only when it is determined by the administrator, in the reasonable exercise of his discretion and on the basis of his expertise and the facts, submissions, evidence, and all information before him, that such rules are needed to prohibit or control acts or practices which create the probability of actual injury to consumers. No rule shall be promulgated where it is reasonably certain that the burden of complying with such rule will outweigh the public interest in prohibiting or controlling the practice which would be so prohibited or controlled. No such rule so promulgated shall be arbitrary or capricious nor shall its promulgation be characterized by an abuse of discretion or an unwarranted exercise of discretion. (Ga. L. 1975, p. 529, § 13; Ga. L. 1982, p. 1073, §§ 2, 4.)

**10-1-602. Application of “Georgia Administrative Procedure Act” and “Fair Business Practices Act of 1975.”**

Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” shall apply to all actions and proceedings of an administrative nature taken by the administrator pursuant to this article, except where the administrator is acting under Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975.” A violation of this article shall also be considered a violation of Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975.” (Ga. L. 1975, p. 529, § 14; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1987, p. 1347, § 2.)

**Cross references.** — Fair Business Practices Act of 1975, § 10-1-390 et seq.

### **10-1-603. Injunctions.**

In addition to any other proceedings authorized by this article, the administrator may bring a civil action in the superior courts to enjoin any violation or threatened violation of any provision of this article or any rule, regulation, or order issued by the administrator pursuant to this article. (Ga. L. 1975, p. 529, § 12; Ga. L. 1982, p. 1073, §§ 2, 4.)

### **10-1-604. Civil penalty for violation; administrative hearing and review; judicial review; judgment on final order; remedy concurrent, alternative, and cumulative.**

(a) In order to enforce this article or any orders, rules, and regulations promulgated pursuant thereto, the administrator may issue an administrative order imposing a penalty not to exceed \$1,000.00 for each violation, whenever he determines, after a hearing, that any person has violated any provisions of this article or any rules, regulations, or orders promulgated under this article.

(b) The hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the administrator shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” All penalties recovered as provided in this Code section shall be paid into the state treasury.

(c) The administrator may file, in the superior court of the county in which the person under an order resides, or if the person is a corporation, in the superior court of the county in which the corporation under an order maintains its principal place of business, or in the superior court of the county in which the violation occurred, a certified copy of the final order of the administrator unappealed from or of a final order of the administrator affirmed upon appeal. Thereupon, the court shall render judgment in accordance therewith and shall notify the parties. Such judgment shall have the same effect and proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by such court.

(d) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the administrator with respect to any violation of this article and



any order, rules, or regulations promulgated pursuant thereto. (Ga. L. 1979, p. 643, § 3; Ga. L. 1982, p. 1073, §§ 2, 4; Ga. L. 1984, p. 22, § 10.)

### 10-1-605. Penalty.

Any person, firm, corporation, organization, partnership, entity, buying club, or buying service violating any provision of this article shall be guilty of a misdemeanor. (Ga. L. 1975, p. 529, § 15.)

## ARTICLE 22

### MOTOR VEHICLE FRANCHISE PRACTICES

**Editor's notes.** — Ga. L. 1993, p. 1585, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to substantively reenact certain legislation relating to distribution of tractors, farm equipment, heavy equipment, and motor vehicles subsequent to the ratification at the 1992 general election of a constitutional amendment declaring that such distribution vitally affects the general economy of the state and the public interest and public welfare and authorizing the General Assembly to regulate such distribution. This Act is intended to ratify and affirm the validity of such legislation subsequent to the ratification of said constitutional amendment; and this Act shall not in any manner be con-

strued to imply a legislative determination that such legislation was not valid prior to the ratification of said constitutional amendment."

Ga. L. 1993, p. 1585, § 2, effective April 27, 1993, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of Code Sections 10-1-620 through 10-1-628 (Part 1), 10-1-630 and 10-1-631 (Part 2), 10-1-640 through 10-1-644 (Part 3), 10-1-650 through 10-1-654 (Part 4), 10-1-660 through 10-1-663 (Part 5), and 10-1-665 through 10-1-668 (Part 6), and was based on Ga. L. 1983, p. 1548, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1990, p. 1004, §§ 2-5; Ga. L. 1991, p. 94, § 10; and Ga. L. 1991, p. 797, § 2.

## PART 1

### GENERAL CONSIDERATION

#### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state statutes regulating dealings between automobile manufacturers, dealers, and franchisees, 82 ALR4th 624.

### 10-1-620. Short title.

This article shall be known and may be cited as the "Georgia Motor Vehicle Franchise Practices Act." (Code 1981, § 10-1-620, enacted by Ga. L. 1993, p. 1585, § 2.)

## JUDICIAL DECISIONS

**Cited** in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555 (N.D. Ga. 1992); *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998); *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**10-1-621. Legislative findings.**

The General Assembly finds and declares that:

- (1) The distribution and sale of motor vehicles within this state are vital to the general economy of this state and to the public interest and public welfare;
- (2) The provision for warranty service and the repair of predelivery transportation damages to motor vehicles is of substantial concern to the people of this state;
- (3) The maintenance of full and fair competition among dealers and others is in the public interest; and
- (4) The maintenance of strong and sound dealerships is essential to provide continuing and necessary reliable services to the consuming public in this state and to provide stable employment to the citizens of this state. (Code 1981, § 10-1-621, enacted by Ga. L. 1993, p. 1585, § 2.)

**JUDICIAL DECISIONS**

**Cited** in *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**10-1-622. Definitions.**

As used in this article, the term:

(1) “Dealer” means any person engaged in the business of selling, offering to sell, soliciting, or advertising the sale of new motor vehicles and who is licensed or otherwise authorized to utilize trademarks or service marks associated with one or more makes of motor vehicles in connection with such sales. The term “dealer” shall also include any person who engages exclusively in the repair of motor vehicles, except motor homes, if such repairs are performed pursuant to the terms of a franchise or other agreement with a franchisor or such repairs are performed as part of a manufacturer’s or franchisor’s warranty. The term “dealer” shall not mean any person engaged solely in the business of selling used motor vehicles.

(2) “Dealership” means:

(A) The dealer, if the dealer is a corporation, partnership, or other business organization; or

(B) All business assets used in connection with the dealer’s business pursuant to the franchise including, but not limited to, the dealership facilities, the franchise, inventory, accounts receivable, and good will if the dealer is an individual.

(3) “Dealership facilities” means the location at which a dealer, pursuant to a franchise, maintains a permanent showroom for new motor vehicles.

(4) “Designated successor” means any person or child who, in the case of the owner’s death, is entitled to inherit the ownership interest in the dealership under the owner’s will or who, in the case of an incapacitated owner, has been appointed by a court as the legal representative of the owner’s property or has been otherwise lawfully nominated or constituted to manage the dealership on behalf of the owner. A “designated successor” may also mean a person specifically named in the franchise agreement or any addendum to the franchise agreement.

(5) “Distributor” means any person, resident or nonresident, who directly or indirectly in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale if such person is the principal supplier of any make of motor vehicle for two or more dealers.

(6) “Franchise” means the written agreement or contract between any franchisor and any dealer which purports to fix the legal rights and liabilities of the parties to such agreement or contract and pursuant to which the dealer purchases and resells motor vehicles or leases or rents the dealership facilities. A franchisor is prohibited from effectuating through any letter, memo, or other document or electronic communication any action or terms that this article makes unlawful when included in a franchise agreement.

(7) “Franchisor” means:

(A) Any person, resident or nonresident, who directly or indirectly licenses or otherwise authorizes one or more dealers to use a trademark or service mark associated with a make of motor vehicle in connection with the retail sale of new motor vehicles bearing such trademark or service mark;

(B) Any person who in the ordinary course of business and on a recurring basis sells such new motor vehicles to a dealer for resale; and

(C) Any person, other than a person who finances the purchase or lease of motor vehicles, who is controlled by a franchisor or more than 10 percent owned by a franchisor, as that term is defined in subparagraphs (A) and (B) of this paragraph.

(8) “Good faith” means honesty in fact and the observation of reasonable commercial standards of fair dealing in the trade as defined and interpreted in Code Section 11-1-203.



(9) “Manufacturer” means any person who performs the major portion of the assembly of a new motor vehicle.

(10) “Motor vehicle” means every self-propelled vehicle intended primarily for use and operation on the public highways, except farm tractors and other machines and tools used in the production, harvesting, and care of farm products, construction equipment, and recreational vehicles as defined in paragraph (5) of subsection (a) of Code Section 10-1-679.

(11) “New motor vehicle” means a motor vehicle which has been sold to a dealer and on which the original motor vehicle title has not been issued.

(12) “Owner” means any person holding an ownership interest in a dealership.

(13) “Person” means every natural person, partnership, corporation, association, trust, estate, or any other legal entity.

(13.1) “Relevant market area” means the area located within an eight-mile radius of an existing dealership.

(14) “Warrantor” means any person who gives a warranty in connection with a new motor vehicle.

(15) “Warranty” means a written document signed or authorized by the party on whose behalf it is given which is made or given incident to the sale or lease of a new motor vehicle which contains either statements or promises that said new motor vehicle meets or will meet certain standards or promises to perform certain repairs or other services in connection with said new motor vehicle if necessary. Such term does not include service contracts, mechanical or other insurance, or “extended warranties” sold for separate consideration by a dealer or other person not controlled by a manufacturer or distributor. (Code 1981, § 10-1-622, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 1; Ga. L. 2005, p. 1233, § 1/SB 155.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, capitalization was revised in paragraph (6).

### JUDICIAL DECISIONS

**Franchise agreement not created.** — Acknowledgment document between automobile dealer and automobile manufacturer did not meet the definitional requirements of the Motor Vehicle Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., and neither the intent of the parties nor their acknowledged

course of conduct could create a statutory franchise agreement between them where none was executed. *Hoyt's Cycle Store, Inc. v. American Suzuki Motor Corp.*, 202 Ga. App. 15, 413 S.E.2d 455 (1991), cert. denied, 202 Ga. App. 906, 413 S.E.2d 455 (1992).

**Applicability of paragraph (11).** — Para-

graph (11) of O.C.G.A. § 10-1-622 applies to transactions between automobile manufacturers and their franchisees not to transactions between car dealers and their retail customers. *Toirkens v. Willett Toyota, Inc.*, 192 Ga. App. 109, 384 S.E.2d 218 (1989).

**Finance company was not a franchisor** and

could not be liable under the Georgia Motor Vehicle Dealer's Day in Court Act, O.C.G.A. § 10-1-630 et seq. *Nissan Motor Acceptance Corp. v. Stovall Nissan, Inc.*, 224 Ga. App. 295, 480 S.E.2d 322 (1997).

**Cited** in *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998).

**10-1-623. Action for violation of article; punitive damages; equitable relief; standing; venue.**

(a) Notwithstanding the terms, provisions, or conditions of any agreement or franchise or other terms or provisions of any novation, waiver, or other written instrument, any person who is or may be injured by a violation of a provision of this article or any party to a franchise who is so injured in his or her business or property by a violation of a provision of this article relating to that franchise or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of this article may file a petition with the Department of Revenue as provided in Code Section 10-1-667 or may bring an action in any court of competent jurisdiction for damages and equitable relief including injunctive relief. Said person may recover damages therefor in any amount equal to the greater of (1) the actual pecuniary loss or (2) three times the actual pecuniary loss, not to exceed \$750,000.00. In addition, said person may recover costs and reasonable attorney's fees as damages. Upon a prima-facie showing by the person filing the petition or cause of action that a violation of this article has occurred, the burden of proof shall then be upon the opposing party to prove that such violation did not occur.

(b) If the franchisor engages in aggravated or continued multiple intentional violations of a provision or provisions of this article, the court may award punitive damages in addition to any other damages authorized under this part.

(c) A dealer, owner, or other party, if he has not suffered any loss of money, property, employment rights, or business opportunity, may obtain final equitable relief if it can be shown that the violation of a provision of this article by a franchisor may have the effect of causing such loss of money, property, employment rights, or business opportunity.

(d) This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement.

(e) Any corporation or association which is primarily owned by or comprised of dealers and which primarily represents the interests of dealers shall have standing to file a petition or cause of action with the Department of Revenue or with any court of competent jurisdiction for itself or by, for, or on behalf of any dealer or group of dealers for an alleged violation of this article or for the determination of any rights created by this article.

(f) In addition to any county in which venue is proper in accordance with any provision of the Constitution of this state or any other provision of this Code, in any cause of action brought against a manufacturer, franchisor, or distributor which is a corporation by a dealer for any alleged breach of the franchise agreement or alleged violation of this article or for the determination of any rights created by the franchise agreement or this article, venue shall be proper in the county in which the dealer engaged in the business of selling the products or services of such manufacturer, franchisor, or distributor, and the manufacturer, franchisor, or distributor which is a corporation shall be deemed to reside in such county for venue purposes. Any provision of a franchise or other agreement, under which the parties determine, agree to, control, restrict, establish, limit, or direct the venue in which a cause of action under this article shall be brought, shall be void. (Code 1981, § 10-1-623, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 2; Ga. L. 2000, p. 136, § 10.)

### JUDICIAL DECISIONS

**Punitive damages.** — In an action by an automobile dealership franchisee against the franchisor for wrongful termination of the franchise agreement, the trial court was authorized to substitute the court's award of punitive damages for that of the jury. *Moore v. American Suzuki Motor Corp.*, 211 Ga. App. 337, 439 S.E.2d 43 (1993).

**No legal duty to consumer.** — Trial court erred by denying a franchisor's motion for summary judgment with regard to a consum-

er's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**Cited in** *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998).

### 10-1-624. Persons subject to article; written instruments violating article void; franchisor's use of subsidiary to accomplish illegal act.

(a) Any person who engages directly or indirectly in purposeful contacts within this state in connection with the offering of advertising for sale or has business dealings with respect to a new motor vehicle sale within this state shall be subject to the provisions of this article and shall be subject to the jurisdiction of the courts of this state.

(b) The applicability of this article shall not be affected by a choice of law clause in any franchise, agreement, waiver, novation, or any other written instrument.

(c) Any provision of any franchise, agreement, waiver, novation, or any other written instrument executed, modified, extended, or renewed after July 1, 1983, which is in violation of any Code section of this article shall be deemed null and void and without force and effect.

(d) No franchisor shall use any subsidiary corporation, affiliated corpo-



ration, or any other controlled corporation, partnership, association, or person to accomplish what would otherwise be illegal conduct under this article on the part of the franchisor. (Code 1981, § 10-1-624, enacted by Ga. L. 1993, p. 1585, § 2.)

#### JUDICIAL DECISIONS

**Cited in** *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998).

#### **10-1-625. Statute of limitations.**

Actions arising out of any provision of this article shall be commenced within a four-year period of the accrual of the cause of action; however, if a person liable under this article conceals the cause of action from the knowledge of the person entitled to bring the action, the period prior to the discovery of his cause of action by the person entitled to bring such action shall be excluded in determining the time limited for the commencement of the action. (Code 1981, § 10-1-625, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-626. Remedies not exclusive.**

The rights, remedies, and duties contained in this article are not exclusive but are cumulative with the rights, remedies, and duties otherwise provided by law. The rights and duties contained in the various parts of this article are not exclusive but are cumulative with the rights and duties provided in other parts of this article. (Code 1981, § 10-1-626, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-627. Waiver of article void; voluntary releases valid.**

No franchisor, nor any agent nor employee of a franchisor, shall use a written instrument, agreement, or waiver to attempt to nullify any of the provisions of this article and any such agreement, written instrument, or waiver shall be null and void. This Code section shall not prevent a dealer from voluntarily entering into a valid release agreement. (Code 1981, § 10-1-627, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-628. Attorney's fees in action to enforce article.**

Whenever any person brings an action or complaint to enforce any provision of this article in any court of competent jurisdiction and prevails or substantially prevails in such action or complaint, the court may award the person bringing such action or complaint his reasonable attorney's fees. Such attorney's fees shall be taxed and collected as part of the costs and

shall be in addition to any other costs or penalties imposed. (Code 1981, § 10-1-628, enacted by Ga. L. 1993, p. 1585, § 2.)

PART 2

MOTOR VEHICLE DEALER’S DAY IN COURT

JUDICIAL DECISIONS

**No retroactive effect.** — Because O.C.G.A. Pt. 2, Art. 22, Ch. 1, T. 10, and the Georgia Motor Vehicle Fair Practices Act, O.C.G.A. § 10-1-660 et seq., affect the substantive rights of the parties, the statutes cannot be given retroactive effect. *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986) (decided prior to 1993 reenactment).

The Dealer’s Day in Court Act, O.C.G.A. § 10-1-630 et seq., in Georgia applied only to acts after July 1, 1983. *Ewers v. Ford Motor Co.*, 843 F.2d 1331 (11th Cir. 1988) (decided prior to 1993 reenactment).

10-1-630. Short title.

This part shall be known and may be cited as the “Georgia Motor Vehicle Dealer’s Day in Court Act.” (Code 1981, § 10-1-630, enacted by Ga. L. 1993, p. 1585, § 2.)

JUDICIAL DECISIONS

**Cited in** *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998); *Greensboro Ford, Inc. v. Ford Motor Co.*, 256 Ga. App. 520, 568 S.E.2d 758 (2002).

10-1-631. Practices violative of existing law.

(a) It is declared to be violative of the existing law of the State of Georgia for any franchisor:

- (1) To fail to act in good faith with any dealer in connection with the sale, transfer, termination, or succession of a franchise or in connection with the operation of a dealer’s business pursuant to a franchise or to fail to act in good faith in any of its business transactions with a dealer; or
- (2) To utilize a boycott, refusal to deal, threat of refusal to deal, coercion, threat of punitive action, withholding of benefits, or other unconscionable business practices in any of its business transactions with a dealer.

(b) Without limitation as to other actions which may violate this Code section, it shall be evidence of a violation of this Code section if a franchisor commits any action which would be a violation of any part of Part 1 of this article, the “Georgia Motor Vehicle Franchise Practices Act.” (Code 1981, § 10-1-631, enacted by Ga. L. 1993, p. 1585, § 2.)

## JUDICIAL DECISIONS

**Bad faith required.** — A violation of O.C.G.A. § 10-1-631 was not established by the prospective transferee of a franchise who failed to show that the franchisor acted in bad faith in rejecting the transfer. *Hickman v. American Honda Motor Co.*, 982 F. Supp. 881 (N.D. Ga. 1997), *aff'd*, 138 F.3d 958 (11th Cir. 1998).

**Finance company was not a franchisor** and could not be liable under O.C.G.A. Pt. 2, Art. 22, Ch. 1, T. 10. *Nissan Motor Acceptance Corp. v. Stovall Nissan, Inc.*, 224 Ga. App. 295, 480 S.E.2d 322 (1997).

**No legal duty to consumer.** — Trial court erred by denying a franchisor's motion for

summary judgment with regard to a consumer's negligence claim predicated on the Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**Cited** in *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 779 F. Supp. 1345 (N.D. Ga. 1990); *Coffee v. GMAC*, 5 F. Supp. 2d 1365 (S.D. Ga. 1998).

## PART 3

## MOTOR VEHICLE WARRANTY PRACTICES

## 10-1-640. Short title.

This part shall be known and may be cited as the "Motor Vehicle Warranty Practices Act." (Code 1981, § 10-1-640, enacted by Ga. L. 1993, p. 1585, § 2.)

## RESEARCH REFERENCES

**ALR.** — Validity, construction and effect of state motor vehicle warranty legislation, 88 ALR5th 301.

### 10-1-641. Dealer's predelivery preparation, warranty service, and recall work obligations to be provided in writing.

(a)(1) Each distributor, manufacturer, or warrantor:

(A) Shall specify in writing to each of its dealers in this state the dealer's obligations for predelivery preparation including the repair of damages incurred in the transportation of vehicles as set forth in Code Section 10-1-642, recall work, and warranty service on its products;

(B) Shall compensate the dealer for such work and service required of the dealer by the distributor, manufacturer, or warrantor;

(C) Shall provide the dealer with a schedule of compensation to be paid such dealer for parts, work, and service in connection therewith; and

(D) Shall provide the dealer with a schedule of the time allowance for the performance of such work and service. Any such schedule of



compensation shall include reasonable compensation for diagnostic work, repair service, and labor. Time allowances for the diagnosis and performance of such work and service shall be reasonable and adequate for the work to be performed.

(2) In the determination of what constitutes reasonable compensation for parts reimbursement and labor rates under this Code section, the principal factors to be considered shall be the retail price paid to dealers for parts and the prevailing hourly labor rates paid to dealers doing the repair, work, or service and to other dealers in the community in which the dealer doing the repair, work, or service is doing business for the same or similar repair, work, or service. However, in no event shall parts reimbursement paid to the dealer be less than the retail price for such parts being paid to such dealer by nonwarranty customers for nonwarranty parts replacement, and in no event shall the hourly labor rate paid to a dealer for such warranty repair, work, or service be less than the rate charged by such dealer for like repair, work, or service to nonwarranty customers for nonwarranty repair, work, or service.

(b) Manufacturers and distributors shall include in written notices of factory recalls to new motor vehicle owners and dealers the expected date by which necessary parts and equipment will be available to dealers for the correction of such defects. Manufacturers and distributors shall compensate any dealers in this state for repairs effected by all recalls.

(c) All such claims shall be either approved or disapproved within 30 days after their receipt on forms and in the manner specified by the manufacturer, distributor, or warrantor, and any claim not specifically disapproved in writing within 30 days after the receipt shall be construed to be approved and payment must follow within 30 days. (Code 1981, § 10-1-641, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 3.)

#### **10-1-642. Risk of loss for vehicle in transit.**

Notwithstanding the terms, provisions, or conditions of any agreement of franchise, a manufacturer or distributor selling motor vehicles to dealers is liable for all damages to such motor vehicles before delivery to a carrier or transporter. If a dealer selects the carrier, the risk of loss passes to the dealer upon delivery of the vehicle to the carrier. In every other instance, the risk of loss remains with the franchisor until such time as the dealer or his designee accepts the vehicle from the carrier. (Code 1981, § 10-1-642, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-643. Payment of dealer's attorney's fees by manufacturer, distributor, or warrantor.**

All manufacturers, distributors, and warrantors shall reimburse their dealers for reasonable attorney's fees incurred by the dealer in defending

any action in which the dealer is named as a defendant and in which the allegations set forth in the action are based solely upon claims of alleged defective or negligent manufacture, assembly, design of new motor vehicles, parts, or accessories, or other functions by the distributor, manufacturer, or warrantor which are beyond the control of the dealer. For this Code section to be applicable, the dealer must give notice to the manufacturer, distributor, and warrantor within 30 days of the receipt of the action if the manufacturer, distributor, or warrantor is not a named defendant in the action. In addition, this Code section only applies to actions in which a judgment or finding of fault is returned only against the manufacturer, distributor, or warrantor or in which the manufacturer, distributor, or warrantor enters into an agreement which settles or makes final disposition of the action. (Code 1981, § 10-1-643, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-644. Exemptions from part.**

This part shall not be applicable with respect to vehicles shipped or contracted to be shipped prior to July 1, 1983, pursuant to contracts which contain provisions which are contrary to matters contained in this part. (Code 1981, § 10-1-644, enacted by Ga. L. 1993, p. 1585, § 2.)

#### **10-1-645. Uniform warranty reimbursement policy amongst dealers.**

(a) Any motor vehicle franchisor and at least a majority of its dealers of the same line make may agree in an express written contract, citing this Code section, upon a uniform warranty reimbursement policy used by contracting dealers to perform warranty repairs. The policy shall only involve either reimbursement for parts used in warranty repairs or the use of a uniform time standards manual, or both. Reimbursement for parts under the agreement shall be used instead of the dealers' prevailing retail price charged by that dealer for the same parts as defined in Code Section 10-1-644 to calculate compensation due from the franchisor for parts used in warranty repairs. This Code section does not authorize a franchisor and its dealers to establish a uniform hourly labor reimbursement.

(b) Each franchisor shall only have one such agreement with each line make. Any such agreement shall:

(1) Establish a uniform parts reimbursement rate. The uniform parts reimbursement rate shall be greater than the franchisor's nationally established parts reimbursement rate in effect at the time the first such agreement becomes effective; however, any subsequent agreement shall result in a uniform reimbursement rate that is greater or equal to the rate set forth in the immediately prior agreement;

(2) Apply to all warranty repair orders written during the period that the agreement is effective;

(3) Be available, during the period it is effective, to any motor vehicle dealer of the same line make at any time and on the same terms; and

(4) Be for a term not to exceed three years so long as any party to the agreement may terminate the agreement upon the annual anniversary of the agreement and with 30 days' prior written notice; however, the agreement shall remain in effect for the term of the agreement regardless of the number of dealers of the same line make that may terminate the agreement.

(c)(1) As used in this subsection, the term "costs" means the difference between the uniform reimbursement rate set forth in an agreement entered into pursuant to subsection (b) of this Code section and the prevailing retail price charged by that dealer received by those dealers of the same line make.

(2) A franchisor that enters into an agreement with its dealers may seek to recover its costs from only those dealers that are receiving their prevailing retail price charged by that dealer under Code Section 10-1-644 as follows:

(A) The costs shall be recovered only by increasing the invoice price on new vehicles received by those dealers not a party to an agreement under this Code section; and

(B) Price increases imposed for the purpose of recovering costs under this Code section may vary from time to time and from model to model but shall apply uniformly to all dealers of the same line make in the State of Georgia that have requested reimbursement for warranty repairs at their prevailing retail price charged by that dealer, except that a franchisor may make an exception for vehicles that are titled in the name of a consumer in another state.

(d) If a franchisor contracts with its dealers, the franchisor shall certify under oath to the Department of Revenue that a majority of the dealers of that line make did agree to such an agreement and file a sample copy of the agreement. On an annual basis, each dealer shall certify under oath to the department that the reimbursement costs it recovers under subparagraph (c)(2)(A) of this Code section do not exceed the amounts authorized by subparagraph (c)(2)(A) of this Code section. The franchisor shall maintain for a period of three years a file that contains the information upon which its certification is based.

(e) If a franchisor and its dealers do not enter into an agreement pursuant to this Code section, and for any matter that is not the subject of an agreement, this Code section shall have no effect whatsoever.

(f) For purposes of this Code section, a uniform time standard manual is a document created by a franchisor that establishes the time allowances for the diagnosis and performance of warranty work and service. The



allowances shall be reasonable and adequate for the work and service to be performed. Each franchisor shall have a reasonable and fair process that allows a dealer to request a modification or adjustment of a standard or standards included in such a manual. (Code 1981, § 10-1-645, enacted by Ga. L. 2003, p. 445, § 1; Ga. L. 2005, p. 334, § 43/HB 501.)

#### PART 4

#### MOTOR VEHICLE FRANCHISE CONTINUATION AND SUCCESSION

##### **10-1-650. Short title.**

This part shall be known and may be cited as the “Motor Vehicle Franchise Continuation and Succession Act.” (Code 1981, § 10-1-650, enacted by Ga. L. 1993, p. 1585, § 2.)

##### **10-1-651. Termination of franchise; grounds; notice; dealer costs reimbursed by franchisor; applicability to distributors.**

(a) Notwithstanding the terms, provisions, or conditions of any franchise and notwithstanding the terms or provisions of any waiver, no franchisor shall cancel, terminate, or fail to renew any franchise with a dealer unless the franchisor:

(1) Has satisfied the notice requirement of subsection (e) of this Code section; and

(2) Has good cause for cancellation, termination, or nonrenewal.

(b) Notwithstanding the terms, provisions, or conditions of any franchise or the terms or provisions of any waiver, good cause shall exist for the purposes of a termination, cancellation, or nonrenewal when there is a failure by the dealer to comply with a provision of the franchise which is both reasonable and of material significance to the franchise relationship, provided the dealer has been notified in writing of the failure within 180 days after the franchisor first acquired knowledge of such failure or after the dealer is given a reasonable opportunity to correct such failure for a period of not less than 180 days.

(c) If the failure by the dealer, as defined in subsection (b) of this Code section, relates to the performance of the dealer in sales or service, then good cause shall be defined as the failure of the dealer to comply with reasonable performance criteria established by the franchisor if:

(1) The dealer was notified by the franchisor in writing of such failure;

(2) Said notification stated that notice was provided of failure of performance pursuant to this Code section; and

(3) The dealer was afforded a reasonable opportunity, for a period of not less than six months, to comply with such criteria.

(d) The franchisor shall have the burden of proof under this Code section.

(e)(1) Notwithstanding franchise terms to the contrary, prior to the termination, cancellation, or nonrenewal of any franchise, the franchisor shall furnish notification, as provided in paragraph (2) of this subsection, of such termination, cancellation, or nonrenewal to the dealer as follows:

(A) Not less than 90 days prior to the effective date of such termination, cancellation, or nonrenewal;

(B) Not less than 15 days prior to the effective date of such termination, cancellation, or nonrenewal with respect to any of the following:

(i) Insolvency of the dealer, or filing of any petition by or against the dealer under any bankruptcy or receivership law;

(ii) Failure of the dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, except for acts of God or circumstances beyond the direct control of the dealer;

(iii) Conviction of the dealer, general manager, or managing executive or any owner with a substantial interest therein of any crime which materially relates to the operation of the dealership or any felony which is punishable by imprisonment;

(iv) Suspension for a period of more than 14 days or revocation of any license which the dealer is required to have to operate a dealership; or

(v) Fraud or intentional misrepresentation by the dealer which materially affects the franchise, provided the franchisor gives notice within one year of the time when the fraud or misrepresentation occurred or was discovered, whichever is later; or

(C) Not less than 180 days prior to the effective date of such termination or cancellation where the franchisor is discontinuing the sale of the product line.

(2) Notification under this Code section shall be in writing and shall be by certified mail or statutory overnight delivery or personally delivered to the dealer and shall contain:

(A) A statement of intention to terminate, cancel, or not to renew the franchise;

(B) A statement of the reasons for the termination, cancellation, or nonrenewal; and

(C) The date on which such termination, cancellation, or nonrenewal is to take effect.

(f)(1)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall repurchase from the dealer any new and unused motor vehicles of the current model year and any new and unused motor vehicles acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession. Any new and unused motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this subparagraph, a motor vehicle shall be considered new and unused if it has less than 500 miles on the odometer and has not been issued a certificate of title.

(B) In addition to the motor vehicles repurchased under subparagraph (A) of this paragraph, the franchisor shall repurchase demonstration motor vehicles of the current model year and demonstration motor vehicles acquired by the dealer within 12 months of the date of termination, cancellation, or nonrenewal so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor prior to receipt of the notice of termination, cancellation, or nonrenewal and so long as such motor vehicles have not been altered, damaged, or materially changed and so long as such motor vehicles do not have more than 6,000 miles each on their odometers. Any such demonstration motor vehicle shall be repurchased at the net cost to the dealer less an allowance for use equal to the net cost to the dealer times the current mileage divided by 100,000. The franchisor shall repurchase a number of demonstration motor vehicles equal to 10 percent of the number of motor vehicles repurchased under subparagraph (A) of this paragraph; however, in no event shall the number of demonstration motor vehicles which the franchisor is required to repurchase ever be less than two or more than 15 motor vehicles.

(C) For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstripping, interior conditioning, or paint sealant.

(2) Upon the termination, cancellation, or nonrenewal of any franchise by the dealer, the franchisor shall repurchase from the dealer any new and unused motor vehicles, except motorcycles as defined in paragraph (29) of Code Section 40-1-1 and except motor homes as defined in paragraph (31) of Code Section 40-1-1 and except school



buses as defined in paragraph (55) of Code Section 40-1-1, of the current model year so long as such motor vehicles have been acquired from the franchisor or from another dealer of the franchisor of the same line-make and in the normal course of business and so long as such motor vehicles have not been altered, damaged, or materially changed while in the dealer's possession. Any new and unused motor vehicle repurchased by the franchisor shall be repurchased at the net cost to the dealer. For purposes of this paragraph, a motor vehicle shall be considered new and unused if it has less than 500 miles on the odometer and has not been issued a certificate of title. For purposes of this paragraph, a motor vehicle shall not be deemed to have been altered, damaged, or materially changed if it has been provided with original equipment or with nonoriginal equipment which does not alter, damage, or materially change the motor vehicle, such as undercoating, pinstriping, interior conditioning, or paint sealant.

(3)(A) Upon the termination, cancellation, or nonrenewal of any franchise by the franchisor or upon the termination, cancellation, or nonrenewal of any franchise by the franchisee, the franchisor shall repurchase, at fair and reasonable compensation, from the dealer the following:

(i) Any unused, undamaged, and unsold parts which have been acquired from the franchisor, provided such parts are currently offered for sale by the franchisor in its current parts catalog and are in salable condition. Such parts shall be repurchased by the franchisor at the current catalog price, less any applicable discount;

(ii) Any supplies, equipment, and furnishings, including manufacturer or line-make signs, purchased from the franchisor or its approved source within three years of the date of termination, cancellation, or nonrenewal; and

(iii) Any special tools purchased from the franchisor within three years of the date of termination, cancellation, or nonrenewal or any special tools or other equipment which the franchisor required the dealer to purchase regardless of the time purchased.

(B) Except as provided in division (i) of subparagraph (A) of this paragraph, fair and reasonable compensation shall be the net acquisition price if the item was acquired in the 12 months preceding the effective date of the termination, cancellation, or nonrenewal; 75 percent of the net acquisition price if the item was acquired between 13 and 24 months preceding the effective date of the termination, cancellation, or nonrenewal; 50 percent of the net acquisition price if the item was acquired between 25 and 36 months preceding the effective date of the termination, cancellation, or nonrenewal; 25 percent of the net acquisition price if the item was acquired between 37

and 60 months preceding the effective date of the termination, cancellation, or nonrenewal; or fair market value if the item was acquired more than 60 months preceding the effective date of the termination, cancellation, or nonrenewal.

(4) The repurchase of any item under this subsection shall be accomplished within 60 days of the effective date of the termination, cancellation, or nonrenewal or within 60 days of the receipt of the item by the franchisor, whichever is later in time, provided the dealer has clear title to the inventory and other items or is able to convey such title to the franchisor and does convey or transfer title and possession of the inventory and other items to the franchisor.

(5) In the event the franchisor does not pay the dealer the amounts due under this subsection or subsection (g) of this Code section within the time period set forth in this subsection, the franchisor shall, in addition to any amounts due, pay the dealer interest on such amount. This interest shall not begin to accrue until the time for payment has expired. The interest shall be computed monthly on any balance due and the monthly interest rate shall be one-twelfth of the sum of the then current *Wall Street Journal* Prime Interest Rate and 1 percentage point.

(g) Within 60 days of the termination, cancellation, or nonrenewal of any franchise by the franchisor, the franchisor shall commence to reimburse the dealer for one year of the dealer's reasonable cost to rent or lease the dealership's facility or location or for the unexpired term of the lease or rental period, whichever is less, or, if the dealer owns the facility or location, for the equivalent of one year of the reasonable rental value of the facilities or location. If more than one franchise is being terminated, canceled, or not renewed, the reimbursement shall be prorated equally among the different franchisors. However, if a franchise is terminated, canceled, or not renewed but the dealer continues in business at the same location under a different franchise agreement, the reimbursement required by this subsection shall not be required to be paid. The provisions of this subsection shall not apply if the dealer is convicted of any criminal offense which conviction is cause of the termination, cancellation, or nonrenewal. In addition, any reimbursement due under this subsection shall be reduced by any amount received by the dealer by virtue of the dealer leasing, subleasing, or selling the facilities or location during the year immediately following the termination, cancellation, or nonrenewal. If reimbursement is made under this subsection, the franchisor is entitled to possession and use of the facilities or location for the period covered by such reimbursement.

(h) If, in an action for damages under this Code section, the franchisor fails to prove that there was good cause for the franchise termination, cancellation, or nonrenewal, then the franchisor may pay the dealer an amount equal to the value of the dealership as an ongoing business, at which time the franchisor shall receive any title to the dealership facilities

which the dealer may have and the franchisee shall surrender his franchise agreement to the franchisor. If the dealer receives an amount equal to the value as an ongoing business, the dealer shall have no other recovery from the franchisor absent a showing such as would warrant punitive damages under Code Section 10-1-623.

(i) Without limitation as to factors which may constitute or indicate a lack of good cause, no termination shall be considered to be for good cause:

(1) If such termination relates to the death or disability of an owner and the franchisor has not complied with Code Section 10-1-652; or

(2) If such termination relates to a change in ownership or management and the franchisor has not complied with Code Section 10-1-653.

(j) All procedures, protections, and remedies afforded to a motor vehicle dealer under this Code section shall be available to a motor vehicle distributor whose distributor agreement is terminated, canceled, not renewed, modified, or replaced by a manufacturer or an importer. (Code 1981, § 10-1-651, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code

section is applicable with respect to notices delivered on or after July, 1, 2000.

## JUDICIAL DECISIONS

**Burden of proof on franchisor.** — The burden is placed on the franchisor to prove the franchisor's refusal to approve the transfer of the franchise was not arbitrary and that the franchisor had good cause to terminate the franchise. *Moore v. American Suzuki Motor Corp.*, 203 Ga. App. 189, 416 S.E.2d 807 (1992).

**No legal duty to consumer.** — Trial court erred by denying a franchisor's motion for summary judgment with regard to a consumer's negligence claim predicated on the

Franchise Practices Act, O.C.G.A. § 10-1-620 et seq., as the Act did not impose a legal duty upon the franchisor to prevent a franchisee from presenting an unreasonable risk of harm to members of the public like the consumer. *DaimlerChrysler Motors Co. v. Clemente*, 294 Ga. App. 38, 668 S.E.2d 737 (2008).

**Cited in** *Moore v. American Suzuki Motor Corp.*, 211 Ga. App. 337, 439 S.E.2d 43 (1993).

## 10-1-652. Succession to franchise upon death of franchisee.

(a) Unless there exists good cause for refusal to honor succession on the part of the franchisor, any designated successor of a deceased or incapacitated owner may succeed to the ownership interest of the owner under the existing franchise if:

(1) The designated successor gives the franchisor written notice of his or her intention to succeed to the ownership interest within 60 days of the owner's death or incapacity or within a longer period if so provided in the franchise agreement; and



(2) The designated successor agrees to be bound by all the terms and conditions of the franchise.

(b) The franchisor may request, and the designated successor shall provide promptly upon said request, personal and financial data that is customarily required by the franchisor to determine whether the succession should be honored.

(c) If a franchisor believes that good cause exists for refusing to honor the succession to the ownership interest of an owner by a designated successor of a deceased or incapacitated owner, the franchisor may, within 60 days following receipt of notice of the designated successor's intent to succeed to the ownership interest of the owner or any personal or financial data which the franchisor has requested, serve upon the designated successor notice of its refusal to honor the succession and of its intent to discontinue the existing franchise with the dealer; however, if the franchisor shall enter into one or more interim or trial agreements with the designated successor, which interim or trial agreements may not extend more than three years from the owner's death or disability, then and in such event such notice shall be deemed timely if sent within 60 days of the termination of such interim or trial agreement. The notice must state the specific grounds for the refusal to honor the succession and of its intent to discontinue the existing franchise with the dealer.

(d) If a franchisor refuses to honor the succession to the ownership interest of a deceased or incapacitated owner, then and in such event:

(1) The franchisor shall allow the designated successor a reasonable period of time which shall not be less than six months in which to negotiate a sale of the dealership. Any such sale shall be subject to Code Section 10-1-653; and

(2) Upon termination of the franchise pursuant to such refusal, the provisions of Code Section 10-1-651 shall apply.

(e) If notice of refusal and discontinuance is not timely served upon the designated successor, the franchise shall continue in effect subject to termination only as otherwise permitted by this part.

(f) In determining whether good cause for the refusal to honor the succession exists, the franchisor has the burden of proving that the designated successor is a person who is not of good moral character or does not meet the franchisor's existing and reasonable standards.

(g) No franchisor shall terminate, cancel, or fail to renew any franchise solely because of the death or incapacity of an owner who is not listed in the franchise as one on whose expertise and abilities the franchisor relied in the granting of the franchise.

(h) This Code section does not preclude a new motor vehicle dealer from time to time designating any person as his or her successor by written

instrument filed with the manufacturer or distributor and, if such instrument is currently on file with such manufacturer or distributor, it alone shall determine the succession rights to the management and operation of the dealership. (Code 1981, § 10-1-652, enacted by Ga. L. 1993, p. 1585, § 2.)

### 10-1-653. Sale of dealership franchise; notice to franchisor.

If a new motor vehicle dealer desires to make a change in its executive management or ownership or to sell its principal assets, the new motor vehicle dealer will give the franchisor prior written notice of the proposed change or sale. The franchisor shall not arbitrarily refuse to agree to such proposed change or sale and may not disapprove or withhold approval of such change or sale unless the franchisor can prove that its decision is not arbitrary and that the new management, owner, or transferee is unfit or unqualified to be a dealer based on the franchisor's prior written, reasonable, objective, and uniformly applied, within reasonable classifications, standards or qualifications which directly relate to the prospective transferee's business experience, moral character, and financial qualifications. A franchisor may not disapprove or withhold approval of a change or sale if the new management, owner, or transferee is an owner of a dealership in the State of Georgia which sells the same line-make motor vehicle as the dealership being transferred unless such management, owner, or transferee is not in substantial compliance with its existing franchise agreement relating to performance in the areas of customer satisfaction or sales or unless such management, owner, or transferee does not meet the franchisor's prior written, reasonable, objective, and uniformly applied standards or qualifications relating to its financial qualifications or moral character. Where the franchisor rejects a proposed change or sale, the franchisor shall give written notice of his reasons to the new motor vehicle dealer within 60 days. If no such notice is given to the new motor vehicle dealer, the change or sale shall be deemed approved. (Code 1981, § 10-1-653, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, § 4.)

## JUDICIAL DECISIONS

**Burden of proof on franchisor.** — The burden is placed on the franchisor to prove the franchisor's refusal to approve the transfer of the franchise was not arbitrary and that the franchisor had good cause to terminate the franchise. *Moore v. American Suzuki Motor Corp.*, 203 Ga. App. 189, 416 S.E.2d 807 (1992).

**Rejection of proposed franchise transfer not unreasonable.** — A franchisor's rejection of a proposed franchise transfer for reasons unrelated to the proposed franchisee's experience or qualifications was not unreasonable. *Hickman v. American Honda Motor*

*Co.*, 982 F. Supp. 881 (N.D. Ga. 1997), *aff'd*, 138 F.3d 958 (11th Cir. 1998).

**No transfer by operation of law.** — Failure of a franchisor to give notice to a former franchisee of its reasons for rejecting a proposed change in the ownership or sale of the dealership did not cause the dealership to transfer by operation of law. *Hickman v. American Honda Motor Co.*, 982 F. Supp. 881 (N.D. Ga. 1997), *aff'd*, 138 F.3d 958 (11th Cir. 1998).

**Cited in** *Moore v. American Suzuki Motor Corp.*, 211 Ga. App. 337, 439 S.E.2d 43 (1993).

**10-1-654. Applicability of part.**

Reserved. Repealed by Ga. L. 1999, p. 1194, § 5, effective May 3, 1999.

**Editor's notes.** — This Code section was based on Code 1981, § 10-1-654, enacted by Ga. L. 1993, p. 1585, § 2.

**PART 5****MOTOR VEHICLE FAIR PRACTICES****JUDICIAL DECISIONS**

**No retroactive effect.** — Because the Georgia Motor Vehicles Day in Court Act, O.C.G.A. § 10-1-630 et seq., and the Motor Vehicle Fair Practices Act, O.C.G.A. § 10-1-660 et seq., affected the substantive

rights of the parties, the statutes could not be given retroactive effect. *Stamps v. Ford Motor Co.*, 650 F. Supp. 390 (N.D. Ga. 1986) (decided prior to 1993 reenactment).

**10-1-660. Short title.**

This part shall be known and may be cited as the “Motor Vehicle Fair Practices Act.” (Code 1981, § 10-1-660, enacted by Ga. L. 1993, p. 1585, § 2.)

**10-1-661. Delivery of motor vehicles; modification of facilities; transfer of sales contracts; warranties.**

(a) No franchisor shall require, attempt to require, coerce, or attempt to coerce any dealer in this state:

(1) To order or accept delivery of any new motor vehicle, part, or accessory thereof, equipment, or any other commodity not required by law which shall not have been voluntarily ordered by the dealer, except that this paragraph does not affect any terms or provisions of a franchise requiring dealers to market a representative line of those motor vehicles which the franchisor is publicly advertising;

(2) To order or accept delivery of any new motor vehicle with special features, accessories, or equipment not included in the list price of such new motor vehicle as publicly advertised by the franchisor;

(3) To refrain from participation in the management of, investment in, or the acquisition of any other line of new motor vehicle or related products. However, this paragraph does not apply unless the dealer maintains a reasonable line of credit for each make or line of new motor vehicle, the dealer remains in compliance with any reasonable facilities requirements of the franchisor, the dealer provides acceptable sales performance, and no change is made in the principal management of the dealer;



(4) To expand, construct, or significantly modify facilities without assurances that the franchisor will provide a reasonable supply of new motor vehicles within a reasonable time so as to justify such an expansion in light of the market and economic conditions;

(5) To sell, assign, or transfer any retail installment sales contract obtained by such dealer in connection with the sale by such dealer in this state of new motor vehicles to a specified finance company or class of such companies or to any other specified persons;

(6) To provide warranty or other services for the account of franchisor, except as provided in Part 3 of this article, the “Motor Vehicle Warranty Practices Act”; or

(7) To acquire any line make of motor vehicle or to give up, sell, or transfer any line make of motor vehicle which has been acquired in accordance with this article once such dealer has notified the franchisor that it does not desire to acquire, give up, sell, or transfer such line make or to retaliate or take any adverse action against a dealer based on such desire.

(b) No action shall in any way be based on this Code section with respect to acts occurring prior to July 1, 1983. (Code 1981, § 10-1-661, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1994, p. 97, § 10; Ga. L. 1999, p. 1194, § 6.)

#### **10-1-662. Unlawful activities by franchisors.**

(a) It shall be unlawful for any franchisor:

(1) To delay, refuse, or fail to deliver new motor vehicles or new motor vehicle parts or accessories in a reasonable time and in reasonable quantity if such vehicles, parts, or accessories are publicly advertised as being available for immediate delivery. This paragraph is not violated, however, if such failure is caused by acts or causes beyond the control of the franchisor;

(2) To obtain money, goods, services, or any other benefit from any other person with whom the dealer does business, on account of, or in relation to, the transaction between the dealer and such other person, other than as compensation for services rendered, unless such benefit is promptly accounted for and transmitted to the dealer;

(3) To release to any outside party, except under subpoena or as otherwise required by law or in an administrative, judicial, or arbitration proceeding involving the franchisor or dealer, any business, financial, or personal information which may be from time to time provided by the dealer to the franchisor, without the express written consent of the dealer;

(4) To resort to or to use any false or intentionally deceptive advertisement in the conduct of business as a franchisor in this state;

(5) To make any false or intentionally deceptive statement, either directly or through any agent or employee, in order to induce any dealer to enter into any agreement or franchise or to take any action which is prejudicial to that dealer or that dealer's business;

(6) To require any dealer to assent prospectively to a release, assignment, novation, waiver, or estoppel which would relieve any person from liability to be imposed by law or to require any controversy between a dealer and a franchisor to be referred to any person other than the duly constituted courts of the state or the United States if such referral would be binding upon the dealer, provided that this Code section shall not prevent any dealer from entering into a valid release agreement with the franchisor;

(7) To fail to observe good faith in any aspect of dealings between the franchisor and the dealer;

(8) To deny any dealer the right of free association with any other dealer for any lawful purposes;

(9) To engage in any predatory practice or discrimination against any dealer;

(10) To propose or make any material change in any franchise agreement without giving the dealer written notice by certified mail or statutory overnight delivery of such change at least 60 days prior to the effective date of such change;

(11) To cancel a franchise or to take any adverse action against a dealer based in whole or in part on the failure of the dealer to meet the performance goals of the manufacturer when that failure is due to the failure of the franchisor to supply, within a reasonable period of time, new motor vehicles ordered by or allocated to the dealer;

(12) To offer to sell or lease or to sell or lease any new motor vehicle or accessory to any dealer at a lower actual price therefor than the actual price offered to any other dealer for the same model vehicle similarly equipped or same accessory or to use any device, including but not limited to an incentive, sales promotion plan, or other similar program, which results in a lower actual price of a vehicle or accessory being offered to one dealer and which is not offered to other dealers of vehicles of the same line make or the same accessory;

(13) To conduct an audit, investigation, or inquiry of any dealer or dealership as to any activity, transaction, conduct, or other occurrence which took place or as to any promotion or special event which ends more than one year prior to such audit, investigation, or inquiry or to base any decision adverse to the dealer or dealership on any activity, transaction, conduct, or other occurrence which took place or as to any promotion or special event which ends more than one year prior to such

decision or which took place any time prior to the period of time covered by such audit, investigation, or inquiry or to apply the results of an audit, investigation, or inquiry to any activity, transaction, conduct, or other occurrence which took place any time prior to the time covered by such audit, investigation, or inquiry;

(14) To charge back to, deduct from, or reduce any account of a dealer or any amount of money owed to a dealer by a franchisor any amount of money the franchisor alleges is owed to such franchisor by such dealer as a result of an audit, investigation, or inquiry of such dealer, but rather if a franchisor alleges that a dealer owes such franchisor any amount of money as a result of an audit, investigation, or inquiry, such franchisor shall send a notice to such dealer for such amount and the dealer shall have not less than 30 days to contest such amount or remit payment;

(15) To deny, delay payment for, restrict, or bill back a claim by a dealer for payment or reimbursement for warranty service or parts, incentives, hold-backs, special program money, or any other amount owed to such dealer unless such denial, delay, restriction, or bill back is the direct result of a material defect in the claim which affects the validity of the claim;

(16) To engage in business as a dealer or to manage, control, or operate, or own any interest in a dealership either directly or indirectly, if the primary business of such dealer or dealership is to perform repair services on motor vehicles, except motor homes, pursuant to a manufacturer's or franchisor's warranty; or

(17) To refuse to allow, limit, or restrict a dealer from acquiring or adding a sales or service operation for another line make of motor vehicles at the same or expanded facility at which the dealer currently operates a dealership unless the franchisor can prove by a preponderance of the evidence that such acquisition or addition will substantially impair the dealer's ability to adequately sell or service such franchisor's motor vehicles.

(b) No action shall in any way be based on this Code section with respect to acts occurring prior to July 1, 1983. (Code 1981, § 10-1-662, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1996, p. 1058, § 2; Ga. L. 1999, p. 1194, § 7; Ga. L. 2000, p. 1589, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, "line make" was substituted for "line-make" in paragraph (a)(12).

**Editor's notes.** — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.



**10-1-663. Advertising campaigns; change in capital structure or ownership; manner of distribution; increased prices; discrimination; unreasonable restrictions or changes.**

(a) No franchisor shall require, attempt to require, coerce, or attempt to coerce any dealer in this state:

(1) To participate monetarily in an advertising campaign or contest or to purchase any promotional materials, training materials, showroom or other display decorations, or materials at the expense of the dealer; or

(2) To change or refrain from changing the capital structure or ownership of the dealer or the means by or through which the dealer finances the operation of the dealership, provided the dealer at all times meets any reasonable capital standards determined by the franchisor in accordance with uniformly applied criteria and provided no change in the capital structure shall cause a change in the principal management or have the effect of a sale of the franchise without the consent of the franchisor, which consent shall not unreasonably be withheld.

(b) No franchisor shall:

(1) Refuse to disclose to any dealer the manner and mode of distribution of the same line make as handled by the dealer within the dealer's market area;

(2) Increase prices of new motor vehicles which the dealer had ordered for consumers prior to the dealer's receipt of the written official price increase notification. A sales contract signed by a consumer shall constitute evidence of each such order, provided the vehicle is in fact delivered to that customer. Price differences applicable to new models or series shall not be considered a price increase. Price changes caused by the addition to a motor vehicle of required or optional equipment, revaluation of the United States dollar in the case of foreign-make vehicles or components, or an increase in transportation charges due to increased rates imposed by carriers shall not be subject to the provisions of this paragraph;

(3) Discriminate unfairly among its dealers with respect to any aspect of operating a motor vehicle dealership;

(4) Establish or create:

(A) By agreement or otherwise, unreasonable restrictions relative to noncompetition covenants or site control, whether by sublease, collateral pledge of lease, agreement, or other means;

(B) Reserved;

(C) By agreement or otherwise, an option to purchase the dealership or its assets from the dealer; or

(D) By agreement or otherwise, unreasonable requirements to comply with subjective standards or other matters incident to the operation of the dealership; or

(5) Unreasonably change the market area of a dealer as set forth in the dealer's franchise agreement. (Code 1981, § 10-1-663, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 1999, p. 1194, §§ 8, 9; Ga. L. 2000, p. 1175, § 1.)

**Code Commission notes.** — Pursuant to was revised at the end of subparagraph Code Section 28-9-5, in 1999, punctuation (b)(4)(B).

### 10-1-663.1. Right of first refusal.

There shall be a right of first refusal to purchase in favor of the franchisor if the dealer has entered into an agreement to transfer the dealership or its assets, provided that all the following qualifications and requirements are met:

(1) The proposed transfer of the dealership or its assets is of more than 50 percent of the ownership or assets;

(2) The franchisor notifies the dealer in writing within 60 days of its receipt of the complete written proposal for the proposed sale or transfer on forms generally utilized by the franchisor for such purpose and containing the information required therein and all documents and agreements relating to the proposed sale or transfer;

(3) The exercise of the right of first refusal will result in the dealer and dealer's owners receiving the same or greater consideration as is provided in the documents and agreements submitted to the franchisor under paragraph (2) of this Code section;

(4) The proposed change of 50 percent or more of the ownership or of the dealership assets does not involve the transfer or sale of assets or the transfer or issuance of stock by the dealer or one or more dealer owners to a designated family member or members, including a spouse, child, grandchild, spouse of a child or grandchild, brother, sister, or parent of the dealer owner; to a manager who has been employed in the dealership for at least four years and is otherwise qualified as a dealer operator; or to a partnership or corporation owned and controlled by one or more of such persons;

(5) The franchisor agrees to pay the reasonable expenses, including reasonable attorney's fees, which do not exceed the usual customary, and reasonable fees charged for similar work done for other clients incurred by the proposed new owner and transferee before the franchisor's exercise of its right of first refusal in negotiating and implementing the contract for the proposed change of ownership or transfer of dealership

assets. However, payment of such expenses and attorney's fees shall not be required if the dealer has not submitted or caused to be submitted an accounting of those expenses within 20 days after the dealer's receipt of the franchisor's written request for such an accounting. Such an accounting may be requested by the franchisor before exercising its right of first refusal; and

(6) The franchisor agrees to comply with and be subject to the requirements and restraints as set forth in paragraphs (1) and (2) of subsection (a) of Code Section 10-1-664.1 and in subsection (b) of Code Section 10-1-664.1. (Code 1981, § 10-1-663.1, enacted by Ga. L. 2000, p. 1175, § 2.)

**10-1-664. Establishing a new dealership or relocating an existing dealership in the market area of an existing dealership; notice; petitions to enjoin or prohibit.**

(a) Any franchisor which intends to establish a new dealership or to relocate a current dealership for a particular line-make motor vehicle within the relevant market area of an existing dealership of the same line-make motor vehicle shall give written notice of such intent by certified mail or statutory overnight delivery to such existing dealership. The notice shall include:

- (1) The specific location of the additional or relocated dealership;
- (2) The date on or after which the additional or relocated dealership will commence operation at the new location;
- (3) The identity of all existing dealerships in whose relevant market area the new or relocated dealership is to be located; and
- (4) The names and addresses of the dealer and principals in the new or relocated dealership.

(b) Any existing dealership in whose relevant market area a franchisor intends to establish a new dealership or to relocate a current dealership may within 60 days of the receipt of the notice petition a superior court to enjoin or prohibit the establishment of the new or relocated dealership within the relevant market area of the existing dealership. The court or other tribunal of competent jurisdiction shall enjoin or prohibit the establishment of the new or relocated dealership within the relevant market area of the existing dealerships unless the franchisor can prove by a preponderance of the evidence that the existing dealership is not providing adequate representation of the line-make motor vehicle in the existing dealership's relevant market area and that the new or relocated dealership is necessary to provide the public with reliable and convenient sales and service within the relevant market area. The burden of proof in establishing adequate representation shall be on the franchisor. In determining whether the existing dealership



is providing adequate representation and whether the new or relocated dealership is necessary, the court or other tribunal may consider, but is not limited to considering, the following:

(1) The impact that the establishment of the new or relocated dealership will have on consumers, the public interest, and the existing dealership; provided, however, that financial impact may be considered only with respect to the existing dealership;

(2) The size and permanency of investment reasonably made and the reasonable obligations incurred by the existing dealership to perform its obligations under the dealership's franchise agreement;

(3) The reasonably expected market penetration of the line-make motor vehicle for the relevant market area involved, after consideration of all factors which may affect such penetration, including, but not limited to, demographic factors such as age, income, education, size class preference, product popularity, retail lease transactions, and other factors affecting sales to consumers in the relevant market area;

(4) Any actions by the franchisor in denying its existing dealership of the same line make the opportunity for reasonable growth, market expansion, or relocation, including the availability of line-make motor vehicles in keeping with the reasonable expectations of the franchisor in providing an adequate number of dealerships in the relevant market area;

(5) Any attempts by the franchisor to coerce the existing dealership into consenting to an additional or relocated dealership of the same line make in the relevant market area;

(6) Distance, travel time, traffic patterns, and accessibility between the existing dealership of the same line make and the location of the proposed new or relocated dealership;

(7) Whether benefits to consumers will likely occur from the establishment or relocation of the dealership which benefits cannot be obtained by other geographic or demographic changes or expected changes in the relevant market area;

(8) Whether the existing dealership is in substantial compliance with its franchise agreement;

(9) Whether there is adequate interbrand and intrabrand competition with respect to the line-make motor vehicles, including the adequacy of sales and service facilities;

(10) Whether the establishment or relocation of the proposed dealership appears to be warranted and justified based on economic and market conditions pertinent to dealerships competing in the relevant market area, including anticipated changes; and

(11) The volume of registrations and service business transacted by the existing dealership and in which would be the relevant market area of the proposed dealership.

(c) This Code section shall not apply:

(1) To the addition of a new dealership at a location which is within a three-mile radius of a former dealership of the same line make which has been closed for less than two years;

(2) To the relocation of an existing dealership to a new location which is further away from the protesting dealer's location than the relocated dealer's prior location; or

(3) To the relocation of an existing dealership to a new location which is within a three-mile radius of such dealership's current location and it has been at such current location at least ten years. (Code 1981, § 10-1-664, enacted by Ga. L. 1999, p. 1194, § 10; Ga. L. 2000, p. 1589, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, "line make" was substituted for "line-make" in paragraph (b)(5).

**Editor's notes.** — Ga. L. 2000, p. 1589,

§ 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July, 1, 2000.

#### JUDICIAL DECISIONS

**Cited in** Ga. Oilmen's Ass'n v. Ga. Dep't of Revenue, 261 Ga. App. 393, 582 S.E.2d 549 (2003).

#### **10-1-664.1. Restrictions on the ownership, operation, or control of dealerships by manufacturers and franchisors; competing unfairly with new dealers.**

(a) It shall be unlawful for any manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a manufacturer or franchisor to own, operate, or control or to participate in the ownership, operation, or control of any new motor vehicle dealer in this state within a 15 mile radius of an existing dealer of such manufacturer or franchisor; to own, operate, or control, directly or indirectly, more than a 45 percent interest in a dealer or dealership in this state; to establish in this state an additional dealer or dealership in which such person or entity has any interest; or to own, operate, or control, directly or indirectly, any interest in a dealer or dealership in this state unless such person or entity has acquired such interest from a dealer or dealership which has been in operation for at least five years prior to such acquisition; provided, however, that this subsection shall not be construed to prohibit:

(1) The ownership, operation, or control by a manufacturer or franchisor of a new motor vehicle dealer for a temporary period, not to exceed one year, during the transition from one owner or operator to another;

(2) The ownership, operation, or control of a new motor vehicle dealer by a manufacturer or franchisor during a period in which such new motor vehicle dealer is being sold under a bona fide contract, shareholder agreement, or purchase option to the operator of the dealership;

(3) The ownership, operation, or control of a new motor vehicle dealer by a manufacturer or franchisor at the same location at which such manufacturer or franchisor has been engaged in the retail sale of new motor vehicles as the owner, operator, or controller of such dealership for a continuous two-year period of time immediately prior to April 1, 1999, where there is no prospective new motor vehicle dealer available to own or operate the dealership in a manner consistent with the public interest;

(4) The ownership, operation, or control by a manufacturer which manufactures only motorcycles or motor homes of a retail sales operation engaged in the retail sale of motorcycles or motor homes;

(5) The ownership, operation, or control by a manufacturer which is selling motor vehicles directly to the public at an established place of business on January 1, 1999, and which has never sold its line make of new motor vehicles in Georgia through a franchised new motor vehicle dealer unless and until such manufacturer is wholly or partially acquired by another manufacturer or franchisor;

(6) The ownership, operation, or control by a manufacturer which manufactures trucks with a gross vehicle weight rating of 12,500 pounds or more of a new motor vehicle dealer which only sells trucks with a gross vehicle weight rating of 12,500 pounds or more at the same location at which such manufacturer has been engaged in the retail sale of such trucks as the owner, operator, or controller of such dealership for a continuous two-year period of time immediately prior to April 1, 1999, or at one additional location which is not located within the relevant market area of an existing dealer of the same line make of trucks; provided, however, this exemption shall apply to a manufacturer described in this paragraph only until such manufacturer is wholly or partially acquired by another manufacturer or distributor; or

(7) A manufacturer from selling new motor vehicles to customers if such vehicles are manufactured or assembled in accordance with custom design specifications of the customer and such sales are limited to no more than 150 vehicles per year.

(b) It shall be unlawful for a manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a



manufacturer or franchisor to compete unfairly with a new motor vehicle dealer of the same line make, operating under a franchise, in the State of Georgia, and, except as otherwise provided in this subsection, the mere ownership, operation, or control of a new motor vehicle dealer by a manufacturer or franchisor under the conditions set forth in paragraphs (1) through (7) of subsection (a) of this Code section shall not constitute a violation of this subsection. For purposes of this Code section, a manufacturer or franchisor or any parent, affiliate, wholly or partially owned subsidiary, officer, or representative of a manufacturer or franchisor shall be conclusively presumed to be competing unfairly if it gives any preferential treatment to a dealer or dealership of which any interest is directly or indirectly owned, operated, or controlled by such manufacturer or franchisor or any partner, affiliate, wholly or partially owned subsidiary, officer, or representative of such manufacturer or franchisor, expressly including, but not limited to, preferential treatment regarding the direct or indirect cost of vehicles or parts, the availability or allocation of vehicles or parts, the availability or allocation of special or program vehicles, the provision of service and service support, the availability of or participation in special programs, the administration of warranty policy, the availability and use of after warranty adjustments, advertising, floor planning, financing or financing programs, or factory rebates.

(c) Except as may otherwise be provided in subsection (a) and subsection (b) of this Code section, no manufacturer or franchisor shall offer to sell or sell, directly or indirectly, any new motor vehicle to a consumer in this state, except through a new motor vehicle dealer holding a franchise for the line make covering such new motor vehicle. This subsection shall not apply to manufacturer or franchisor sales of new motor vehicles to the federal government, charitable organizations, or employees of the manufacturer or franchisor. (Code 1981, § 10-1-664.1, enacted by Ga. L. 1999, p. 1194, § 11; Ga. L. 2000, p. 1175, § 3.)

## PART 6

### ENFORCEMENT OF ARTICLE BY COMMISSIONER OF MOTOR VEHICLE SAFETY

#### **10-1-665. “Commissioner” and “department” defined.**

As used in this part, the term:

(1) “Commissioner” means the state revenue commissioner.

(2) “Department” means the Department of Revenue. (Code 1981, § 10-1-665, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.)

#### **10-1-666. Enforcement of article by state revenue commissioner.**

As an alternative to and in addition to any civil or criminal enforcement

of this article, the state revenue commissioner by and through the Department of Revenue is authorized to enforce the provisions of this article and any order issued pursuant to the enforcement of this article. (Code 1981, § 10-1-666, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.)

**10-1-667. Administrative review of alleged violation of this article by dealer, distributor, or manufacturer.**

Any dealer, distributor, or manufacturer who is aggrieved by a violation of any provision of this article may file a petition with the Department of Revenue setting forth the facts supporting the allegation of such violation. The commissioner shall issue an administrative order, whenever the commissioner, after notice to all parties and after a hearing, determines that a violation of this article or any order issued under this article has occurred. The notice and the hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” Any party who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” The commissioner or the prevailing party may file, in the superior court in the county wherein the party under order resides or, if such party is a corporation, in the county wherein the corporation maintains its established place of business or its agent for service of process is located, or in the county wherein the violation occurred, a certified copy of a final order of the commissioner, whether unappealed from or affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. Such judgment shall have the same effect and proceedings in relation thereto shall thereafter be the same as though the judgment had been rendered in an action duly heard and determined by the court. The remedy prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available under the laws of this state. (Code 1981, § 10-1-667, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2; Ga. L. 2005, p. 334, § 4-4/HB 501.)

**10-1-668. Annual dealer registration and appropriation to department fund.**

(a) In addition to the licensing fee set forth in Code Section 40-2-38, each dealer shall register annually with the department and shall pay an annual registration fee of \$25.00. The fee shall be paid on or before January 1 of the registration year and shall be paid with and accompanied by such forms as the commissioner shall prescribe.

(b) It is the intent of the General Assembly of Georgia that an amount equal to the amount collected by the registration fee provided for in this Code section be appropriated to the department to fund the provisions of this part. If the funds appropriated to the department to fund the provisions of this part exceed the actual cost to the department to enforce this part, then the excess funds so appropriated shall lapse. However, if the fees collected under subsection (a) of this Code section do not equal the actual cost to the department to enforce the provisions of this part, then the commissioner may raise the registration fee to an amount which will ensure that the cost to the state to enforce this part is received. (Code 1981, § 10-1-668, enacted by Ga. L. 1993, p. 1585, § 2; Ga. L. 2003, p. 445, § 2.)

## PART 7

### IMPAIRMENT OF OBLIGATIONS

#### 10-1-670. Application to franchise agreements.

Any provision of this article which would, in the absence of this Code section, impair an obligation of a franchise agreement or any other agreement between a manufacturer or franchisor and a franchisee shall only apply to any such agreement made, entered into, renewed, extended, modified, or continued after the effective date of such provision. Otherwise, each provision of this article shall apply to all franchise or other agreements. (Code 1981, § 10-1-670, enacted by Ga. L. 1999, p. 1194, § 12.)

## ARTICLE 22A

### MARINE MANUFACTURERS

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Boats and Boating, § 86 et seq.

**C.J.S.** — 72A C.J.S., Products Liability, § 157.

#### 10-1-675. Legislative findings.

The General Assembly finds and declares that the distribution of marine vessels and products in the State of Georgia vitally affects the general economy of the state and the public interest and public welfare and, in the exercise of its police power, it is necessary to regulate marine manufacturers, distributors, and dealers and their representatives doing business in Georgia in order to prevent unfair business practices, unfair methods of competition, impositions, and other abuses upon its citizens. (Code 1981, § 10-1-675, enacted by Ga. L. 2001, p. 778, § 1.)



**10-1-676. Definitions.**

As used in this article, the term:

(1) “Distributor” or “wholesaler” means any person, company, or corporation who sells or distributes marine products to marine dealers and who maintains distributor representatives within the state.

(2) “Franchise” means an oral or written agreement for a definite or indefinite period of time in which a manufacturer grants to a marine dealer permission to use a trade name, service mark, or related characteristic and in which there is a community of interest in the marketing of marine products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

(3) “Manufacturer” means any person, firm, association, corporation, or trust, resident or nonresident, that fabricates, manufactures, or assembles new and unused marine products. It does not include a person, firm, association, corporation, or trust which converts, modifies, or otherwise alters a marine product manufactured by another person, firm, association, corporation, or trust.

(4) “Manufacturer sales representative” means any officer, agent, or employee employed by a person, firm, association, corporation, or trust that fabricates, manufactures, or assembles marine products or by a factory branch for the purpose of making or promoting the sale of marine products or supervising or contacting marine dealers or prospective dealers.

(5) “Marine dealer” means any person who holds a bona fide contract, agreement, or franchise with a manufacturer or distributor of marine products.

(6) “Marine product” means a new or used watercraft, boat, vessel, or motor primarily designed for recreational or commercial use on water. The term also includes an outboard motor or a boat outfitted with an inboard or outboard motor. The term shall not mean a watercraft designed primarily for commercial use. (Code 1981, § 10-1-676, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 415, § 10.)

**JUDICIAL DECISIONS**

**Cited** in *Carolina Tobacco Co. v. Baker*,  
295 Ga. App. 115, 670 S.E.2d 811 (2008).

**10-1-677. Termination of contractual relationship between dealer and manufacturer.**

(a)(1) Whenever any marine dealer enters into a franchise, selling, or other contractual agreement with a manufacturer, distributor, or whole-

salers wherein the dealer agrees to maintain an inventory of marine products or repair parts, the manufacturer, distributor, or wholesaler shall not terminate such agreement in case of breach by the dealer unless and until 90 days after notice of such intention to terminate has been sent by certified mail or statutory overnight delivery, return receipt requested, to the dealer and the dealer has failed to correct the breach within such period.

(2) If the franchise, selling, or other contractual agreement is terminated as a result of any action by the manufacturer and the dealer is not in breach of such agreement, the manufacturer, distributor, or wholesaler shall repurchase the inventory as provided in this article. The dealer may keep the inventory if he or she desires. If the dealer has any outstanding debts to the manufacturer, distributor, or wholesaler, then the repurchase amount may be credited to the dealer's account.

(3) If the franchise, selling, or other contractual agreement is terminated as a result of any action by the dealer and the manufacturer is not in breach of such agreement, the manufacturer shall not be required to repurchase the inventory as provided in this article; provided, however, if the franchise, selling, or other contractual agreement is terminated as a result of any action by the dealer and the manufacturer is in breach of such agreement, the manufacturer shall be required to repurchase the inventory as provided in this article.

(4) It shall be unlawful for the manufacturer, wholesaler, distributor, or franchisor, without due cause and pursuant to its own initiating action, to fail to renew a franchise, selling, or other contractual agreement on terms then equally available to all its marine dealers, unless the manufacturer repurchases the inventory as provided for in this Code section. The tests for determining what constitutes due cause for a manufacturer or distributor to fail to renew a franchise, selling, or other contractual agreement shall include whether the dealer:

(A) Has made a material misrepresentation in applying for or acting under the franchise agreement;

(B) Has filed a voluntary petition in bankruptcy or has had an involuntary petition in bankruptcy filed against the dealer which has not been discharged within 30 days after the filing, is in default under the provisions of a security agreement in effect with the manufacturer or distributor, or is in receivership;

(C) Has engaged in an unfair business practice;

(D) Has engaged in conduct which is injurious or detrimental to the public welfare;

(E) Has failed to comply with an applicable licensing law;

(F) Has been convicted of a crime, the effect of which would be detrimental to the manufacturer, distributor, or dealership;

(G) Has failed to operate in the normal course of business for seven consecutive business days; or

(H) Has failed to comply with the terms of the dealership or franchise agreement.

(5) In the event that the manufacturer, wholesaler, distributor, or franchisor does not intend to renew a franchise, selling, or other contractual agreement, such manufacturer, wholesaler, distributor, or franchisor shall give the dealer 90 days' written notice prior to the effective date thereof by certified mail or statutory overnight delivery, return receipt requested.

(b) Within 30 days of the termination of the franchise, selling, or other contractual agreement, the manufacturer, distributor, or wholesaler shall repurchase that inventory previously purchased from him or her, including all new and unused marine products of the current or immediate prior model year and parts on hand and held by the dealer on the date of termination of the contract. The manufacturer, distributor, or wholesaler shall pay an amount equivalent to the cost actually paid by the dealer less discounts or rebates per unit for any new, unused, undamaged, unaltered from original invoice and delivery, and complete marine vessel. The manufacturer shall also pay an amount equal to the price paid by the dealer for any new, unused, and undamaged repair parts and accessories which are listed in the manufacturer's current parts price list and are not more than two model years old.

(c) Upon payment within a reasonable time of the repurchase amount to the dealer, the title, if any, and right of possession to the repurchased inventory shall transfer to the manufacturer, distributor, or wholesaler, as the case may be.

(d) The provisions of this article shall not require the repurchase from a dealer of:

(1) Any repair part which has a limited storage life or is otherwise subject to deterioration;

(2) Any single repair part which is priced as a set of two or more items;

(3) Any repair part which, because of its condition, is not resalable as a new part without repackaging or reconditioning;

(4) Any inventory for which the dealer is unable to furnish evidence that is reasonably satisfactory to the manufacturer, distributor, or wholesaler of good title, free and clear of all claims, liens, and encumbrances;

(5) Any inventory which the dealer desires to keep, provided that the dealer has a contractual right to do so;



(6) Any marine vessel or product which is not in new, unused, undamaged, and complete condition;

(7) Any repair parts which are not in new, unused, and undamaged condition;

(8) Any inventory which was ordered by the dealer on or after the date of receipt of the notification of termination of the franchise, selling, or other contractual agreement;

(9) Any inventory which was acquired by the dealer from any source other than the manufacturer, distributor, or wholesaler; or

(10) Any boat that has been altered substantially from original delivery.

(e) If any manufacturer, distributor, or wholesaler shall fail or refuse to repurchase any inventory as required by this article within 60 days after termination of a dealer's contract and submission by the dealer to the manufacturer, by certified mail or statutory overnight delivery, return receipt requested, of a final inventory of marine products and parts on hand, he or she shall be civilly liable not only for the amounts provided in subsection (b) of this Code section but also the dealer's reasonable attorney's fees, court costs, and interest on the amount due for such inventory computed at the legal interest rate from the sixty-first day after termination.

(f) In the event of the death or incapacity of the dealer or the majority stockholder of a corporation operating as a dealer, the manufacturer, distributor, or wholesaler shall, at the option of the heirs at law if the dealer died intestate or the devisees or transferees under the terms of the deceased dealer's last will and testament if said dealer died testate, repurchase the inventory from said heirs or devisees as if the manufacturer, distributor, or wholesaler had terminated the contract, and the inventory repurchase provisions of this Code section shall apply. The heirs or devisees shall have until the end of the contract term or one year from the date of the death of the retailer or majority stockholder, whichever comes first, to exercise their option under this article; provided, however, that nothing in this article shall require the repurchase of inventory if the heirs or devisees and the manufacturer, distributor, or wholesaler enter into a new franchise agreement to operate the retail dealership. (Code 1981, § 10-1-677, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 1021, § 1; Ga. L. 2003, p. 140, § 10; Ga. L. 2006, p. 72, § 10/SB 465.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2002, "article; provided" was substituted for "article. Provided" in paragraph (a)(3) and "90 days'

written" was substituted for "90 days written" and a period was substituted for a semicolon in paragraph (a)(5).

**10-1-678. Application.**

The provisions of this article shall apply to any contract now in effect which has no expiration date and is a continuing contract and any other contract entered into or renewed on or after July 1, 2002. Any contract in force and effect prior to July 1, 2002, which by its own terms will terminate on a date subsequent thereto shall be governed by the law as it existed prior to July 1, 2002. (Code 1981, § 10-1-678, enacted by Ga. L. 2001, p. 778, § 1; Ga. L. 2002, p. 1021, § 2.)

**ARTICLE 22B****RECREATIONAL VEHICLE DEALERS****10-1-679. Definitions; considerations in determining “good cause”.**

(a) As used in this article, the term:

(1) “Community of interest” means a continuing financial interest between the grantor and the grantee in either the operation of the dealership business or the marketing of such goods or services.

(2) “Franchise” means an oral or written agreement for a definite or indefinite period of time in which a manufacturer grants to a recreational vehicle dealer permission to use a trade name, service mark, or related characteristic and in which there is a community of interest in the marketing of recreational vehicle products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise.

(3) “Grantor” means a person who grants a recreational vehicle dealership.

(4) “Person” means a natural person, partnership, joint venture, corporation, or other entity.

(5) “Recreational vehicle” means a vehicular type unit primarily designed as temporary living quarters for recreational, camping, or travel use which either has its own motive power or is mounted on or towed by another vehicle. The basic entities are as follows: travel trailer, camping trailer, truck camper, motor home, park trailer, and fifth wheel travel trailer.

(6) “Recreational vehicle dealer” or “dealer” means a person who is a grantee of a recreational vehicle dealership situated in Georgia.

(7) “Recreational vehicle dealership” means an established place of business engaged in the marketing of new recreational vehicle products or services related thereto at wholesale or retail, whether by leasing, sale, or otherwise, and which is marked by an appropriate permanent sign, a working telephone with a telephone number listed in the local phone

directory, and which derives at least 75 percent of its revenue from the sale of new recreational vehicles and recreational vehicle related products and services.

(8) “Warrantor” means a person, firm, corporation, or business entity that gives a warranty in connection with a new recreational vehicle or parts, accessories, or components thereof. Such term does not include service contracts, mechanical or other insurance, or extended warranties sold for separate consideration by a dealer or other person not controlled by a manufacturer.

(b) For purposes of this article when determining whether there is “good cause” for a proposed action, the trier of fact shall consider:

(1) The volume of the affected dealer’s business in the relevant market area;

(2) The nature and extent of the dealer’s investment in its business;

(3) The adequacy of the dealer’s service facilities, equipment, parts, supplies, and personnel;

(4) The effect of the proposed action on the community;

(5) The extent and quality of the dealer’s service under recreational vehicle warranties; and

(6) The dealer’s performance under the terms of its franchise agreement. (Code 1981, § 10-1-679, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

#### **10-1-679.1. Legislative purposes and policies.**

(a) This article shall be liberally construed and applied to promote its underlying remedial purposes and policies.

(b) The underlying purposes and policies of this article are:

(1) To promote the compelling interest of the public in fair business relations between recreational vehicle dealers and grantors and in the continuation of recreational vehicle dealerships on a fair basis;

(2) To protect recreational vehicle dealers against unfair treatment by grantors who inherently have superior economic power and superior bargaining power in the negotiations of recreational vehicle dealerships;

(3) To provide recreational vehicle dealers with rights and remedies in addition to those existing by contract or common law; and

(4) To govern all franchise agreements for recreational vehicle dealerships, including any renewals or amendments, to the full extent consistent with the Constitutions of Georgia and the United States.



(c) The effect of this article may not be varied by contract or agreement. Any contract or agreement purporting to do so is void and unenforceable to that extent only. (Code 1981, § 10-1-679.1, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.2. Designation of area of sales responsibility assigned to a recreational vehicle dealer; change in assignment.**

The grantor shall designate in writing the area of sales responsibility assigned to a recreational vehicle dealer and shall not change such area nor establish another recreational vehicle dealer in the same area unless the grantor can show good cause for the addition of the new recreational vehicle dealer, including reasonable evidence that the market will support the establishment of a new dealership. (Code 1981, § 10-1-679.2, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.3. Published prices, charges, and terms of sale.**

Sales of recreational vehicles by grantors or distributors shall be in accordance with published prices, charges, and terms of sale in effect at any given time. (Code 1981, § 10-1-679.3, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.4. Termination or change of dealership agreements; burden of proving good cause.**

No grantor, directly or through any officer, agent, or employee, may terminate, cancel, fail to renew, or substantially change the competitive circumstances, including the area of sales responsibility, of a recreational vehicle dealership agreement without good cause. The burden of proving good cause shall be on the grantor. (Code 1981, § 10-1-679.4, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.5. Notice required for termination of or substantial change to dealership agreements.**

(a) Except as provided in this Code section, a grantor shall provide a recreational vehicle dealer at least 120 days' prior written notice of termination, cancellation, nonrenewal, or substantial change in competitive circumstances and shall provide that the recreational vehicle dealer has 120 days in which to rectify any claimed deficiency. The notice shall state all the reasons for termination, cancellation, or nonrenewal and shall further state that if, within 30 days following the receipt of the grantor's notice, the recreational vehicle dealer provides to the grantor a written notice to cure all claimed deficiencies, the recreational vehicle dealer shall then have 120 days from the date of the notice to rectify such deficiencies. If the deficiency

is rectified within 120 days, the notice shall be void. The notice provisions of this Code section shall not apply if the reason for termination, cancellation, or nonrenewal is insolvency, the occurrence of an assignment for the benefit of creditors, or bankruptcy.

(b) The 120 days' notice shall be reduced to 30 days' notice if the grounds for termination, cancellation, or nonrenewal is due to:

(1) Conviction or pleas of nolo contendere to a felony of a recreational vehicle dealer or one of its principal owners;

(2) The business operation of the recreational vehicle dealer has been abandoned or closed for ten consecutive days, unless the closing is due to an act of God, strike, or labor difficulty or other cause over which the dealer has no control;

(3) The suspension, revocation, or refusal to renew the recreational vehicle dealer's license; or

(4) A significant misrepresentation by the recreational vehicle dealer. (Code 1981, § 10-1-679.5, enacted by Ga. L. 2005, p. 1233, § 2/SB 155; Ga. L. 2006, p. 72, § 10/SB 465.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Fingerprinting required for violators.** — be fingerprinted. 2006 Op. Att'y Gen. No. O.C.G.A. § 10-1-679.5 is an offense for 2006-2.  
which those charged with a violation are to

#### **10-1-679.6. Repurchase of inventory, equipment tools, accessories, and signage on termination of the dealership contract; reimbursement for accessories and parts returned.**

(a) If a recreational vehicle dealership franchise agreement is terminated, canceled, or not renewed by the grantor, the grantor, at the option of the recreational vehicle dealer, shall repurchase:

(1) All new, untitled recreational vehicle inventory acquired from the manufacturer within 12 months prior to the effective date of the termination, cancellation, or nonrenewal which has not been materially altered or substantially damaged. The grantor shall reimburse the dealer for 100 percent of the net invoice cost of such inventory, including transportation, less applicable rebates and discounts to the dealer.

(2) All functioning diagnostic equipment, special tools, other equipment and machinery, accessories and proprietary parts, and signage as were required to meet the dealer's service responsibilities in accordance with manufacturer's guides and applicable customer service bulletins and signs sold under the recreational vehicle dealership agreement.

(b) The manufacturer shall reimburse the dealer for 100 percent of the current net prices as published in the manufacturer's current price lists or

catalogs on accessories and parts, including superseded parts, provided it was purchased by the dealer within five years before termination and can no longer be used in the normal course of the dealer's business, plus 5 percent of the current net price of all manufacturer's accessories and parts returned to compensate the dealer for handling, packing, and loading the parts, plus the cost of freight to return said parts. The grantor shall pay the dealer within 30 days of receipt of the returned items. This Code section shall apply only to merchandise with a name, trademark, label, or other mark on it which identifies the grantor or with proof of purchase from the grantor. (Code 1981, § 10-1-679.6, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

#### **10-1-679.7. Unlawful coercive practices.**

It shall be unlawful for any grantor, directly or through any officer, agent, or employee:

(1) To coerce, or attempt to coerce, any dealer to accept delivery of any parts or accessories or any other commodities which have not been ordered by such dealer; or

(2) To coerce, or attempt to coerce, any dealer to enter into an agreement with such grantor or do any other act unfair to such dealer by threatening to cancel any recreational vehicle dealership franchise agreement existing between such grantor and such dealer. (Code 1981, § 10-1-679.7, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

#### **10-1-679.8. Sale or transfer of ownership or change in management of dealerships; unlawful practices; required notices.**

It shall be unlawful for any grantor to prevent or refuse to approve the sale or transfer of the ownership of a recreational vehicle dealership by the sale of the business assets, stock transfer, or otherwise, or a change in executive management or principal operator of the dealership if the new owner, principal operator, or management is creditworthy, has not been convicted of a felony, and is properly licensed; the sale or transfer shall not result in a relocation of the business; and the sale or transfer is otherwise reasonable under the circumstances. The recreational vehicle dealer must give the manufacturer 30 days' written notice prior to the closing of such agreement. If the manufacturer rejects a proposed change or sale, the manufacturer shall give written notice of its reasons to the recreational vehicle dealer within 30 days after receipt of the dealer notification and complete documentation. If no such notice is given to the recreational vehicle dealer, the change or sale shall be deemed approved. The burden of proving that any sale or transfer is not reasonable shall be on the grantor. (Code 1981, § 10-1-679.8, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)



**10-1-679.9. Requirement for dealers' opportunity to designate successors; requirement to honor succession; grounds for objection to succession.**

(a) It shall be unlawful for any grantor to fail to provide a recreational vehicle dealer with an opportunity, at the time of signing a recreational vehicle dealership franchise agreement or at a reasonable time thereafter, to designate a member of his or her family as a successor to the dealership in the event of the death, incapacity, or retirement of the dealer. A dealer may from time to time during the term of the franchise agreement change the beneficiary by providing a written notification to the manufacturer.

(b) It shall be unlawful to prevent or refuse to honor the succession to a dealership by a family member of the deceased, incapacitated, or retired dealer unless the grantor has provided to the family member so designated written notice of its objections. The burden of proving that such transfer is not reasonable shall be on the grantor.

(c) Grounds for objection shall be lack of creditworthiness, conviction of a felony, inability to obtain necessary and required licenses by the beneficiary, lack of required licenses, or other conditions which make such succession unreasonable under the circumstances, but the grantor shall bear the burden of proving the unreasonableness of such succession. No family member of the deceased, incapacitated, or retired dealer may succeed to a recreational vehicle dealership unless the succession to the recreational vehicle dealership will not involve, without the grantor's consent, a relocation of the business. (Code 1981, § 10-1-679.9, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.10. Required specification of obligation for warranty service; compensation; time allowances; reimbursement for warranty parts; denial of claims; violations; damage to new recreational vehicles delivered to dealers.**

(a) Each grantor or warrantor, where applicable, shall specify in writing to each of its recreational vehicle dealers licensed in Georgia the dealer's obligation for preparation, delivery, and warranty service on its products; shall compensate the dealer for warranty service required of the dealer by the grantor or warrantor; and shall provide the dealer the schedule of compensation to be paid to such dealers for parts, work, and service in connection with warranty service and the time allowances for the performance of such work and service. In no event shall such schedule of compensation fail to include reasonable compensation for diagnostic work as well as repair service and labor.

(b) Time allowances for the diagnosis and performance of warranty work

and service shall be reasonable and adequate for the work to be performed. In the determination of what constitutes reasonable compensation under this Code section, the principal factors to be considered shall be the actual wage rates being paid by the dealer and the actual retail labor rates being charged by the dealer in the community in which the dealer is doing business. In no event shall such compensation of a dealer for warranty labor be less than the retail rates charged by the dealer for like service to retail customers for nonwarranty labor and repairs as long as such rates are reasonable.

(c) A grantor or warrantor, where applicable, shall reimburse the dealer for warranty parts at actual wholesale costs plus a minimum 30 percent handling charge and the cost, if any, of freight to return warranty parts to the grantor or warrantor. Warranty audits of dealer records may be conducted by the grantor or warrantor, where applicable, on a reasonable basis. A grantor or warrantor, where applicable, must disapprove warranty claims in writing within 30 days of the date of submission by the dealer in the manner and form prescribed by the grantor or warrantor. Claims not specifically disapproved in writing within this 30 day period shall be construed to be approved and shall be paid within 45 days.

(d) Dealer claims for warranty compensation shall not be denied except for good cause, such as performance of nonwarranty repairs, lack of material documentation, fraud, or misrepresentation. Claims for dealer compensation must be submitted within 45 days of completing the work. The dealer must notify the warrantor verbally or in writing if the dealer is unable to promptly perform material or repetitive warranty repairs. All claims shall be paid within 30 days of dealer submission or rejected in writing for stated reasons.

(e) It shall be a violation of this article for any grantor or warrantor, where applicable, to:

(1) Fail to perform any of its warranty obligations with respect to a recreational vehicle and recreational vehicle components;

(2) Fail to assume all responsibility for any liability resulting from structural or production defects;

(3) Fail to include written notices of factory recalls to vehicle owners and dealers and the expected date by which necessary parts and equipment will be available to dealers for the correction of such defects. The grantor or warrantor, where applicable, may ship parts in quantity to the dealer to effect such campaign work, and if such parts are in excess of the dealer's requirements, the dealer may return unused parts to the grantor or warrantor for credit after completion of the campaign;

(4) Fail to compensate any of its recreational vehicle dealers licensed

in Georgia for repairs effected by such dealer of merchandise damaged in manufacture or transit to the dealer where the carrier is designated by the grantor, factory branch, distributor, or distributor branch;

(5) Fail to compensate its recreational vehicle dealers licensed in this state for warranty parts, work, and service in accordance with the schedule of compensation provided the dealer pursuant to subsection (a) of this Code section if performed in a timely and competent manner, or for legal costs and expenses incurred by such dealers in connection with warranty obligations for which the grantor or warrantor, where applicable, is legally responsible or which the grantor or warrantor imposes upon the dealer;

(6) Misrepresent in any way purchases of recreational vehicles that contain warranties with respect to the manufacture, performance, or design of the vehicles which are made by the dealer, either as warrantor or co-warrantor; or

(7) Require the dealer to make warranties to customers in any manner related to the manufacture of a recreational vehicle.

(f) Notwithstanding the terms of any agreement, it shall be a violation of this article for any grantor or warrantor, where applicable, to fail to indemnify and hold harmless its recreational vehicle dealers against any losses or damages arising out of claims, costs, judgments, and expenses, including reasonable attorney's fees, or suits relating to the manufacture, assembly, or design of recreational vehicles, parts, or accessories, or other functions by the grantor or warrantor beyond the control of the dealer, including, without limitation, the selection by the grantor or warrantor, where applicable, of parts or components for the recreational vehicle or any damages to merchandise occurring in transit to the dealer where the carrier is designated by the grantor or warrantor. The dealer shall give notice to the grantor or warrantor of pending suits in which allegations are made which come within this subsection whenever reasonably practicable to do so. Any recreational vehicle dealer franchise agreement issued to, amended, or renewed for recreational vehicles in Georgia on or after July 1, 2005, shall be deemed to incorporate provisions consistent with the requirements of this subsection.

(g) On any new recreational vehicle, any uncorrected and significant damage, or any corrected damage exceeding 5 percent of the manufacturer's suggested retail price or \$500.00 or more in paint damage, must be disclosed to the dealer in writing prior to delivery. Factory mechanical repair and damage to glass, tires, and bumpers is excluded from disclosure when properly replaced by identical manufacturer's or distributor's original equipment or parts.

(h) Whenever a new recreational vehicle is damaged in transit when the



carrier or means of transportation is determined by the manufacturer or distributor or whenever a recreational vehicle is otherwise damaged prior to delivery to the recreational vehicle dealer or if a new recreational vehicle is found to have substantial box or chassis defects upon arrival at the recreational vehicle dealership, the dealer must notify the grantor or distributor of such damage or such defects within three business days from the date of delivery or within a reasonable amount of additional time or such time as specified in the recreational vehicle dealership franchise agreement and either:

(1) Request from the grantor, warrantor, or distributor authorization to replace the components, parts, and accessories damaged or otherwise correct the damage; or

(2) Reject the vehicle within the three day grace period.

If the dealer exercises the option to refuse delivery of the vehicle, the recreational vehicle grantor must immediately repurchase such vehicle.

(i) If the grantor, warrantor, or distributor refuses or fails to authorize repair of such damage within ten days after receipt of notification or if the dealer rejects a recreational vehicle because of damage, ownership of the new recreational vehicle shall revert to the grantor or distributor and the recreational vehicle dealer shall have no obligations, financial or otherwise, with respect to such recreational vehicle.

(j) It shall be a violation of this article for any recreational vehicle dealer to:

(1) Fail to perform predelivery inspection functions, if required, in a competent and timely manner;

(2) Fail to perform warranty service work, authorized by the vehicle warrantor, in a reasonably timely and competent manner on any transient customer's vehicle of the same line-make, whether sold by that dealer or not;

(3) Intentionally misrepresent the terms of any warranty.

(k) All grantors, warrantors, and distributors of recreational vehicle components shall be subject to the provisions of this article. (Code 1981, § 10-1-679.10, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

#### **10-1-679.11. Remedy for violations.**

If any grantor or warrantor violates this article, a recreational vehicle dealer may bring an action against such grantor or warrantor in a court of competent jurisdiction in the county of the recreational vehicle dealer for damages sustained as a consequence of the grantor's or warrantor's violation, together with the actual costs of the action including reasonable

attorney's fees, and the dealer also may be granted injunctive relief against unlawful termination, cancellation, nonrenewal, or substantial change of competitive circumstances and refusal to permit transfer of ownership in accordance with Code Sections 10-1-679.2 and 10-1-679.3. (Code 1981, § 10-1-679.11, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.12. Violations deemed irreparable injuries for the purpose of determining whether a temporary injunction should be issued.**

In any action brought by a recreational vehicle dealer against a grantor or warrantor under this article, any violation of this article by the grantor or warrantor shall be deemed an irreparable injury to the recreational vehicle dealer for determining if a temporary injunction should be issued. (Code 1981, § 10-1-679.12, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.13. Requirements for new dealerships.**

It shall be unlawful for a grantor to establish a new recreational vehicle dealership unless the dealer meets the requirements and definitions provided in this article. (Code 1981, § 10-1-679.13, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**10-1-679.14. Franchise agreement required for the sale or distribution of recreational vehicles; exceptions; enforcement.**

(a) It shall be unlawful for any dealer to sell or distribute any new recreational vehicle in Georgia unless the dealer has a franchise dealership agreement with a grantor with the express right to sell or distribute recreational vehicles in Georgia and meets the requirements and definitions provided in this article. Any dealer who does not meet the requirements of this article may participate in events where recreational vehicles are exhibited or demonstrated and seminars are provided but shall be prohibited from contracting to sell or distribute recreational vehicles to the public.

(b) Subsection (a) of this Code section shall not apply to:

(1) The sale of recreational vehicles at events sponsored by a Georgia based recreational vehicle grantor with manufacturing facilities located in this state, where recreational vehicles are sold or contracted for by its franchised out-of-state recreational vehicle dealers;

(2) Any convention or rally involving more than 2,500 recreational vehicles which are preregistered with the sponsor of said event, owned by individuals attending such convention or rally, and there for the personal use of their owners for the purpose of camping and not for sale or display; provided, however, that no dealers from outside of this state shall be

invited to said event by a participating manufacturer unless all franchised Georgia dealers for such participating manufacturer shall be invited to said event, and there shall be no discrimination in terms of sales by a manufacturer to any franchised Georgia dealer for recreational vehicles to be sold at the convention or rally; nor shall any franchised Georgia dealer be required by a manufacturer to purchase inventory in addition to that required under a current franchise agreement between the manufacturer and such dealer in order for the dealer to participate in such convention or rally. Out-of-state dealers shall register with the Department of Revenue and purchase a permit 30 days prior to participating in any rally or convention in Georgia. The cost of such permit shall be \$500.00 per dealer. Any manufacturer or dealer that violates this paragraph shall not be eligible to participate in any such events; or

(3) Any dealer at a convention or rally if:

(A) There are ten or more dealers from this state participating in such convention or rally; and

(B) Such convention or rally takes place at a location other than the principal place of business of any of the dealers participating in such convention or rally.

Nothing in this subsection shall be applied to impair an obligation of a contract existing on March 14, 2008.

(c) The state revenue commissioner and the Department of Revenue shall enforce this Code section in the same manner as provided by Code Sections 10-1-666 and 10-1-667 for violations of Article 22 of this chapter. (Code 1981, § 10-1-679.14, enacted by Ga. L. 2005, p. 1233, § 2/SB 155; Ga. L. 2006, p. 72, § 10/SB 465; Ga. L. 2008, p. 3, § 1/HB 297.)

**The 2008 amendment**, effective March 14, 2008, designated the existing provisions as subsection (a) and (b); in the introductory paragraph of subsection (b), substituted “Subsection (a) of” for “Notwithstanding the foregoing,” at the beginning and substituted a colon for “the” at the end; added the paragraph (b)(1) designation, and in paragraph (b)(1), added “The” at the beginning, substituted “this state” for “the state” near the middle, and substituted a semicolon for a period at the end; added paragraphs (b)(2) and (b)(3) and the undesignated sentence at the end of subsection (b); and added subsection (c). See Editor’s note for applicability.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, subparagraphs (b)(3)(1) and (b)(3)(2) were redesignated as subparagraphs (b)(3)(A) and (b)(3)(B), respectively, and “March 14, 2008” was substituted for “the effective date of this subsection” at the end of the undesignated text of subsection (b).

**Editor’s notes.** — Ga. L. 2008, p. 3, § 2, not codified by the General Assembly, provides that the amendment to this Code section shall apply to any agreement entered into on or after March 14, 2008, and to any renewal, modification, or amendment made on or after such date to any such agreement.



**10-1-679.15. Violations.**

Any person who violates the provisions of this article shall be guilty of a misdemeanor. (Code 1981, § 10-1-679.15, enacted by Ga. L. 2005, p. 1233, § 2/SB 155.)

**ARTICLE 23****LEASE-PURCHASE AGREEMENTS****10-1-680. Short title.**

This article shall be known and may be cited as the “Lease-purchase Agreement Act.” (Code 1981, § 10-1-680, enacted by Ga. L. 1985, p. 1341, § 1.)

**JUDICIAL DECISIONS**

**Cited** in Shamrock Rental Co. v. Huffman,  
63 Bankr. 737 (Bankr. N.D. Ga. 1986).

**10-1-681. Definitions.**

As used in this article, the term:

(1) “Lease-purchase agreement” means an agreement for the use of personal property by a lessee primarily for personal, family, or household purposes for an initial period of four months or less that is renewable with each payment after the initial period and that permits the lessee to become the owner of the property. Lease-purchase agreements shall not include any of the following:

(A) A lease or agreement which constitutes a credit sale as defined in 12 C.F.R. 226.2(a)(16) and Section 1602(g) of the Truth-in-Lending Act, 15 U.S.C. Section 1601, et seq.;

(B) A lease which constitutes a consumer lease as defined in 12 C.F.R. 213.2(a)(6);

(C) Any lease for agricultural, business, or commercial purposes;

(D) Any lease made to an organization; or

(E) A lease or agreement which constitutes a retail installment transaction as defined in paragraph (10) of subsection (a) of Code Section 10-1-2.

(2) “Lessee” means a person who leases property pursuant to a lease-purchase agreement.

(3) “Lessor” means a person who, in the ordinary course of business, regularly leases, offers to lease, or arranges for the leasing of property under a lease-purchase agreement.

(4) “Period” means a day, week, month, or other subdivision of a year. (Code 1981, § 10-1-681, enacted by Ga. L. 1985, p. 1341, § 1; Ga. L. 2000, p. 136, § 10.)

### JUDICIAL DECISIONS

**Lease-purchase agreement** meeting the requirements of O.C.G.A. § 10-1-681 constituted a true lease, not a security agreement, and was subject to § 365 of the Bankruptcy Code, 11 U.S.C. § 365. *Central Rents, Inc. v. Johnson*, 203 Bankr. 498 (Bankr. S.D. Ga. 1996).

### 10-1-682. Requirements for written statement of agreement.

(a) A lease-purchase agreement shall be in the form of a written statement which shall include all of the following:

(1) A brief description of the leased property, sufficient to identify the property to the lessee and lessor including whether the property is new or previously rented or, if a lease is for multiple items, a description of each item may be provided in a separate statement which is incorporated by reference in the primary disclosure statement;

(2) The total amount of any initial payment, including any advance payment, delivery charge, or any trade-in allowance to be paid by the lessee at or before consummation of the lease-purchase agreement;

(3) The amount and timing of payments;

(4) The amount of all other charges, individually itemized, payable by the lessee to the lessor which are not included in the periodic payments;

(5) A statement of the party liable for loss, damage in excess of normal wear and tear, or destruction to the leased property;

(6) The lessee’s right to reinstate and the amount, or method of determining the amount, of any penalty or other charge for reinstatement as established in Code Section 10-1-686;

(7) The party responsible for maintaining or servicing the leased property together with a brief description of this responsibility;

(8) A statement of the conditions under which the lessee or lessor may terminate the lease;

(9) A statement of the total cost of the lease expressed as the product of the number of payments necessary to acquire ownership of the leased property times the amount of each payment, using the term “cost of lease”;

(10) A statement that the lessee has the option to purchase the leased property during the term of the lease-purchase agreement and, at what price, formula, or by what method the price is determined;

(11) A statement that if any part of a manufacturer's warranty continues to cover the leased property at the time the lessee assumes ownership of the property, if allowed by the terms of the warranty, it will be passed on to the lessee;

(12) The fair market value of the leased property at the time it is initially leased to the lessee, using the term "estimated fair market value of the leased property," provided that in the case of property that has been previously leased the lessor may establish a standard value that may be used in lieu of a specific valuation for an individual item; and

(13) The difference between the amount disclosed under paragraph (9) of this subsection and the amount disclosed under paragraph (12) of this subsection, using the term "cost of lease services."

(b) All information required by this Code section shall be stated in a clear and coherent manner, using words and phrases of common meaning. The information shall be appropriately divided and captioned by its sections. All numerical amounts and percentages shall be stated in figures. The information shall also be disclosed by the lessor prior to the signing of the lease by the lessee. All of the information required by this Code section shall be provided directly on the lease contract or instrument or on a separate form. The disclosures described in paragraphs (1), (2), (3), (4), (9), (12), and (13) of subsection (a) of this Code section shall be made clearly, conspicuously, and together in sequence and shall be prominently located on the same page of the contract or other instrument evidencing the lease.

(c) At the lessor's option, information in addition to that required by this Code section may be disclosed if the additional information is not stated, utilized, or placed in a manner which will contradict, obscure, or distract attention from the required information. (Code 1981, § 10-1-682, enacted by Ga. L. 1985, p. 1341, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1986, a misspelling of "agreement" was corrected in paragraph (a)(2).

### 10-1-683. Advertisements.

(a) An advertisement for any lease-purchase agreement shall not state that a specific lease of any property at specific amounts or terms is available unless the lessor usually and customarily leases or will lease the property at those amounts or terms.

(b) An advertisement for any lease-purchase agreement shall not state that a payment or a periodic payment is due at the start of a lease of a



specific item without disclosing both the payment due at the start of the lease, the periodic payment, the cost of lease services, and the total of all periodic payments necessary to obtain ownership. (Code 1981, § 10-1-683, enacted by Ga. L. 1985, p. 1341, § 1.)

#### **10-1-684. Prohibited agreement provisions.**

A lease-purchase agreement shall not contain a provision:

(1) Requiring a garnishment of wages or a power of attorney to confess a judgment;

(2) Granting authorization to the lessor or a person acting on the lessor's behalf to unlawfully enter upon the lessee's premises or to commit any breach of the peace in the repossession of goods;

(3) Requiring the lessee to waive any defense, counterclaim, or right of action against the lessor or a person acting on the lessor's behalf (as the lessee's agent on the lessor's behalf or as the lessee's agent) in collection of payments under the lease or in the repossession of goods;

(4) Requiring the lessee to agree not to assert against a lessor or against an assignee a claim or defense arising out of the lease;

(5) Requiring any collection or repossession charges in excess of those allowable under Code Section 10-1-7 and applicable court rules; or

(6) Providing that the lessee cannot return the leased property to the lessor at the end of any term. (Code 1981, § 10-1-684, enacted by Ga. L. 1985, p. 1341, § 1.)

**Law reviews.** — For article surveying commercial law in 1984-1985, see 37 Mercer L. Rev. 139 (1985).

#### **JUDICIAL DECISIONS**

**Cited** in Shamrock Rental Co. v. Huffman, 63 Bankr. 737 (Bankr. N.D. Ga. 1986).

#### **10-1-685. Purchase of insurance; early termination or return of items; fees.**

(a) A lessor shall not require the purchase of insurance by the lessee from the lessor of a leased item.

(b) A lessor shall not impose a penalty for early termination of a lease-purchase agreement or for the return of an item at any point.

(c) A lessor shall not impose a fee for in-home collection of a payment unless the lessee has expressly agreed to the fee and the amount of the fee is disclosed.

(d) A lessor shall not impose a fee for picking up rental property should the lessee choose to terminate the lease.

(e) A lessor shall not impose a fee for making a late payment except the charge for reinstatement as established in Code Section 10-1-686. (Code 1981, § 10-1-685, enacted by Ga. L. 1985, p. 1341, § 1.)

**10-1-686. Right to reinstatement of agreement by lessee failing to make timely payments; fees; substitute items.**

(a) A lessee who fails to make timely periodic payments shall have the right to reinstate the original lease-purchase agreement without losing any rights or options previously acquired under the lease-purchase agreement if both of the following apply:

(1) The lessee has not missed more than three periodic payments; and

(2) One periodic payment has been missed and the lessee has surrendered the item to the lessor, if requested by the lessor, during the time in which payments were missed.

(b) A lessee shall not be charged more than one reinstatement fee per missed periodic payment. A reinstatement fee shall equal the outstanding balance of any missed payments plus a charge which shall not exceed \$5.00 per missed payment. A delivery fee not to exceed the original delivery fee may be charged if redelivery of an item is necessary.

(c) If reinstatement occurs pursuant to this Code section, the lessor shall provide the lessee with either the same item leased by the lessee prior to reinstatement or a substitute item of comparable quality and condition. If a substitute item is provided, the lessor shall provide the lessee with all of the information required in Code Section 10-1-682. (Code 1981, § 10-1-686, enacted by Ga. L. 1985, p. 1341, § 1.)

**10-1-687. Penalties; grace period for compliance.**

(a) Any person who shall willfully and intentionally violate any provision of this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine not to exceed \$500.00 for the first offense and as for a misdemeanor for each subsequent offense.

(b) In case of a violation of any provision of this article, with respect to any transaction, the lessee in such transaction may recover from the person committing the violation, or may set off or counterclaim in any action by such person, actual damages with a minimum recovery of \$300.00 or 25 percent of the cost of the lease to acquire ownership, whichever is greater, attorneys' fees, and court costs. However, the lessor shall not be liable for any error in estimating the fair market value required in paragraph (12) of

subsection (a) of Code Section 10-1-682 unless said estimate shall be proved to have been made in bad faith.

(c) Notwithstanding this Code section, any failure to comply with any provisions in this article may be corrected within ten days after the date of execution of the lease-purchase agreement by the lessee, and, if so corrected, neither the lessor nor any holder is subject to any penalty under this Code section. (Code 1981, § 10-1-687, enacted by Ga. L. 1985, p. 1341, § 1.)

**10-1-688. Limitation of actions.**

No action shall be brought under this article more than four years after the person bringing this action knew or should have known of the occurrence of the alleged violation. (Code 1981, § 10-1-688, enacted by Ga. L. 1985, p. 1341, § 1.)

**10-1-689. Example of form.**

The following form is an example of the form which may be used to satisfy the disclosure requirements of subsection (b) of Code Section 10-1-682, requiring that the disclosures described in paragraphs (1), (2), (3), (4), (9), (12), and (13) of subsection (a) of Code Section 10-1-682 be made clearly, conspicuously, prominently, and together in sequence:

LEASE-PURCHASE DISCLOSURES

1. Description of leased property:

<u>Item</u>	<u>Quantity</u>	<u>Serial #</u>	<u>Mfg. Model</u>	<u>Condition</u>
_____	_____	_____	_____	_____
_____	_____	_____	_____	_____

2. Total payment due at beginning of contract:

Lease payment:	_____
Delivery charge:	_____
Sales tax:	_____
Other:	_____
Total:	_____

3. Lease payments:

- 1. You may renew the lease weekly or monthly as you choose.
- 2. The weekly rental is \$\_\_\_\_\_.
- 3. The monthly rental is \$\_\_\_\_\_.



4. Other charges:

1. Reinstatement fee \$\_\_\_\_
2. (Specify all others)

5. Cost of lease:

If you renew this lease each week/month for \_\_\_\_ weeks/months, you will pay a total of \$\_\_\_\_ to own this property. This total includes all costs included in the first lease payment.

6. Estimated fair market value of the leased property:

The estimated fair market value of the property you are leasing is \$\_\_\_\_\_.

7. Cost of lease services:

The difference between the amount in item 5 and item 6 above is \$\_\_\_\_\_. This is the cost of services to you under this lease if you elect to renew this lease for the number of terms necessary to acquire ownership of the leased property.

I have read the above statement before signing this agreement.

Date: \_\_\_\_\_ Lessee: \_\_\_\_\_

Date: \_\_\_\_\_ Lessee: \_\_\_\_\_

(Code 1981, § 10-1-689, enacted by Ga. L. 1985, p. 1341, § 1; Ga. L. 2000, p. 136, § 10.)

ARTICLE 24

WHOLESALE DISTRIBUTION BY OUT-OF-STATE PRINCIPAL

**Editor's notes.** — Ga. L. 1986, p. 884, § 2, not codified by the General Assembly, provided that that Act would apply to all contracts entered into on or after July 1, 1986.

**10-1-700. Definitions.**

As used in this article, the term:

(1) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of orders or sales or as a specified amount per order or per sale.

(2) "Principal" means a person who does business in this state and who:

(A) Manufactures, produces, imports, or distributes a tangible product for wholesale;

(B) Contracts with a sales representative to solicit orders for the product; and

(C) Compensates the sales representative in whole or in part by commission.

(3) "Sales representative" means a person who contracts with a principal to solicit wholesale orders and who is compensated in whole or in part by a commission, but such term does not include one who places orders or purchases for his or her own account for resale. (Code 1981, § 10-1-700, enacted by Ga. L. 1986, p. 884, § 1; Ga. L. 1993, p. 1092, § 1.)

#### **10-1-701. Contract for services in state.**

Reserved. Repealed by Ga. L. 1992, p. 1320, § 1, effective April 13, 1992.

**Editor's notes.** — This Code section was based on Ga. L. 1986, p. 884, § 1.

#### **10-1-702. Rights of sales representative; frivolous actions.**

(a) When a contract between a principal and a sales representative is terminated, the principal shall within 30 days after the termination of the contract pay all commissions due to the sales representative.

(b) A principal who fails to make timely payment of commissions as required by subsection (a) of this Code section shall be liable to the sales representative in a civil action for:

(1) All amounts due to the sales representative according to the terms of the contract;

(2) Exemplary damages in an amount not to exceed double the amount not timely paid as required by subsection (a) of this Code section; and

(3) Reasonable attorney's fees actually and reasonably incurred by the sales representative in the action.

(c) A person who brings an action under this Code section shall, if the court determines that the action is frivolous, be liable to the defendant for attorney's fees actually and reasonably incurred by the defendant in defending against such action. (Code 1981, § 10-1-702, enacted by Ga. L. 1986, p. 884, § 1; Ga. L. 1992, p. 1320, § 2.)

#### **JUDICIAL DECISIONS**

**Cited** in *Stover v. Candle Corp. of Am.*, 238 Ga. App. 657, 520 S.E.2d 7 (1999).

**10-1-703. Waiver of law prohibited.**

The provisions of this article may not be waived; and, in applying the provisions of this article, the courts of this state shall not recognize any purported waiver of the provisions of this article, whether by expressed waiver or by attempt to make a contract or agreement subject to the laws of another state. (Code 1981, § 10-1-703, enacted by Ga. L. 1986, p. 884, § 1.)

**10-1-704. Jurisdiction of court.**

A principal who is not a resident of this state and who enters into a contract subject to this article is declared to be doing business in this state for purposes of the exercise of personal jurisdiction over nonresidents under Code Section 9-10-91. (Code 1981, § 10-1-704, enacted by Ga. L. 1986, p. 884, § 1.)

**ARTICLE 25****RETAIL PETROLEUM PRODUCT DEALERS****10-1-720. Definitions.**

As used in this article, the term:

- (1) "Adult" means any person who is not a minor.
- (2) "Dealer" means any person, other than an agent or employee of a producer or redistributor, who is engaged in the retail sale of petroleum products under a franchise agreement as defined in paragraph (4) of this Code section.
- (3) "Designated family member" means the adult spouse, the adult child of the dealer, or the spouse of an adult child of the dealer, who has experience in the service station business and who, in the case of the dealer's death or retirement, is designated in writing by notice from the dealer to the producer or redistributor as entitled to be offered a trial franchise as such term is defined in the federal Petroleum Marketing Practices Act (15 U.S.C. Section 2801, et seq.).
- (4) "Franchise" or "franchise agreement" means an agreement between a producer and a dealer or a redistributor and a dealer under which the dealer is granted the right to:
  - (A) Use a trademark, trade name, service mark, or other identifying symbol or name owned by the producer or redistributor; or
  - (B) Occupy a service station owned, leased, or controlled by the producer or redistributor for the purpose of engaging in the retail sale of petroleum products of the producer or redistributor.



(5) “Producer” means every person who produces, refines, manufactures, processes, blends, or otherwise alters any motor fuel and other petroleum products for sale or use in this state and every person who distributes any motor fuel and other petroleum products for resale in this state.

(6) “Redistributor” means any person who sells petroleum products for resale at retail.

(7) “Service station” means any filling station, store, garage, or other place of business in this state engaging in the retail sale of motor fuel and other petroleum products. (Code 1981, § 10-1-720, enacted by Ga. L. 1987, p. 1459, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, “U.S.C. Section” was substituted for “U.S.C., paragraph” in paragraph (3).

### 10-1-721. Successor to deceased retail dealer.

(a) Effective January 1, 1988, no franchise agreement entered into between a producer and a dealer or a redistributor and a dealer shall deny a dealer the rights provided in this Code section.

(b) A dealer shall have the right, effective upon his death or retirement, to have the producer or redistributor offer a trial franchise to the designated family member who has been approved by the producer or redistributor in accordance with the producer’s or redistributor’s reasonable standard for personal and financial condition unless the producer or redistributor shows that the designated family member no longer meets the reasonable standards set at the time of designation of the previous approval. The foregoing shall not prohibit a producer or redistributor from requiring that the designated family member accept the trial franchise within 30 days of the dealer’s death or retirement and that the designated family member attend a training program offered by the producer or redistributor. As used in this Code section, the term “trial franchise” shall have the same meaning as provided in the federal Petroleum Marketing Practices Act (15 U.S.C. Section 2801, et seq.).

(c) A dealer and a producer or a dealer and a redistributor may mutually agree to change the family member designated. The designated family member shall provide, upon the request of the producer or redistributor, personal and financial data that are reasonably necessary to determine whether he or she meets the producer’s or redistributor’s reasonable standards. The producer or redistributor shall not be obligated to accept a designated family member under this subsection who does not meet the producer’s or redistributor’s reasonable standards but any refusal to accept the designated family member shall be given by the producer or redistributor in writing to the dealer and shall fairly state the reason therefor. (Code 1981, § 10-1-721, enacted by Ga. L. 1987, p. 1459, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, “U.S.C. Section” was substituted for “U.S.C., paragraph” in subsection (b).

## ARTICLE 26

### MULTILINE HEAVY EQUIPMENT DEALERS

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1989, the Article 26 that was enacted by Ga. L. 1989, p. 569, § 1, has been renumbered as Article 27 (Code Section 10-1-760).

**Editor’s notes.** — Ga. L. 1993, p. 1585, § 3, effective April 27, 1993, repealed the

Code sections codified at this article and enacted the current article. The former article consisted of Code Sections 10-1-730 through 10-1-740 and was based on Ga. L. 1989, p. 1771, § 1 and Ga. L. 1992, p. 6, § 10.

#### 10-1-730. Short title.

This article shall be known and may be cited as the “Georgia Multiline Heavy Equipment Dealer Act.” (Code 1981, § 10-1-730, enacted by Ga. L. 1993, p. 1585, § 3.)

#### 10-1-731. Definitions.

As used in this article, the term:

(1) “Agreement” means a commercial relationship, either written or oral, between a supplier and a multiline dealer pursuant to which the multiline dealer has been authorized to distribute one or more of the supplier’s heavy equipment products and attachments and repair parts therefor and in connection therewith to use a trade name, trademark, service mark, logo type, or advertising or other commercial symbol.

(2) “Heavy equipment” means self-propelled, self-powered, or pull-type equipment and machinery, including diesel engines, weighing 5,000 pounds or more and primarily employed for construction, industrial, maritime, mining, or forestry uses. The term “heavy equipment” shall not include:

(A) Motor vehicles requiring registration and certificates of title;

(B) Farm machinery, equipment, and implements; or

(C) Equipment that is “consumer goods” within the meaning of Code Section 11-9-102.

(3) “Multiline dealer” means a person in Georgia meeting all the following requirements:

(A) Who is engaged in the business of selling or leasing heavy equipment at retail;

(B) Who customarily maintains a total inventory valued at over \$250,000.00 of new heavy equipment and attachments and repair parts therefor;

(C) Who provides repair services for the heavy equipment sold;

(D) Who has agreements with at least six different suppliers; and

(E) Whose retail sales volume of heavy equipment purchased from a single supplier, under all agreements with that supplier, is not greater than 75 percent of such person's total retail sales volume of heavy equipment during:

(i) The 12 month period immediately prior to July 1, 1989, if an agreement or agreements between the supplier and such person is or are in effect on July 1, 1989; or

(ii) The 12 month period immediately following the date the initial agreement between the supplier and such person is entered into, or portion thereof in the event of cancellation, termination, or transfer of the business prior to the end of such 12 month period, if such initial agreement is entered into subsequent to July 1, 1989.

(4) "Person" means a natural person, corporation, partnership, trust, agency, or other entity as well as the individual officers, directors, or other persons in active control of the activities of each such entity. The term "person" also includes heirs, assigns, personal representatives, and guardians.

(5) "Supplier" means every person, including any agent of such person or any authorized broker acting on behalf of that person, that enters into an agreement with a multiline dealer. (Code 1981, § 10-1-731, enacted by Ga. L. 1993, p. 1585, § 3; Ga. L. 2001, p. 362, § 26.)

**10-1-732. Unilateral amendment, cancellation, termination, refusal to renew, or causing resignation from agreement for good cause.**

(a) Notwithstanding the terms, provisions, or conditions of any agreement, no supplier shall unilaterally amend, cancel, terminate, or refuse to continue to renew any agreement, or unilaterally cause a dealer to resign from an agreement, unless the supplier has first complied with the provisions of this article and good cause exists for amendment, termination, cancellation, nonrenewal, noncontinuance, or causing a resignation. The term "good cause" shall not include the sale or purchase of a supplier. The term "good cause" shall be limited to withdrawal by the supplier, its successors, and assigns of the sale of its products in Georgia or multiline dealer performance deficiencies including, but not limited to, the following:

(1) Bankruptcy or receivership of the multiline dealer;



(2) Assignment for the benefit of creditors or similar disposition of the assets of the dealer, other than the creation of a security interest in the assets of a multiline dealer for the purpose of securing financing in the ordinary course of business; or

(3)(A) Failure by the multiline dealer to comply substantially, without reasonable cause or justification, with any reasonable and material requirement imposed upon such dealer in writing by the supplier, including, but not limited to, a substantial failure by a multiline dealer to:

(i) Maintain a sales volume or trend of his supplier's product line or lines comparable to that of other similarly situated dealers of that product line; or

(ii) Render services comparable in quality, quantity, or volume to the services rendered by other dealers of the same product or product line similarly situated.

(B) In any determination as to whether a multiline dealer has failed to comply substantially, without reasonable excuse or justification, with any reasonable and material requirement imposed upon such dealer by the supplier, consideration shall be given to the relative size, population, geographical location, number of retail outlets, and demand for the products applicable to the market area of the multiline dealer in question and to comparable market area.

(b) No supplier shall be required to give notice or show good cause pursuant to subsection (a) of this Code section to amend unilaterally agreements with multiline dealers to comply with federal or state law or, where not inconsistent with this article, to amend uniformly agreements as to all multiline dealers of the supplier in question in all states in which the supplier is marketing its products.

(c) In any dispute as to whether a supplier has acted with good cause as required by this Code section, the supplier shall have the burden of proof to establish that good cause existed. (Code 1981, § 10-1-732, enacted by Ga. L. 1993, p. 1585, § 3.)

**10-1-733. Notice of intent to amend, terminate, cancel, or decline to renew agreement; time within which dealer may rectify condition; contract for transfer of business; immediate termination, amendment, cancellation or expiration.**

(a) Except as provided in subsection (d) of this Code section, a supplier shall provide a multiline dealer at least 120 days' prior written notice of any intention to amend, terminate, cancel, or decline to renew any agreement. The notice shall state all the reasons for the intended amendment, termination, cancellation, or nonrenewal.

(b) Where such reason or reasons relate to a condition or conditions which may be rectified by action of the multiline dealer, he shall have 75 days in which to take such action and, within such 75 day period, shall give written notice to the supplier if and when such action is taken. If such condition or conditions have been rectified by action of the multiline dealer, then the proposed amendment, termination, cancellation, or nonrenewal shall be void and without legal effect. However, where the supplier contends that action on the part of the multiline dealer has not rectified one or more of such conditions, such supplier must give written notice thereof to the multiline dealer within 15 days after the dealer gave notice to the supplier of the action taken.

(c) During the 120 day notice period provided for in subsection (a) of this Code section, the multiline dealer shall have the right to contract for a transfer of his or her business to another person who meets the material and reasonable qualifications and standards required by the supplier of its multiline dealers. The multiline dealer shall give notice of any such transfer to the supplier at least 45 days prior to the expiration of the 120 day notice period.

(d) An agreement may be immediately terminated, amended, canceled, or allowed to expire and no notice shall be required if the reason for the amendment, termination, cancellation, or nonrenewal is:

(1) The bankruptcy or receivership of the multiline dealer;

(2) An assignment for the benefit of the creditors or similar disposition of the assets of the business, other than the creation of a security interest in the assets of a multiline dealer for the purpose of securing financing in the ordinary course of business;

(3) Willful or intentional misrepresentation made by the multiline dealer with the express intent to defraud the supplier;

(4) Failure of the multiline dealer to conduct its customary sales and service operations during its customary business hours for seven consecutive business days, unless such failure has resulted from acts of God, casualties, strikes, or other similar circumstances beyond the multiline dealer's reasonable control;

(5) Failure to pay any undisputed amount due the supplier continuing for 30 days after written notice thereof; or

(6) A final conviction of the multiline dealer of a felony. (Code 1981, § 10-1-733, enacted by Ga. L. 1993, p. 1585, § 3.)

**10-1-734. Consent to transfer of dealer's business; notice of withholding of consent; assumption of transferor's obligations and rights; burden of proving justification for denying consent.**

(a) No supplier shall unreasonably withhold or delay consent to any transfer of the multiline dealer's business or transfer of the stock or other

interest in the dealership whenever the transferee meets the material and reasonable qualifications and standards required in supplying its multiline dealers. Should a supplier determine that a proposed transferee does not meet its qualifications and standards, it shall give the multiline dealer written notice thereof, stating the specific reasons for withholding consent. No prospective transferee shall be disqualified to be a multiline dealer because it is a publicly held corporation. A supplier shall have 45 days to consider a multiline dealer's request to make a transfer under this subsection.

(b) Whenever a transfer of a multiline dealer's business occurs, the transferee shall assume all the obligations imposed on and succeed to all the rights held by the selling multiline dealer by virtue of any agreement consistent with this article between the selling multiline dealer and one or more suppliers entered into prior to the transfer.

(c) In any dispute as to whether a supplier has denied consent in violation of this Code section, the supplier shall have the burden of proving a substantial and reasonable justification for the denial of consent. (Code 1981, § 10-1-734, enacted by Ga. L. 1993, p. 1585, § 3.)

#### **10-1-735. Mailing of notice.**

Notices required by this article shall be sent by certified or registered mail or statutory overnight delivery, postage prepaid. (Code 1981, § 10-1-735, enacted by Ga. L. 1993, p. 1585, § 3; Ga. L. 2000, p. 1589, § 4.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July, 1, 2000.

#### **10-1-736. When change in dealer's management or personnel may be required or prohibited.**

No supplier shall require or prohibit any change in management or personnel of any multiline dealer unless the current or potential management or personnel fails to meet reasonable qualifications and standards required by the supplier for its multiline dealers. (Code 1981, § 10-1-736, enacted by Ga. L. 1993, p. 1585, § 3.)

#### **10-1-737. Article deemed incorporated in agreements subject to it; waiver of compliance; good faith settlements of disputes.**

The provisions of this article shall be deemed to be incorporated into every agreement subject to this article and shall supersede and control all other provisions of any agreement inconsistent with this article. No supplier shall require any multiline dealer to waive compliance with any provision of this article. Any provision or agreement purporting to do so is void and



unenforceable to the extent of the waiver or variance. Nothing in this article shall be construed to limit or prohibit good faith settlements of disputes voluntarily entered into between the parties. (Code 1981, § 10-1-737, enacted by Ga. L. 1993, p. 1585, § 3.)

**10-1-738. Good faith, fair dealing, and reasonableness requirements.**

(a) Every agreement entered into under the provisions of this article shall impose on the parties the obligation to act in good faith and deal fairly.

(b) This article shall impose on every term and provision of any agreement a requirement of reasonableness. Every term or provision of any agreement shall be interpreted so that the requirements or obligations imposed therein are reasonable. (Code 1981, § 10-1-738, enacted by Ga. L. 1993, p. 1585, § 3.)

**10-1-739. Venue; equitable relief; recovery of losses and damages for violation of Code Sections 10-1-732 and 10-1-734; when supplier may not cancel, terminate, or refuse to renew agreement.**

(a) Venue to hear and determine cases and controversies arising under the provisions of this article shall be in the superior court of the county wherein the multiline dealer has its principal place of business. The court may grant equitable relief as is necessary to remedy the effects of conduct which it finds to exist and which is prohibited under this article, including, but not limited to, declaratory judgment and injunctive relief.

(b) In addition to any other remedies available at law or in equity, if a supplier has attempted or accomplished an annulment, cancellation, or termination or has refused to continue or renew an agreement without good cause or has withheld or delayed consent in violation of Code Section 10-1-732 or Code Section 10-1-734, then the multiline dealer shall be entitled to recover losses and damages, both general and special, proximately resulting therefrom, together with the costs of the action and reasonable legal fees. Such damages shall include compensation for the value of the agreement and the loss of good will of the multiline dealer's business, if any, arising therefrom.

(c) No supplier may cancel, terminate, or refuse to continue to renew an agreement during the period set forth in this article or during the pendency of litigation or arbitration with respect thereto except under the conditions set forth in subsection (d) of Code Section 10-1-733. (Code 1981, § 10-1-739, enacted by Ga. L. 1993, p. 1585, § 3.)

**10-1-740. Applicability of article.**

The provisions of this article shall apply to any agreements entered into on or after July 1, 1989. The provisions of this article shall also apply to any

agreement modified or amended on or after July 1, 1989. The provisions of this article are also applicable to any renewal or amendment of such agreements. (Code 1981, § 10-1-740, enacted by Ga. L. 1993, p. 1585, § 3.)

## ARTICLE 27

### TRADE SECRETS

**Cross references.** — Trade secrets in discovery proceedings, § 9-11-26. Criminal penalty for theft of trade secrets, § 16-8-13.

**Editor's notes.** — Ga. L. 1990, p. 1560, § 1, effective July 1, 1990, repealed former Article 27 of Chapter 1 of Title 10 and enacted the current article. The former article consisted of Code Section 10-1-760, relating to the definition of a trade secret, and was based on Ga. L. 1989, p. 569, § 1.

**Law reviews.** — For survey article on law relating to intellectual property, see 42 Mercer L. Rev. 295 (1990). For annual survey of appellate practice and procedure, see 56 Mercer L. Rev. 61 (2004).

For note on 1990 enactment of this article, see 7 Ga. St. U.L. Rev. 213 (1990).

### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Use of Customer List by Former Employee, 3 POF2d 785.

Unfair Competition — Misuse of Trade Secret by Former Employee, 19 POF2d 163.

Abandonment of Trade Secret, 41 POF2d 517.

Misappropriation of Trade Secret under Uniform Trade Secrets Act, 12 POF3d 711.

Misappropriation of Trade Secret under the Restatement of Torts, 14 POF3d 619.

Misuse of Intellectual Property, 37 POF3d 315.

### 10-1-760. Short title.

This article shall be known as the “Georgia Trade Secrets Act of 1990.” (Code 1981, § 10-1-760, enacted by Ga. L. 1990, p. 1560, § 1.)

**Law reviews.** — For note on 1989 enactment of this Code section, see 6 Ga. St. U.L. Rev. 179 (1989).

### JUDICIAL DECISIONS

**Elements.** — Under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., a claim for misappropriation of trade secrets requires a plaintiff to prove that: (1) the plaintiff had a trade secret; and (2) the opposing party misappropriated the trade secret. *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

Defendant is liable for the misappropriation of a trade secret only if the plaintiff can show that the defendant (1) disclosed information that enabled a third party to learn the trade secret or (2) used a “substantial

portion” of the plaintiff’s trade secret to create an improvement or modification that is “substantially derived” from the plaintiff’s trade secret, but if the defendant independently created the allegedly misappropriated item with only “slight” contribution from the plaintiff’s trade secret, then the defendant is not liable for misappropriation. *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

**Definition of trade secret satisfied.** — Despite a corporation incorporator’s testimony that there was “probably nothing” the

corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was presented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. *Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

**Patient list is not trade secret.** — Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. *Vito v. Inman*, 286 Ga. App. 646,

649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

**Personal knowledge gained during employment.** — In an action to have a noncompetition agreement declared invalid under Georgia law, O.C.G.A. § 9-2-46(a), which evidenced Georgia's favoritism for the first-filed rule, the employer's counterclaim for misappropriation of trade secrets, asserted under the Georgia Trade Secrets Act (TSA), O.C.G.A. § 10-1-760 et seq., and Ohio law, was properly dismissed rather than stayed pending the outcome of a later-filed suit in Ohio; the employee's utilization of personal knowledge of customer and vendor information was not forbidden and did not state a claim under the TSA. *Manuel v. Convergys Corp.*, 430 F.3d 1132 (11th Cir. 2005).

**Cited in** *Union Carbide Corp. v. Tarancon Corp.*, 742 F. Supp. 1565 (N.D. Ga. 1990); *Servicetrends, Inc. v. Siemens Medical Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994); *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Ga.*, F. Supp. 2d , 2008 U.S. Dist. LEXIS 32116 (M.D. Ga. Apr. 18, 2008).

RESEARCH REFERENCES

**ALR.** — What constitutes “trade secrets and commercial or financial information obtained from person and privileged or con-

fidential”, exempt from disclosure under Freedom of Information Act (5 USCS § 552(b)(4)) (FOIA), 139 ALR Fed 225.

10-1-761. Definitions.

As used in this article, the term:

(1) “Improper means” includes theft, bribery, misrepresentation, breach or inducement of a breach of a confidential relationship or other duty to maintain secrecy or limit use, or espionage through electronic or other means. Reverse engineering of a trade secret not acquired by misappropriation or independent development shall not be considered improper means.

(2) “Misappropriation” means:

(A) Acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(B) Disclosure or use of a trade secret of another without express or implied consent by a person who:

(i) Used improper means to acquire knowledge of a trade secret;



(ii) At the time of disclosure or use, knew or had reason to know that knowledge of the trade secret was:

(I) Derived from or through a person who had utilized improper means to acquire it;

(II) Acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) Derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(iii) Before a material change of position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

(3) "Person" means a natural person, corporation, business trust, estate, trust, partnership, association, joint venture, government, governmental subdivision or agency, or any other for profit or not for profit legal or commercial entity.

(4) "Trade secret" means information, without regard to form, including, but not limited to, technical or nontechnical data, a formula, a pattern, a compilation, a program, a device, a method, a technique, a drawing, a process, financial data, financial plans, product plans, or a list of actual or potential customers or suppliers which is not commonly known by or available to the public and which information:

(A) Derives economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and

(B) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy. (Code 1981, § 10-1-761, enacted by Ga. L. 1990, p. 1560, § 1; Ga. L. 1996, p. 894, § 1.)

**Law reviews.** — For article, "Application of the 'Inevitable Disclosure' Doctrine in Georgia," see 4 Ga. St. B.J. 58 (1999). For survey article on labor and employment law, see 59 Mercer L. Rev. 233 (2007). For article, "Avoiding the Potholes: A Roadmap for

Intellectual Property Due Diligence in Business Transactions," see 14 Ga. St. B.J. 17 (2008). For article, "Keeping Your Genies in the Bottle: 10 Steps to Protect Your Most Sensitive Secrets," see 14 Ga. St. B.J. 32 (2008).

## JUDICIAL DECISIONS

**Computer software.** — Computer software programs are trade secrets if the requirements of paragraphs (4)(A) and (4)(B) of O.C.G.A. § 10-1-761 are met. CMAX/Cleveland, Inc. v. UCR, Inc., 804 F. Supp. 337 (M.D. Ga. 1992).

Despite a corporation incorporator's testimony that there was "probably nothing" the corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was pre-

sented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. *Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

**Customer lists.** — Because purported customer lists sought to be protected consisted of information a former employee had in the employee's memory about nurses and health facilities with which the employer contracted during the period the employer employed the employee, and because there was no evidence the employer made reasonable efforts to maintain the confidentiality of the information the employer sought to protect, the information was not a "trade secret" within the meaning of the Georgia Trade Secrets Act (GTSA), O.C.G.A. § 10-1-760 et seq., for the purposes of determining whether an interlocutory injunction was appropriate. *Smith v. Mid-State Nurses, Inc.*, 261 Ga. 208, 403 S.E.2d 789 (1991).

Lists containing the identities of and specific information concerning actual customers of companies were "trade secrets." *Avnet, Inc. v. Wyle Lab., Inc.*, 263 Ga. 615, 437 S.E.2d 302 (1993).

Information contained in a customer list that was readily obtainable by proper means was not a trade secret. *Leo Publications, Inc. v. Reid*, 265 Ga. 561, 458 S.E.2d 651 (1995).

Tangible customer lists are the property of the employer and warrant protection as trade secrets. *Leo Publications, Inc. v. Reid*, 265 Ga. 561, 458 S.E.2d 651 (1995).

The only information that may be protected under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., is an actual tangible customer list. *AmeriGas Propane, L.P. v. T-Bo Propane, Inc.*, 972 F. Supp. 685 (S.D. Ga. 1997).

Where a car repair company took no precautions to maintain the confidentiality of the company's customer list, which was on computers that were not password protected, the same information in those lists was available to technicians through repair orders that the technicians were permitted to retain indefinitely, and employees were not informed that the information was confidential, such customer lists were not trade

secrets. *Bacon v. Volvo Serv. Ctr., Inc.*, 266 Ga. App. 543, 597 S.E.2d 440 (2004).

There was a genuine issue of fact as to whether a former employee had misappropriated trade secrets as defined by O.C.G.A. § 10-1-761; tangible customer lists could warrant protection as trade secrets, and the employee had signed an agreement to keep customer lists confidential, the employee took an organizer containing contact information for customers when the employee resigned, and the employee used the organizer to look up phone numbers after the employee's resignation. *Hilb, Rogal & Hamilton Co. of Atlanta, Inc. v. Holley*, 284 Ga. App. 591, 644 S.E.2d 862 (2007).

Because a doctor's patient list was not a trade secret within the meaning of the Georgia Trade Secrets Act, O.C.G.A. § 10-1-761(4)(A), and because an attorney the doctor sued for misappropriation was not in the same industry as the doctor, the attorney's possession of the list did not reduce the doctor's competitive advantage in the field, which was the main purpose of protecting a trade secret; thus, the attorney was entitled to summary judgment on the doctor's claim of misappropriation. *Vito v. Inman*, 286 Ga. App. 646, 649 S.E.2d 753 (2007), cert. denied, 2007 Ga. LEXIS 770 (Ga. 2007).

**"Trade secret" standard satisfied.** — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be maintained, the idea was a trade secret, under O.C.G.A. § 10-1-761(4), because aspects of it were not publicly available, it had economic value, as another manufacturer sought a licensing agreement, and reasonable efforts were made to maintain its secrecy. *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

Given the highly competitive nature of the asphalt industry in the State of Georgia, the trial court did not err in permanently enjoining the DOT from giving unredacted copies of documents, which contained trade secrets and confidential technical specifications relating to the mix design, to a competitor of a group of contractors; further, the public could ascertain whether a contractor's asphalt product met DOT requirements by examining information on the forms, which was not included in the trial

court's injunction, and the records did not fall within the exception to Open Records Act disclosure because the contractors were not required by law to submit the information to the DOT. *Douglas Asphalt Co. v. E. R. Snell Contr., Inc.*, 282 Ga. App. 546, 639 S.E.2d 372 (2006), cert. denied, 2007 Ga. LEXIS 140 (2007).

**Distribution of information outside company.** — A former employee was not guilty of misappropriation of trade secrets and confidential information where it was shown that the allegedly confidential technical data provided to the employee was also distributed to the company's customers which removed any legal protection it might otherwise have had as trade secrets. *Servicetrends, Inc. v. Siemens Medical Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994).

Manufacturer of a boiler cleaner system was denied a preliminary injunction against a competitor's marketing of a similar product because the manufacturer failed to show it was likely to prevail on a misappropriation of trade secret charge under O.C.G.A. § 10-1-761; the manufacturer could not establish the existence of a trade secret because the product at issue had been sold to the public and was not subject to reasonable efforts to maintain secrecy. *Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc.*, 370 F. Supp. 2d 1339 (N.D. Ga. 2005).

**Tangible form of property not required.** — In order to be considered "property," an employer's customer list had to be in tangible form to be protected under the Georgia Trade Secrets Act (GTSA); by contrast, the employer's trade secrets were already considered the employer's property; if the employer could show that it was otherwise entitled to protection under the GTSA when its employee began working for a competitor, unless it was complaining of misappropriation of a customer list, Georgia law did not require that the trade secret be in tangible form and; moreover, even without a valid written contract or written covenant, the employee was required to refrain from disclosing the employer's trade secrets. *Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc.*, 370 F. Supp. 2d 1339, 2005 U.S. Dist. LEXIS 12493 (N.D. Ga. Jan. 5, 2005).

**Lease documents.** — Where a former employee testified to taking files containing lease documents from the employer with the

intent of using the leases to further the former employee's own business, the trial court did not err in finding a genuine issue of material fact as to whether the former employee misappropriated trade secrets and improperly used confidential information. *Kuehn v. Selton & Assocs.*, 242 Ga. App. 662, 530 S.E.2d 787 (2000).

**Names.** — If the idea for the geographically descriptive name of a proposed publication was not novel or original, the name was not worthy of protection as a trade secret. *Leo Publications, Inc. v. Reid*, 265 Ga. 561, 458 S.E.2d 651 (1995).

**List of cities for new franchises.** — Names of cities which a franchisor considered good candidates for new franchises could not be considered trade secrets. *Allen v. Hub Cap Heaven, Inc.*, 225 Ga. App. 533, 484 S.E.2d 259 (1997).

Particularized information about a logistics system learned by an employee through the employee's position of trust with the company that developed the system was a trade secret. *Essex Group, Inc. v. Southwire Co.*, 269 Ga. 553, 501 S.E.2d 501 (1998).

**Personal knowledge.** — A former employee's personal knowledge of the employer's customer information was not a "trade secret." *Avnet, Inc. v. Wyle Lab., Inc.*, 263 Ga. 615, 437 S.E.2d 302 (1993).

An injunction prohibiting solicitation and sale to customers that defendant company knew or had reason to know were plaintiff company's customers during former employee's employment with plaintiff and prohibiting contact with any vendor on any list obtained from plaintiff effectively enjoined defendant from utilizing personal knowledge of customer and vendor information and was overbroad. *DeGiorgio v. Megabyte Int'l, Inc.*, 266 Ga. 539, 468 S.E.2d 367 (1996).

In an annuity company's suit alleging that two former employees violated restrictive covenants of nondisclosure of trade secrets and confidential information and nonsolicitation, the employees' personal knowledge of the company's customers, as well as account information contained in the employees' day planners, both of which the employees used to take business from the company, constituted trade secrets under O.C.G.A. § 10-1-761(4). *Variable Annuity Life Ins. Co. v. Joiner*, 454 F. Supp. 2d 1297 (S.D. Ga. 2006).



**Trade secrets need not be in the form of written data** to warrant protection, but Georgia law generally does not prevent a departing employee from using the skills and information the employee acquired at work. *Servicetrends, Inc. v. Siemens Medical Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994).

**Trade secrets protected under Open Records Act.** — Since a company made reasonable efforts to protect the dissemination of trade secret information except for providing the information to the Environmental Protection Division (EPD) of the Georgia Department of Natural Resources, trade secret status was not lost simply because the company did not notify the EPD each time that the company provided the EPD with information containing trade secrets. *Theragenics Corp. v. Georgia Dep't of Natural Res.*, 244 Ga. App. 829, 536 S.E.2d 613 (2000), *aff'd*, *Theragenics Corp. v. Georgia Dep't of Natural Res.*, 273 Ga. 724, 545 S.E.2d 904 (2001).

**Confidentiality agreements not sufficient.** — Requiring employees to sign confidentiality agreements was not a reasonable step to maintain the secrecy of computer software because the employees were transferred to work for a competitor on projects involving use of the software without instructions as to the confidentiality of documentation on the projects. *Stargate Software Int'l, Inc. v. Rumph*, 224 Ga. App. 873, 482 S.E.2d 498 (1997).

Plaintiff former employer's Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., claim against defendants, a former employee and a competitor, failed as to items the employer distributed to the employer's representatives for use at customer sites, without confidentiality markings or copying protection, as those items were not trade secrets under O.C.G.A. § 10-1-761(4) and a general confidentiality agreement the employer required the employees to sign did not create trade secrets in those items. *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322 (N.D. Ga. 2007).

**"Misappropriation."** — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be maintained, and the manufacturer then asked another company to design a similar concept, the evidence did

not show misappropriation by the manufacturer, under O.C.G.A. § 10-1-761(2), because all of the other company's production elements were different from the marketing company's idea, and the concept elements had been presented to the manufacturer by a fourth company, as a result of which the manufacturer legally owned those elements, which were also in the public domain, having been the subject of a fifth company's patent application. *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

Considering the definition of "misappropriation" in O.C.G.A. § 10-1-761(2) in a motion for a preliminary injunction, an employer could show misappropriation by a competitor through acquisition, disclosure, or use of the employer's trade secrets by the competitor hiring one of the employer's former employees. *Diamond Power Int'l, Inc. v. Clyde Bergemann, Inc.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 12493 (N.D. Ga. Jan. 5, 2005).

The record showed defendant competitor's officer sent an e-mail to the officer's superiors speculating on plaintiff former employer's product design, then, the next day, after having lunch with the other defendant, the employer's former employee, the officer knew of the product's inner structure, components, and service history, and the competitor previously failed in an attempt to reverse engineer the product, a question of fact existed concerning whether the employee "disclosed" the employer's trade secrets in violation of O.C.G.A. § 10-1-761(2)(B)(ii)(II). *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322 (N.D. Ga. 2007).

**Summary judgment denied.** — Summary judgment was unwarranted on the misappropriation of trade secrets and unfair trade practices claims under Georgia statutory and common law because defendant software developer failed to timely provide plaintiff software developer with discoverable information about the PA system, and therefore, the court should not say that genuine issues of material fact did not exist. *TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc.*, 880 F. Supp. 1572 (N.D. Ga. 1995).

In an action by a franchisee against a franchisor, evidence that the franchisor mis-

used information acquired from the franchisee by legitimate means precluded summary judgment. *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 130 F.3d 1009 (11th Cir. 1997), modified on other grounds, 139 F.3d 1396 (11th Cir. 1998).

When plaintiff presented expert testimony showing that the disputed information was closely guarded in the hotel industry and that to the extent the information was disclosed, it was done so on the express

condition that it would not be made public, enough evidence existed to allow a reasonable jury to find in its favor, and summary judgment in favor of the defendant should have been denied. *Camp Creek Hospitality v. Sheraton Franchise*, 139 F.3d 1396 (11th Cir. 1998).

**Cited in** *Taylor & Rozier, Inc. v. Anderson*, 211 Ga. App. 897, 440 S.E.2d 767 (1994); *Atlanta Bread Co. Int'l, Inc. v. Lupton-Smith*, 292 Ga. App. 14, 663 S.E.2d 743 (2008).

### 10-1-762. Injunctive relief.

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in appropriate circumstances for reasons including, but not limited to, an elimination of commercial advantage that otherwise would be derived from the misappropriation or where the trade secret ceases to exist due to the fault of the enjoined party or others by improper means.

(b) In exceptional circumstances, if the court determines that it would be unreasonable to prohibit future use, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

(d) In no event shall a contract be required in order to maintain an action or to obtain injunctive relief for misappropriation of a trade secret. (Code 1981, § 10-1-762, enacted by Ga. L. 1990, p. 1560, § 1.)

**Law reviews.** — For article, “Application of the ‘Inevitable Disclosure’ Doctrine in Georgia,” see 4 Ga. St. B.J. 58 (1999). For

article, “Georgia’s Constitutional Scheme for State Appellate Jurisdiction,” see 6 Ga. St. B.J. 24 (2001).

### JUDICIAL DECISIONS

**Out-of-state order prohibiting unprivileged testimony.** — Michigan order, by facially prohibiting former corporate litigation consultant from testifying as to matters outside the scope of any privilege, violated Georgia public policy; therefore, the full faith and credit clause did not require the

federal district court in Georgia to give full effect to the Michigan court order. *Williams v. GMC*, 147 F.R.D. 270 (S.D. Ga. 1993).

**Permanent injunction appropriate.** — After a company in the cable and wire industry developed a logistics system that constituted a trade secret, it was proper to issue a

permanent injunction prohibiting a former employee of the company from working in the logistics department of a competitor for five years, or sooner if the competitor independently develops the competitor's own system. *Essex Group, Inc. v. Southwire Co.*, 269 Ga. 553, 501 S.E.2d 501 (1998).

**Royalty injunction appropriate.** — Trial court did not abuse the court's discretion in imposing a royalty injunction after making findings as to the public's interest in compe-

tition, plaintiff's delays in bringing the matter to resolution, and the adequacy of a royalty to protect the parties' respective interests. *Electronic Data Sys. Corp. v. Heinemann*, 268 Ga. 755, 493 S.E.2d 132 (1997).

**Cited in** *CMAX/Cleveland, Inc. v. UCR, Inc.*, 804 F. Supp. 337 (M.D. Ga. 1992); *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 130 F.3d 1009 (11th Cir. 1997).

## OPINIONS OF THE ATTORNEY GENERAL

**Applicability to state trade secrets.** — A state entity contending that information requested pursuant to the Open Records Act, § 50-18-70 et seq., constitutes a trade secret

to another, may exercise the entity's rights to protect the information under O.C.G.A. § 10-1-762. 1994 Op. Att'y Gen. No. 94-15.

### 10-1-763. Recovery of damages.

(a) In addition to or in lieu of the relief provided by Code Section 10-1-762, a person is entitled to recover damages for misappropriation. Damages can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss. If neither damages nor unjust enrichment caused by the misappropriation are proved by a preponderance of the evidence, the court may award damages caused by misappropriation measured in terms of a reasonable royalty for a misappropriator's unauthorized disclosure or use of a trade secret for no longer than the period of time for which use could have been prohibited.

(b) If willful and malicious misappropriation exists, the court may award exemplary damages in an amount not exceeding twice any award made under subsection (a) of this Code section.

(c) In no event shall a contract be required in order to maintain an action or to recover damages for misappropriation of a trade secret. (Code 1981, § 10-1-763, enacted by Ga. L. 1990, p. 1560, § 1.)

## JUDICIAL DECISIONS

**Summary judgment denied.** — Summary judgment was unwarranted on the misappropriation of trade secrets and unfair trade practices claims under Georgia statutory and common law because defendant software developer failed to timely provide plaintiff software developer with discoverable information about the PA system, and therefore, the court could not say that genuine issues of

material fact did not exist. *TDS Healthcare Sys. Corp. v. Humana Hosp. Ill., Inc.*, 880 F. Supp. 1572 (N.D. Ga. 1995).

Despite a corporation incorporator's testimony that there was "probably nothing" the corporation had which derived its competitive value from not being generally known and not being readily ascertainable by proper means, sufficient evidence was pre-



sented from which a jury could find that the computer software the corporation's president developed for the corporation satisfied the definition of a trade secret under the Georgia Trade Secrets Act of 1990, O.C.G.A. § 10-1-760 et seq., to withstand a motion for summary judgment. *Insight Tech., Inc. v. FreightCheck, LLC*, 280 Ga. App. 19, 633 S.E.2d 373 (2006).

**Pleading.** — There is no requirement in O.C.G.A. § 10-1-763 that punitive damages

be specifically asked for in the complaint, and exemplary damages may be awarded in the absence of such a request, if the evidence shows that willful and malicious misappropriation existed. *Brandenburg v. All-Fleet Refinishing, Inc.*, 252 Ga. App. 40, 555 S.E.2d 508 (2001).

**Cited in** *White v. Arthur Enters., Inc.*, 219 Ga. App. 124, 464 S.E.2d 225 (1995); *Camp Creek Hospitality Inns, Inc. v. Sheraton Franchise Corp.*, 130 F.3d 1009 (11th Cir. 1997).

### 10-1-764. Award of attorneys' fees.

If a claim of misappropriation is made in bad faith, a motion to terminate an injunction is made or resisted in bad faith, or willful and malicious misappropriation exists, the court may award reasonable attorneys' fees to the prevailing party. (Code 1981, § 10-1-764, enacted by Ga. L. 1990, p. 1560, § 1.)

### 10-1-765. Protection of trade secret during action.

In an action under this article, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval. (Code 1981, § 10-1-765, enacted by Ga. L. 1990, p. 1560, § 1.)

### RESEARCH REFERENCES

**ALR.** — Discovery of trade secret in state court action, 75 ALR4th 1009.

What constitutes "trade secrets and commercial or financial information obtained

from person and privileged or confidential", exempt from disclosure under Freedom of Information Act (5 USCS § 552(b)(4)) (FOIA), 139 ALR Fed 225.

### 10-1-766. Limitation of action.

An action for misappropriation must be brought within five years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered. For the purposes of this Code section, a continuing misappropriation by any person constitutes a single claim against that person, but this Code section shall be applied separately to the claim against each person who receives a trade secret from another person who misappropriated that trade secret. (Code 1981, § 10-1-766, enacted by Ga. L. 1990, p. 1560, § 1.)

## JUDICIAL DECISIONS

**Mere suspicion of misappropriation of trade secrets insufficient.** — Because: (1) the trial court erred in holding that mere suspicion of a possible misappropriation of an employer's trade secrets by one of the employer's former employees amounted to objectively reasonable notice sufficient to trigger the running of the statute; and (2) a fact issue existed as to whether the suspicions reflected in the employer's letters to

the former employee's counsel were sufficient to cause a reasonable person to investigate whether its trade secrets had been misappropriated, the trial court erred in granting the former employee partial summary judgment on the basis of the five-year statute of limitations under O.C.G.A. § 10-1-766. *Porex Corp. v. Haldopoulos*, 284 Ga. App. 510, 644 S.E.2d 349 (2007), cert. denied, 2007 Ga. LEXIS 498 (Ga. 2007).

## 10-1-767. Applicability of article.

(a) Except as provided in subsection (b) of this Code section, this article shall supersede conflicting tort, restitutionary, and other laws of this state providing civil remedies for misappropriation of a trade secret.

(b) This article shall not affect:

(1) Contractual duties or remedies, whether or not based upon misappropriation of a trade secret; provided, however, that a contractual duty to maintain a trade secret or limit use of a trade secret shall not be deemed void or unenforceable solely for lack of a durational or geographical limitation on the duty;

(2) Other civil remedies that are not based upon misappropriation of a trade secret; or

(3) The definition of a trade secret contained in Code Section 16-8-13, pertaining to criminal offenses involving theft of a trade secret or criminal remedies, whether or not based upon misappropriation of a trade secret. (Code 1981, § 10-1-767, enacted by Ga. L. 1990, p. 1560, § 1; Ga. L. 1991, p. 94, § 10.)

## JUDICIAL DECISIONS

**Federal preemption.** — Misappropriation claims under O.C.G.A. Art. 27, Ch. 1, T. 10 were not preempted by the federal Copyright Act (17 U.S.C. § 101 et seq.) because the claims involved the additional element of a breach of the confidentiality that was owed to the software owner under the owner's license agreement and common law. *CMAX/Cleveland, Inc. v. UCR, Inc.*, 804 F. Supp. 337 (M.D. Ga. 1992).

**Preemption of common law claims.** — When a marketing company presented a packaging idea to a beverage manufacturer, requiring that the secrecy of the idea be

maintained, and the manufacturer then asked another company to design a similar concept, as a result of which the marketing company sued the manufacturer, the marketing company's conversion, breach of confidential relationship and duty of good faith, unjust enrichment, and quantum meruit claims were preempted by O.C.G.A. § 10-1-767, as the subject matter of each of those claims was a trade secret. *Penalty Kick Mgmt. v. Coca Cola Co.*, 318 F.3d 1284 (11th Cir. 2003).

In a former employer's suit against a former employee and the new employer, the

former employer's conversion, misappropriation, unjust enrichment, quantum merit, and civil theft claims were dismissed, as O.C.G.A. § 10-1-767 was the exclusive remedy for misappropriation of trade secrets, and the other claims were based on the same facts that comprised the trade secret misappropriation claim. *Opteum Fin. Servs., LLC v. Spain*, 406 F. Supp. 2d 1378 (N.D. Ga. 2005).

**Breach of contract not preempted.** — After plaintiff former employer also asserted Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., claims, its common law breach of contract claim against defendant former employee was not superseded by the Act because, under O.C.G.A. § 10-1-767(b)(1), such a claim was not superseded, and the employee did not argue that there was an absence of a factual dispute as to whether the employee breached the employee's conflict of interest agreement. *Diamond Power Int'l, Inc. v. Davidson*, 540 F. Supp. 2d 1322 (N.D. Ga. 2007).

**Customer base as trade secret.** — Bankruptcy trustee had no action against defendants for their conversion of the debtor's customer base because the remedies provided by the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., for misappropriation of a trade secret are exclusive. In re *Hercules Auto. Prods., Inc.*, 245 Bankr. 903 (M.D. Ga. 1999).

Remedies under the Georgia Trade Secrets Act, O.C.G.A. § 10-1-760 et seq., for misappropriation of a debtor's customer list were not available to a bankruptcy trustee because the debtor did not take the steps necessary to protect the debtor's customer base as a trade secret. In re *Hercules Auto. Prods., Inc.*, 245 Bankr. 903 (M.D. Ga. 1999).

**Cited in** *Servicetrends, Inc. v. Siemens Medical Sys.*, 870 F. Supp. 1042 (N.D. Ga. 1994); *Equifax Servs., Inc. v. Examination Mgt. Servs., Inc.*, 216 Ga. App. 35, 453 S.E.2d 488 (1995).

## ARTICLE 28

### GEORGIA LEMON LAW

**Effective date.** — This chapter became effective January 1, 2009, except Code Section 10-1-795 became effective May 14, 2008.

**Editor's notes.** — Ga. L. 2008, p. 746, § 1, effective January 1, 2009, repealed the Code sections formerly codified at this article and enacted the current article. The former article consisted of §§ 10-1-780 through 10-1-794 and was based on Code 1981,

§§ 10-1-780 through 10-1-794, enacted by Ga. L. 1990, p. 1013, § 1; Ga. L. 1991, p. 94, § 10; Ga. L. 2000, p. 1589, § 3; Ga. L. 1996, p. 6, § 10; Ga. L. 1991, p. 604, § 1.

**Administrative rules and regulations.** — Motor Vehicle Warranty Rights Act, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Consumer Affairs, Chapters 122-9 — 122-14.

### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — "Lemon Law" Litigation — Existence of Substantial Defect, 11 POF3d 343.

**Am. Jur. Trials.** — Automobile Warranty Litigation, 39 Am. Jur. Trials 1.

**ALR.** — Award of attorney's fees under

state motor vehicle warranty legislation (lemon laws), 82 ALR5th 501.

Validity, construction and effect of state motor vehicle warranty legislation, 88 ALR5th 301.

### 10-1-780. Short title.

This article shall be known and may be cited as the "Georgia Lemon Law." (Code 1981, § 10-1-780, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)



**RESEARCH REFERENCES**

**ALR.** — Validity, construction and effect of state motor vehicle warranty legislation, 88 ALR5th 301.

**10-1-781. Legislative intent.**

The General Assembly recognizes that a new motor vehicle is a major consumer purchase and that a defectively manufactured new motor vehicle is likely to create hardship for, or may cause injury to, the consumer. It is the intent of the General Assembly to create a procedure for expeditious resolution of complaints and disputes concerning nonconforming new motor vehicles, to provide a method for notifying consumers of their rights under this article, and to ensure that consumers receive information, documents, and service necessary to enable them to exercise their rights under this article. In enacting these comprehensive measures, the General Assembly intends to encourage manufacturers to take all steps necessary to correct nonconformities in new motor vehicles and to create the proper blend of private and public remedies necessary to enforce this article. (Code 1981, § 10-1-781, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-782. Definitions.**

Unless the context clearly requires otherwise, as used in this article, the term:

(1) “Adjusted capitalized cost” means the amount shown as the adjusted capitalized cost in the lease agreement.

(2) “Administrator” means the administrator appointed pursuant to Code Section 10-1-395 or his or her designee.

(3) “Authorized agent” means any person, including a franchised motor vehicle dealer, who is authorized by the manufacturer to service motor vehicles.

(4) “Collateral charges” means charges incurred by a consumer as a result of the purchase of a new motor vehicle including, but not limited to, charges attributable to factory or dealer installed options, sales tax and title charges, and earned finance charges.

(5) “Consumer” means each of the following:

(A) A person who purchases or leases a new motor vehicle for personal, family, or household use and not for the purpose of selling or leasing the new motor vehicle to another person; and

(B) A person who purchases or leases ten or fewer new motor vehicles a year for business purposes other than limousine rental services.

(6) "Days" means calendar days.

(7) "Express warranty" means a warranty which is given by the manufacturer in writing.

(8) "Incidental costs" means any reasonable expenses incurred by a consumer in connection with the repair of a new motor vehicle, including, but not limited to, payments to new motor vehicle dealers for the attempted repair of nonconformities, towing charges, and the costs of obtaining alternative transportation.

(9) "Informal dispute settlement mechanism" means any procedure established, employed, utilized, or sponsored by a manufacturer for the purpose of resolving disputes with consumers under this article.

(10) "Lemon law rights period" means the period ending two years after the date of the original delivery of a new motor vehicle to a consumer or the first 24,000 miles of operation after delivery of a new motor vehicle to the original consumer, whichever occurs first. The lemon law rights period shall be extended by one day for each day that repair services are not available to the consumer as a direct result of a strike, war, invasion, terrorist act, blackout, fire, flood, other disaster, or declared state of emergency.

(11) "Lessee" means any consumer who enters into a written lease agreement or contract to lease a new motor vehicle for a period of at least one year and is responsible for repairs to such vehicle.

(12) "Lessee cost" means the aggregate payment made by the lessee at the inception of the lease agreement or contract, inclusive of any allowance for a trade-in vehicle, and all other lease payments made by or on behalf of the lessee to the lessor.

(13) "Lessor" means a person who holds title to a new motor vehicle that is leased to a consumer under a written lease agreement or contract or who holds the lessor's rights under such agreement.

(14) "Manufacturer" means any person engaged in the business of constructing or assembling new motor vehicles or engaged in the business of importing or receiving imports of new motor vehicles into the United States for the purpose of selling or distributing them to new motor vehicle dealers.

(15) "New motor vehicle" means any self-propelled vehicle primarily designed for the transportation of persons or property over the public highways that was leased, purchased, or registered in this state by the consumer or lessor to whom the original motor vehicle title was issued without previously having been issued to any person other than a new motor vehicle dealer. The term "new motor vehicle" does not include any vehicle on which the title and other transfer documents show a used,

rather than new, vehicle. The term “new motor vehicle” also does not include trucks with more than 12,000 pounds gross vehicle weight rating, motorcycles, or golf carts. If a new motor vehicle is a motor home, this article shall apply to the self-propelled vehicle and chassis, but does not include those portions of the vehicle designated, used, or maintained primarily as living quarters, office, or commercial space.

(16) “New motor vehicle dealer” means a person who holds a dealer agreement with a manufacturer for the sale of new motor vehicles, who is engaged in the business of purchasing, selling, servicing, exchanging, leasing, or dealing in new motor vehicles, or who is licensed or otherwise authorized to utilize trademarks or service marks associated with one or more makes of motor vehicles in connection with such sales.

(17) “Nonconformity” means a defect, a serious safety defect, or a condition, any of which substantially impairs the use, value, or safety of a new motor vehicle to the consumer or renders the new motor vehicle nonconforming to a warranty. A nonconformity does not include a defect, a serious safety defect, or a condition that is the result of abuse, neglect, or unauthorized modification or alteration of the new motor vehicle.

(18) “Panel” means the new motor vehicle arbitration panel as designated in this article.

(19) “Person” shall have the same meaning as provided in Code Section 10-1-392.

(20) “Purchase price” means, in the case of a sale of a new motor vehicle to a consumer, the cash price of the new motor vehicle appearing in the sales agreement or contract, inclusive of any reasonable allowance for a trade-in vehicle. In the case of a lease executed by a consumer, “purchase price” refers to the agreed upon value of the vehicle as shown in the lease agreement or contract.

(21) “Reacquired vehicle” means a new motor vehicle with an alleged nonconformity that has been replaced or repurchased by the manufacturer as the result of any court order or judgment, arbitration decision, voluntary settlement entered into between a manufacturer and the consumer, or voluntary settlement between a new motor vehicle dealer and a consumer in which the manufacturer directly or indirectly participated.

(22) “Reasonable number of attempts” under the lemon law rights period shall be as set forth in subsection (a) of Code Section 10-1-784.

(23) “Reasonable offset for use” means an amount calculated by multiplying the purchase price of a vehicle by the number of miles directly attributable to consumer use as of the date on which the consumer first delivered the vehicle to the manufacturer, its authorized



agent, or the new motor vehicle dealer for repair of a nonconformity and dividing the product by 120,000, or in the case of a motor home 90,000.

(24) “Replacement motor vehicle” means a new motor vehicle that is identical or at least equivalent to the motor vehicle to be replaced as the motor vehicle to be replaced existed at the time of purchase or execution of the lease.

(25) “Serious safety defect” means a life-threatening defect or a malfunction that impedes the consumer’s ability to control or operate the motor vehicle for ordinary use or reasonable intended purposes or creates a risk of fire or explosion.

(26) “Superior court” means the superior court in the county where the consumer resides, except if the consumer does not reside in this state, then the superior court in the county where an arbitration hearing was conducted pursuant to this article.

(27) “Warranty” means any manufacturer’s express warranty or any affirmation of fact or promise made by the manufacturer in connection with the sale of a new motor vehicle to a consumer concerning the vehicle’s materials, workmanship, operation, or performance which becomes part of the basis of the bargain. The term shall not include any extended coverage purchased by the consumer as a separate item or any statements made by the dealer in connection with the sale of a motor vehicle to a consumer which relate to the nature of the material or workmanship and affirm or promise that such material or workmanship is free of defects or will meet a specified level of performance. (Code 1981, § 10-1-782, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**Cross references.** — Georgia vehicle protection product, § 33-34A-1 et seq.

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the provisions, decisions under former Code Section 10-1-782, are included in the annotations for this Code section.

**Automobile used as demonstrator was “new car.”** — In an action alleging violations of the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., because the van leased to plaintiffs was always titled in the dealer and was never the subject of a retail sale or lease,

it was a “new car”. Therefore, the dealer did not engage in fraudulent or unfair business practices by listing it as “new,” even though it had been driven as a demonstrator and had been in a collision. *Kondo v. Marietta Toyota, Inc.*, 224 Ga. App. 490, 480 S.E.2d 851 (1997) (decided under former O.C.G.A. § 10-1-780 et seq.).

**Cited in** *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

### 10-1-783. Provision of owner’s manual and notice of rights; fully itemized and legible repair order; copies of reports.

(a) The manufacturer shall publish an owner’s manual and provide it to the new motor vehicle dealer. The owner’s manual shall include a clear and

conspicuous listing of addresses, e-mail addresses, facsimile numbers, and toll-free telephone numbers for the manufacturer's customer service personnel who are authorized to direct activities regarding repair of the consumer's vehicle. A manufacturer shall also provide all applicable manufacturer's written warranties to the new motor vehicle dealer, who shall transfer the owner's manual and all applicable manufacturer's written warranties to the consumer at the time of purchase or vehicle acquisition.

(b) At the time of purchase or vehicle acquisition, the new motor vehicle dealer shall provide the consumer with a written statement that explains the consumer's rights under this article. The statement shall be written by the administrator and shall contain information regarding the procedures and remedies under this article.

(c) By October 1 of each year, the manufacturer shall forward to the administrator one copy of the owner's manual and the express warranty for each make and model of current year new motor vehicles it sells in this state. To the extent the instructions, terms, and conditions in the owner's manuals and express warranties for other models of the same make are substantially the same, submission of the owner's manual and express warranty for one model and a list of all other models for that make will satisfy the requirements of this subsection.

(d) Each time the consumer's new motor vehicle is returned from being diagnosed or repaired, the manufacturer, its authorized agent, or the new motor vehicle dealer shall provide to the consumer a fully itemized and legible statement or repair order containing a general description of the problem reported by the consumer; the date and the odometer reading when the vehicle was submitted for repair; the date and odometer reading when the vehicle was made available to the consumer; the results of any diagnostic test, inspection, or test drive; a description of any diagnosis or problem identified by the manufacturer, its authorized agent, or the new motor vehicle dealer; and an itemization of all work performed on the vehicle, including, but not limited to, parts and labor.

(e) Upon request of the consumer, the manufacturer, its authorized agent, or the new motor vehicle dealer shall provide a copy of any report or computer reading compiled by the manufacturer's representative regarding inspection, diagnosis, or test drive of the consumer's new motor vehicle. (Code 1981, § 10-1-783, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-784. Reasonable attempts to correct nonconformity; option to repurchase or replace vehicle.**

(a)(1) If a consumer reports a nonconformity during the lemon law rights period, the manufacturer, its authorized agent, or the new motor vehicle dealer shall be allowed a reasonable number of attempts to repair and correct the nonconformity. A reasonable number of attempts shall be

deemed to have been undertaken by the manufacturer, its authorized agent, or the new motor vehicle dealer if, during the lemon law rights period:

(A) A serious safety defect has been subject to repair one time and the serious safety defect has not been corrected;

(B) The same nonconformity has been subject to repair three times, and the nonconformity has not been corrected; or

(C) The vehicle is out of service by reason of repair of one or more nonconformities for a cumulative total of 30 days.

If the vehicle is being repaired by the manufacturer through an authorized agent or a new motor vehicle dealer on the date that the lemon law rights period expires, the lemon law rights period shall be extended until that repair attempt has been completed.

(2)(A) If the manufacturer through an authorized agent or a new motor vehicle dealer is unable to repair and correct a nonconformity after a reasonable number of attempts, the consumer shall notify the manufacturer by statutory overnight delivery or certified mail, return receipt requested, of the need to repair and correct the nonconformity. The notice shall be sent to the address provided by the manufacturer in the owner's manual. The manufacturer shall have 28 days from its receipt of the notice to make a final attempt to repair and correct the nonconformity.

(B) By not later than the close of business on the seventh day following receipt of notice from the consumer, the manufacturer shall notify the consumer of the location of a repair facility that is reasonably accessible to the consumer. By not later than the close of business on the fourteenth day following the manufacturer's receipt of notice, the consumer shall deliver the nonconforming new motor vehicle to the designated repair facility.

(C) If the manufacturer fails to notify the consumer of the location of a reasonably accessible repair facility within seven days of its receipt of notice, or fails to complete the final attempt to repair and correct the nonconformity with the 28 day time period, the requirement that it be given a final attempt to repair and correct the nonconformity shall not apply. However, if the consumer delivers the nonconforming new motor vehicle to the designated repair facility more than 14 days from the date the manufacturer receives notice from the consumer, the 28 day time period shall be extended and the manufacturer shall have 14 days from the date the nonconforming new motor vehicle is delivered to the repair facility to complete the final attempt to repair and correct the nonconformity.



(3) No manufacturer, its authorized agent, or new motor vehicle dealer may refuse to diagnose or repair any alleged nonconformity for the purpose of avoiding liability under this article.

(b)(1) If the manufacturer, through an authorized agent or new motor vehicle dealer to whom the manufacturer directs the consumer to deliver the vehicle, is unable to correct a nonconformity after the final attempt, or if a vehicle has been out of service by reason of repair of one or more nonconformities for 30 days during the lemon law rights period, the manufacturer shall, at the option of the consumer, repurchase or replace the vehicle. The consumer shall notify the manufacturer, in writing by statutory overnight delivery or certified mail, return receipt requested, of which option the consumer elects. The manufacturer shall have 20 days from receipt of the notice to repurchase or replace the vehicle.

(2)(A) If a consumer who is a lessee elects to receive a replacement motor vehicle, in addition to providing the replacement motor vehicle, the manufacturer shall pay to the lessor an amount equal to all charges that the lessor will incur as a result of the replacement transaction and shall pay the lessee an amount equal to all incidental costs that have been incurred by the lessee plus all charges that the lessee will incur as a result of the replacement transaction. If a lessee elects to receive a replacement motor vehicle, all terms of the existing lease agreement or contract shall remain in force and effect, except that the vehicle identification information contained in the lease agreement or contract shall be changed to conform to the vehicle identification information of the replacement vehicle.

(B) If a consumer who is not a lessee elects to receive a replacement motor vehicle, in addition to providing the replacement motor vehicle, the manufacturer shall pay to the consumer an amount equal to all incidental costs incurred by the consumer plus all charges that the consumer will incur as a result of the replacement transaction.

(3)(A) If a consumer who is a lessee elects a repurchase, the manufacturer shall pay to the lessee an amount equal to all payments made by the lessee under the lease agreement or contract, including, but not limited to, the lessee cost, plus all incidental costs, less a reasonable offset for use of the nonconforming new motor vehicle. The manufacturer shall pay to the lessor an amount equal to 110 percent of the adjusted capitalized cost of the nonconforming new motor vehicle. After the lessor has received payment from the manufacturer as specified in this subparagraph and payment from the consumer of all past due charges, if any, the consumer shall have no further obligation to the lessor.

(B) If a consumer who is not a lessee elects a repurchase, the manufacturer shall pay to the consumer an amount equal to the

purchase price of the nonconforming new motor vehicle plus all collateral charges and incidental costs, less a reasonable offset for use of the nonconforming new motor vehicle. Payment shall be made to the consumer and lienholder of record, if any, as their interests may appear on the records of ownership. (Code 1981, § 10-1-784, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-785. Compelled replacement or repurchase through arbitration; manufacturer's informal dispute settlement mechanism; revocation of mechanism.**

(a)(1) If a manufacturer does not replace or repurchase a nonconforming new motor vehicle after being requested to do so under subsection (b) of Code Section 10-1-784, the consumer may move to compel replacement or repurchase by applying for arbitration pursuant to Code Section 10-1-786. However, if a manufacturer has established an informal dispute settlement mechanism which the administrator has certified as complying with the provisions and rules of this article, the consumer shall be eligible to apply for arbitration only after submitting a dispute under this article to the informal dispute settlement mechanism.

(2) A consumer must file a claim with the manufacturer's certified informal dispute settlement mechanism no later than one year after expiration of the lemon law rights period.

(3) After a decision has been rendered by the certified informal dispute settlement mechanism, the consumer is eligible to apply for arbitration pursuant to Code Section 10-1-786.

(4) If a decision is not rendered by the certified informal dispute settlement mechanism within 40 days of filing, the requirement that the consumer submit his or her dispute to the certified informal dispute settlement mechanism shall not apply and the consumer is eligible to apply for arbitration under Code Section 10-1-786.

(b) Certified informal dispute settlement mechanisms shall be required to take into account the principles contained in and any rules promulgated under this article and shall take into account all legal and equitable factors germane to a fair and just decision. A decision shall include any remedies appropriate under the circumstances, including repair, replacement, refund, and reimbursement for collateral charges and incidental costs. For purposes of this Code section, the phrase "take into account the principles contained in and any rules promulgated under this article" means to be aware of the provisions of this article, to understand how they might apply to the circumstances of the particular dispute, and to apply them if it is appropriate and fair to both parties to do so.

(c) A certified informal dispute settlement mechanism shall keep such records as prescribed by the administrator in rules promulgated under this

article and shall allow the administrator, without notice, to inspect and obtain copies of the records. Copies of any records requested by the administrator shall be provided promptly to the administrator at no cost.

(d) A manufacturer may apply to the administrator for certification of its informal dispute settlement mechanism. The administrator may, in his or her discretion, impose requirements on an informal dispute settlement mechanism in order for it to be certified. Within a reasonable time following receipt of the application, the administrator shall certify the informal dispute settlement mechanism or notify the manufacturer of the reason or reasons for denial of the requested certification.

(e) At any time the administrator has reason to believe that a certified informal dispute settlement mechanism is no longer in compliance with this article, he or she may notify the manufacturer of intent to revoke the informal dispute settlement mechanism's certification. The notice shall contain a statement of the reason or reasons for the revocation.

(f) The manufacturer shall have ten days from its receipt of notice of denial of requested certification or notice of intent to revoke certification to submit a written request for a hearing to contest the denial or intended revocation. If a hearing is requested, it shall be held within 30 days of the administrator's receipt of the hearing request. The hearing shall be conducted by the Office of State Administrative Hearings following the procedures set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(g) No representation shall be made to a consumer that his or her dispute must be submitted to an informal dispute settlement mechanism that is not certified by the administrator pursuant to this Code section. (Code 1981, § 10-1-785, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-786. Request for arbitration; determination of eligibility; notifications; timing; requirements for decision.**

(a) A consumer shall request arbitration by filing a written application for arbitration with the administrator. The application must be filed no later than one year from the date of expiration of the lemon law rights period or 60 days from the conclusion of the certified informal dispute settlement mechanism's proceeding, whichever occurs later.

(b)(1) After receiving an application for arbitration, the administrator shall determine whether the dispute is eligible for arbitration. Manufacturers shall be required to submit to arbitration under this article if the consumer's dispute is deemed eligible for arbitration by the administrator. Disputes deemed eligible for arbitration shall be assigned to an arbitrator or arbitrators appointed pursuant to Code Section 10-1-789.

(2)(A) A consumer whose dispute is determined to be ineligible for arbitration by the administrator may appeal the determination of



ineligibility to an arbitrator or arbitrators appointed pursuant to Code Section 10-1-789.

(B) If the arbitrator or arbitrators determine that the consumer's dispute is eligible for arbitration, the arbitrator or arbitrators shall retain jurisdiction and the consumer's dispute shall proceed in accordance with this Code section.

(C) If the arbitrator or arbitrators determine that the consumer's dispute is not eligible for arbitration, a written decision shall be prepared and sent to the consumer and manufacturer by certified mail, return receipt requested.

(D) The decision of ineligibility may be appealed by the consumer under the provisions set forth in subsection (a) of Code Section 10-1-787. On appeal, the court shall consider only the issue of eligibility for arbitration.

(3) If the court finds that a consumer's appeal from a determination of ineligibility is frivolous or has been filed in bad faith or for the purpose of harassment, the court may require the consumer to pay to the administrator all costs incurred as a direct result of the appeals from the administrator's determination of ineligibility.

(c) A lessee shall notify the lessor of the pending arbitration, in writing, within ten days of the lessee's receipt of notice that a dispute has been deemed eligible for arbitration and shall provide to the arbitrator or arbitrators proof that notice was given to the lessor. Within ten days of its receipt of notice from the lessee, a lessor may petition the arbitrator or arbitrators to be a party to the arbitration proceeding.

(d) The arbitrator or arbitrators shall make every effort to conduct the arbitration hearing within 40 days from the date the dispute is deemed eligible for arbitration. The hearing shall be held at a location that is reasonably convenient to the Georgia consumer. Failure to hear the case within 40 days shall not divest authority of the arbitrator or arbitrators to hear the dispute or void any decision ultimately rendered.

(e) If the arbitrator or arbitrators determine:

(1) That a reasonable number of attempts has been undertaken to repair and correct the nonconformity and that the manufacturer was given the opportunity to make a final attempt to repair and correct the nonconformity and was unable to correct it; or

(2) That a new motor vehicle was out of service by reason of repair of one or more nonconformities for a cumulative total of 30 days within the lemon law rights period,

the consumer shall be awarded replacement or repurchase of the new motor vehicle as provided under Code Section 10-1-784. The arbitrator or

arbitrators also may award attorney's fees and technical or expert witness fees to a consumer who prevails.

(f) The decision of the arbitrator or arbitrators shall be in writing, be signed, and contain findings of fact and conclusions of law. The original signed decision shall be filed with the administrator and copies shall be sent to all parties. The filing of the decision with the administrator constitutes entry of the decision.

(g) A decision of the arbitrator or arbitrators that has become final under the provisions of subsection (a) of Code Section 10-1-787 may be filed with the clerk of the superior court, shall have all the force and effect of a judgment or decree of the court, and may be enforced in the same manner as any other judgment or decree.

(h) No arbitrator may be required to testify concerning any arbitration and the arbitrator's notes or other records are not subject to discovery. This provision does not extend to testimony or documents sought in connection with legal claims brought against an arbitrator arising out of an arbitration proceeding. (Code 1981, § 10-1-786, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Code Section 10-1-786, are included in the annotations for this Code section.

**Right to file action for breach of warranty not barred.** — Trial court erred in granting summary judgment to a vehicle manufacturer as to a purchaser's claim for breach of warranty, as the purchaser did not waive the right to bring the breach of warranty claim

by engaging in arbitration proceedings under the Motor Vehicle Warranty Rights Act, former O.C.G.A. §§ 10-1-786(1) and 10-1-794, because sections of the Uniform Commercial Code which dealt with breach of warranty actions were not included in former O.C.G.A. § 10-1-786. *Rodgers v. GMC*, 277 Ga. App. 547, 627 S.E.2d 151 (2006) (decided under former O.C.G.A. § 10-1-786).

### **10-1-787. Finality of arbitrator's decision; appeals by manufacturers; time for compliance with arbitrator's decision.**

(a) The decision of the arbitrator or arbitrators is final unless a party to the arbitration, within 30 days of entry of the decision, appeals the decision to the superior court. A party who appeals a decision shall follow the procedures set forth in Article 2 of Chapter 3 of Title 5, and any appeal shall be de novo; however, the decision of the arbitrator or arbitrators shall be admissible in evidence.

(b) If the manufacturer appeals, the court may require the manufacturer to post security for the consumer's financial loss due to the passage of time for review.

(c) If the manufacturer appeals and the consumer prevails, recovery, in addition to the arbitrator's award, shall include all charges incurred by the

consumer during the pendency of, or as a result of, the appeal, including, but not limited to, continuing collateral and incidental costs, technical or expert witness fees, attorney's fees, and court costs.

(d) A manufacturer which does not appeal a decision in favor of a consumer must fully comply with the decision within 40 days of entry thereof. If a manufacturer does not fully comply within the 40 day time period, the administrator may issue an order imposing a civil penalty of up to \$1,000.00 per day for each day that the manufacturer remains out of compliance. The provisions of Code Sections 10-1-398 and 10-1-398.1 shall apply in connection with the imposition of a civil penalty under this subsection. It shall be an affirmative defense to the imposition of a civil penalty under this subsection that a delay or failure to comply was beyond the manufacturer's control or that a delay was acceptable to the consumer. (Code 1981, § 10-1-787, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-788. Exhaustion of remedies under article required.**

The provisions of this article are not available to a consumer in a civil action unless the consumer has first exhausted all remedies provided for in this article. (Code 1981, § 10-1-788, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-789. Establishment of motor vehicle arbitration panel; compensation; conduct; liability.**

(a) The administrator shall establish a new motor vehicle arbitration panel to resolve disputes between consumers and manufacturers arising under this article. The administrator, in his or her discretion, may operate the panel by contracting with public or private entities to conduct arbitrations under this article or by appointing individuals to serve as panel member arbitrators. An arbitrator shall be licensed to practice law in the State of Georgia and a member in good standing of the State Bar of Georgia or shall have at least two years' experience in professional arbitration or dispute resolution. No arbitrator shall be affiliated with or involved in the manufacture, distribution, sale, lease, or servicing of motor vehicles.

(b) Panel member arbitrators and entities that contract with the administrator to provide arbitration services shall be compensated for time and expenses at a rate to be determined by the administrator.

(c) Each arbitration proceeding shall be conducted by either one or three arbitrators, each of whom is to be assigned by the administrator or contracted entity.

(d) Neither the administrator, an entity with which the administrator has contracted, nor any arbitrator shall be civilly liable for any decision, action,



statement, or omission made in connection with any proceeding under this article, except in circumstances where the decision, action, statement, or omission was made with malice or gross negligence. (Code 1981, § 10-1-789, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-790. Requirements for transfer of reacquired vehicle.**

(a) No manufacturer, its authorized agent, new motor vehicle dealer, or other transferor shall knowingly resell, either at wholesale or retail, lease, transfer a title, or otherwise transfer a reacquired vehicle, including a vehicle reacquired under a similar statute of any other state, unless the vehicle is being sold for scrap and the manufacturer has notified the administrator of the proposed sale or:

(1) The fact of the reacquisition and nature of any alleged nonconformity are clearly and conspicuously disclosed in writing to the prospective transferee, lessee, or buyer; and

(2) The manufacturer warrants to correct such nonconformity for a term of one year or 12,000 miles, whichever occurs first.

A knowing violation of this subsection shall constitute an unfair or deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of Chapter 1 of Title 10 and will subject the violator to an action by a consumer under Code Section 10-1-399.

(b) The manufacturer shall have 30 days to notify the administrator that a vehicle has been reacquired in this state under the provisions of this article. The notice shall be legible and include, at a minimum, the vehicle year, make, model, and identification number; the date and mileage at the time the vehicle was reacquired; the nature of the alleged nonconformity; the reason for reacquisition; and the name and address of the original consumer. When the manufacturer resells, leases, transfers, or otherwise disposes of a reacquired vehicle, the manufacturer shall, within 30 days of the resale, lease, transfer, or disposition, notify the administrator of the vehicle year, make, model, and identification number; the date of the sale, lease, transfer, or disposition of the vehicle; and the name and address of the buyer, lessee, or transferee.

(c) If a manufacturer resells, leases, transfers, or otherwise disposes of a motor vehicle in this state that it reacquired under a similar statute of any other state, the manufacturer shall, within 30 days of the resale, lease, transfer, or disposition, notify the administrator of the transaction. The contents of the notice shall comply with the requirements of subsection (b) of this Code section.

(d) Manufacturers shall use forms approved by the administrator. The forms shall contain the information required under this Code section and

any other information the administrator deems necessary for implementation of this Code section. (Code 1981, § 10-1-790, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-791. Consumer fees to implement provisions of article; enforcement.**

(a) A fee of \$3.00 shall be collected by the new motor vehicle dealer from the consumer at completion of a sale or execution of a lease of each new motor vehicle. The fee shall be forwarded quarterly to the Office of Planning and Budget for deposit in the new motor vehicle arbitration account created in the state treasury. The payments are due and payable the first day of the month in each quarter for the previous quarter's collection and shall be mailed by the new motor vehicle dealer not later than the twentieth day of such month. The first day of the month in each quarter is July 1, October 1, January 1, and April 1 for each year. Consumer fees in the account shall be used for the purposes of this article. Funds in excess of the appropriated amount remaining in the new motor vehicle arbitration account at the end of each fiscal year shall be transferred to the general treasury. The new motor vehicle dealer shall retain \$1.00 of each fee collected to cover administrative costs.

(b) The administrator appointed pursuant to subsection (g) of Code Section 10-1-395 shall have the power to enforce the provisions of this Code section. The administrator's enforcement power shall include:

(1) The authority to investigate alleged violations through use of all investigative powers available under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act"; and

(2) The authority to initiate proceedings, pursuant to Code Section 10-1-397, in the event of a violation of this Code section. Such proceedings include, without limitation, issuance of a cease and desist order, a civil penalty order imposing a civil penalty up to a maximum of \$2,000.00 for each violation, and proceedings to seek additional relief in any superior court of competent jurisdiction. The provisions of Code Sections 10-1-398, 10-1-398.1, 10-1-402, and 10-1-405 shall apply to proceedings initiated by the administrator under this Code section. (Code 1981, § 10-1-791, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-792. Other rights and remedies.**

(a) Except as provided in subsection (a) of Code Section 10-1-790, this article shall not create or give rise to any cause of action by manufacturers or consumers against new motor vehicle dealers. No new motor vehicle dealer shall be held liable by a manufacturer or a consumer for any collateral charges, incidental charges, costs, purchase price refunds, or

vehicle replacements. Manufacturers and consumers shall not make new motor vehicle dealers party to an arbitration proceeding or any other proceeding under this article. A new motor vehicle dealer that is named as a party in any proceeding brought by a consumer or a manufacturer under this article, except as provided in subsection (a) of Code Section 10-1-790, shall be entitled to an award of reasonable attorney's fees and expenses of litigation incurred in connection with such proceeding.

(b) The provisions of this article shall not impair any obligation under any manufacturer-dealer franchise agreement; provided, however, that any provision of any manufacturer-dealer franchise agreement which attempts to shift any duty, obligation, responsibility, or liability imposed upon a manufacturer by this article to a new motor vehicle dealer, either directly or indirectly, shall be void and unenforceable, except for any liability imposed upon a manufacturer by this article which is directly caused by the gross negligence of the dealer in attempting to repair the motor vehicle after such gross negligence has been determined by the hearing officer, as provided in Article 22 of this chapter, the "Georgia Motor Vehicle Franchise Practices Act." (Code 1981, § 10-1-792, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-793. Violations constitute unfair and deceptive act or practice; cumulative effect.**

(a) A violation of this article shall constitute an unfair and deceptive act or practice in the conduct of consumer transactions under Part 2 of Article 15 of this chapter, the "Fair Business Practices Act"; provided, however, that enforcement against such violations shall be by public enforcement by the administrator and, except as provided in subsection (a) of Code Section 10-1-790, shall not be enforceable through private action under Code Section 10-1-399.

(b) Except as otherwise provided, this article is cumulative with other laws and is not exclusive. The rights and remedies provided for in this article shall be in addition to any other rights and remedies that are otherwise available to a consumer under any other law. (Code 1981, § 10-1-793, enacted by Ga. L. 2008, p. 746, § 1/HB 470; Ga. L. 2009, p. 8, § 10/SB 46.)

**The 2009 amendment**, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, revised language in this Code section.

**10-1-794. Staff for administration.**

All administrative staff hired by the administrator to aid in the administration of this article shall be in the unclassified service and compensated at a salary determined by the administrator. (Code 1981, § 10-1-794, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)



**10-1-795. Promulgation of rules and regulations.**

The administrator shall promulgate rules and regulations and establish procedures necessary to carry into effect, implement, and enforce the provisions of this article. The authority granted to the administrator pursuant to this Code section shall be exercised at all times in conformity with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” (Code 1981, § 10-1-795, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**Effective date.** — This Code section became effective May 14, 2008.

**10-1-796. Severability.**

If any provision of this article or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of this article which can be given effect without the invalid provision or application, and to this end the provisions of this article are severable. (Code 1981, § 10-1-796, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**10-1-797. Consumer cannot waive rights.**

Any agreement entered into by a consumer that waives, limits, or disclaims the rights set forth in this article shall be unenforceable as contrary to public policy. (Code 1981, § 10-1-797, enacted by Ga. L. 2008, p. 746, § 1/HB 470.)

**ARTICLE 29****FARM TRACTOR WARRANTY ACT****10-1-810. Short title.**

This article shall be known and may be cited as the “Farm Tractor Warranty Act.” (Code 1981, § 10-1-810, enacted by Ga. L. 1991, p. 419, § 1.)

**10-1-811. Definitions.**

As used in this article, the term:

(1) “Consumer” means a purchaser, other than for purposes of resale, of a new farm tractor, a person to whom the new farm tractor is transferred for the same purposes during the duration of an express

warranty applicable to the farm tractor, and any other person entitled by the terms of the warranty to enforce the terms of the warranty. In the case of an agricultural vehicle within the warranty period, the sale must be made through an authorized farm tractor dealer.

(2) “Farm tractor” means any self-propelled vehicle which is designed primarily for pulling or propelling agricultural machinery and implements and is used principally in the occupation or business of farming, including an implement of husbandry that is self-propelled, excluding forestry equipment and equipment designed primarily for construction purposes.

(3) “Manufacturer” means a person engaged in the business of manufacturing, assembling, or distributing farm tractors who, under normal business conditions during the year, manufactures, assembles, or distributes to dealers at least ten new farm tractors.

(4) “Manufacturer’s express warranty” or “warranty” means the written warranty of the manufacturer of a new farm tractor of its condition and fitness for use, including any terms or conditions precedent to the enforcement of obligations under that warranty.

(5) “Nonconformity” means any condition of the farm tractor that makes it impossible to use for the purpose for which it was designed or manufactured.

(6) “Reasonable allowance for prior use” means the number of field hours performed by the farm equipment, divided by eight field hours per day, multiplied by 50 percent of the daily reasonable rental rate, referenced by model, in the most current *North American Equipment Dealers Association Official Guide*. (Code 1981, § 10-1-811, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.)

**10-1-812. Written notice of warranty supplied by manufacturer and presented by dealer to consumer at time of purchase.**

The manufacturer must supply to the dealer and the dealer must present directly to the consumer at the time of purchase a written notice stating, in ten-point all-capital type, in substantially the following form:

“This equipment is subject to Article 29 of Chapter 1 of Title 10 of the Official Code of Georgia Annotated, entitled the ‘Farm Tractor Warranty Act.’ To be entitled to a refund or replacement, you must first notify the manufacturer or its agent and the authorized dealer which was a party to the sale of the problem in writing and give them an opportunity to repair the equipment.

<u>Manufacturer</u>	<u>Agent</u>	<u>Dealer</u>
Name	Name	Name
Address	Address	Address
Telephone number	Telephone number	Telephone number"

(Code 1981, § 10-1-812, enacted by Ga. L. 1991, p. 419, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, “all-capital” was substituted for “all capital” near the beginning of this Code section.

**10-1-813. Opportunity to make repairs in order to conform to express written warranties.**

If the farm tractor does not conform to applicable express written warranties and the consumer reports the nonconformity to the manufacturer and its authorized dealer within 18 months of the date of the original delivery of the farm tractor to the consumer, the manufacturer or its authorized dealers shall make the repairs necessary to make the farm tractor conform to the express written warranties, notwithstanding that the repairs are made after the expiration of the warranty term or the 18 month period. (Code 1981, § 10-1-813, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.)

**10-1-814. Replacement of or refund for nonconforming farm tractor; limitation of liability.**

(a) If the manufacturer or its authorized dealers are unable to make the farm tractor conform to any applicable express written warranty by repairing or correcting any condition which substantially impairs the use or market value of the farm tractor to the consumer within the time periods and after the number of attempts specified in subsection (c) of this Code section, the manufacturer, through its authorized dealer who sold the farm tractor, shall, at the option of the consumer, replace the farm tractor with a comparable farm tractor, charging the consumer only a reasonable allowance for the consumer’s use of the farm tractor, or accept the return of the farm tractor from the consumer and refund to the consumer the cash purchase price, including sales tax, license fees, registration fees, and any similar governmental charges, less a reasonable allowance for prior use. Refunds shall be made to the consumer and lienholder, if any, as their interests may appear in the county superior court clerk’s office. If no replacement or refund is made, the consumer may bring a civil action against the manufacturer to enforce the obligation. No action may be brought unless the manufacturer has received prior direct written notification from or on behalf of the consumer and has been offered the opportunities, as set forth in subsection (c) of this Code section, to cure the



condition alleged within a reasonable time that is not to exceed 30 business days.

(b) No dealer or distributor shall be held liable by the manufacturer or by the consumer for any collateral charges, damages, costs, purchase price refunds, or replacements, and manufacturers and consumers shall not have a cause of action against a dealer or distributor.

(c) The replacement or refund obligation specified in subsection (a) of this Code section shall arise if the manufacturer or its authorized dealers are unable to make the farm tractor conform to applicable express written warranties within 18 months of the original physical delivery of the farm tractor to the consumer and the same nonconformity has been subject to repair four or more times by the manufacturer or its authorized dealers, but such nonconformity continues to exist or the farm tractor is out of service by reason of repair of the same nonconformity for a cumulative total of 30 or more business days when the service department of the authorized dealer in possession of the farm tractor is open for purposes of repair, provided that days when the consumer has been provided by the manufacturer or its authorized dealers with the use of another farm tractor which performs the same function shall not be counted. (Code 1981, § 10-1-814, enacted by Ga. L. 1991, p. 419, § 1.)

**10-1-815. Extension of period for reporting nonconformity and of 30 day repair period.**

The 18 month period and the 30 day repair period shall be extended by any period of time during which repair services or replacement parts are not available to the consumer because of a war, invasion, strike, fire, flood, or other natural disaster. (Code 1981, § 10-1-815, enacted by Ga. L. 1991, p. 419, § 1.)

**10-1-816. Informal dispute settlement procedures; remedy for violation.**

(a) If a manufacturer has established, or participates in, an informal dispute settlement procedure which substantially complies with the provisions of the Code of Federal Regulations, Title 16, Part 703, as amended, and the requirements of this Code section, the provisions of Code Section 10-1-814 concerning refunds or replacement do not apply to a consumer who has not first used this procedure.

(b) The findings and decisions in an informal dispute settlement procedure shall address and state in writing whether the consumer would be entitled to a refund or replacement under the presumptions and criteria set out in Code Section 10-1-814, and are admissible as nonbinding evidence in any legal action and are not subject to further evidentiary foundation requirements.

(c) If, in an informal dispute settlement procedure, it is decided that a consumer is entitled to a replacement farm tractor under Code Section 10-1-814, then the consumer has the option of selecting and receiving either the replacement farm tractor or a full refund as authorized by Code Section 10-1-814. Any refund selected by a consumer shall include all amounts authorized by Code Section 10-1-814.

(d)(1) In any informal dispute settlement procedure provided for by this Code section:

(A) No documents shall be received by any informal dispute settlement panel unless those documents have been provided to each of the parties in the dispute prior to the panel's meeting, with an opportunity for the parties to comment on the documents in writing, or with oral presentation at the request of the panel;

(B) Nonvoting manufacturer or dealer representatives shall not attend or participate in the informal dispute settlement procedures unless the consumer is also present and given a chance to be heard or unless the consumer previously consents to the manufacturer or dealer participation without the consumer's presence and participation;

(C) Consumers shall be given an adequate opportunity to contest a manufacturer's assertion that a nonconformity falls within intended specifications for the farm tractor by having the basis of the manufacturer's claim appraised by a technical expert selected and paid for by the consumer prior to the informal dispute settlement hearing;

(D) No disputes shall be heard where there has been a recent attempt by the manufacturer to repair a consumer's farm tractor, but no response has yet been received by the informal dispute panel from the consumer as to whether the repairs were successfully completed. This provision shall not prejudice a consumer's rights under this Code section nor shall it extend the informal dispute panel's 40 day time limit for deciding disputes, as established by the Code of Federal Regulations, Title 16, Part 703; and

(E) The manufacturer shall provide and the informal dispute settlement panel shall consider all information relevant to resolving the dispute, such as the prior dispute records and information required by the Code of Federal Regulations, Title 16, Part 703.6, and any relevant technical service bulletins which may have been issued by the manufacturer or lessor regarding the farm tractor being disputed.

(2) A settlement reached under this Code section is binding on all participating parties.

(e) No consumer shall be required to participate in an informal dispute settlement procedure before filing an action in court if the informal dispute settlement procedure does not comply with the requirements of this Code

section, notwithstanding the procedure's compliance with the Code of Federal Regulations, Title 16, Part 703.

(f) Any consumer injured by a violation of this Code section may bring a civil action to enforce this Code section and recover costs and disbursements, including reasonable attorney's fees. (Code 1981, § 10-1-816, enacted by Ga. L. 1991, p. 419, § 1; Ga. L. 1992, p. 6, § 10.)

#### **10-1-817. Affirmative defenses against claims.**

It shall be an affirmative defense to claims under this article that:

(1) An alleged nonconformity does not substantially impair such use and market value; or

(2) A nonconformity is the result of abuse or neglect or of modifications or alterations of the farm tractor not authorized by the manufacturer. (Code 1981, § 10-1-817, enacted by Ga. L. 1991, p. 419, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, a comma was deleted following “neglect” in paragraph (2).

#### **10-1-818. Statute of limitations.**

Any action brought under this article shall be commenced within 12 months following the 18 month period. (Code 1981, § 10-1-818, enacted by Ga. L. 1991, p. 419, § 1.)

#### **10-1-819. Other remedies and rights not limited by article.**

Nothing in this article limits the rights or remedies which are otherwise available to a consumer under any other provisions of law. (Code 1981, § 10-1-819, enacted by Ga. L. 1991, p. 419, § 1.)

### **ARTICLE 30**

#### **BEAUTY PAGEANTS**

#### **10-1-830. Definitions.**

As used in this article, the term:

(1) “Beauty pageant” means any contest or competition in which entrants are judged on the basis of physical beauty, skill, talent, poise, and personality and in which a winner or winners are selected as representing an ideal in one or more of these areas. “Beauty pageant” shall not include any such contest or competition in which no application fee or entrance charge is made for contestants, to which no admission charge is made for attendance, and in connection with which no tickets, chances, advertisements, or sponsorships are sold.



(2) “Entrant’s fee” means any payment of money or other thing of value including, but not limited to, the selling of advertisements or tickets or the obtaining of sponsors, which activity is a precondition to participation in a beauty pageant.

(3) “Operator” means any person, franchisee, firm or corporation, civil group, or elementary or secondary educational institution which promotes, organizes, or otherwise operates a beauty pageant, participation in which is limited to persons paying an entrant’s fee. (Code 1981, § 10-1-830, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 1.)

### 10-1-831. Required information from operators.

Before accepting any entrant’s fee, all operators shall provide to each entrant a written document in at least ten-point type clearly containing only the following information:

- (1) Name, address, and telephone number of the operator;
- (2) Name, address, and telephone number of the individual or officer of the organization having full responsibility for the conducting of the pageant;
- (3) Names of pageants customarily promoted by the operator;
- (4) Name and address of individual authorized to accept service of process;
- (5) Name, address, and telephone number of the financial institution in which the entrants’ fees are held;
- (6) Name, address, and telephone number of the surety company maintaining the bond required by Code Section 10-1-832; and
- (7) A statement which reads as follows: “The State of Georgia requires bonding or escrow of pageants conducted for the profit of operators.” (Code 1981, § 10-1-831, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 2.)

### JUDICIAL DECISIONS

**Attorney fees awarded.** — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow

account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court’s award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

**10-1-832. Bond requirements.**

Except for operators who are exempt from the requirements of this Code section, in accordance with Code Section 10-1-833, each operator shall maintain a bond in the amount of \$10,000.00 with a surety company duly authorized to do business in this state or post a cash bond in such amount, payable to the Governor of this state. Such bond shall be for the use and benefit of any person who has paid any entrant's fee for a beauty pageant. Such bond shall be conditioned to pay all losses, damages, and expenses that may be sustained by such person by reason of any violation of this title. Any person who complies with the requirements of Code Section 10-1-837 shall not be required to post the bond required by this Code section. (Code 1981, § 10-1-832, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 3.)

**JUDICIAL DECISIONS**

**Attorney fees awarded.** — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

**10-1-833. Exemptions from bond requirements.**

No bond shall be required from nonprofit organizations, bona fide civic clubs in existence for at least one year, churches, religious organizations, and groups, fairs, or festivals affiliated with schools or political subdivisions, or from any other pageant which confers no benefit upon any participant other than any or all of the following: a beauty title, a crown, a trophy, a ribbon, or a sash. To be exempt from Code Section 10-1-832 under this Code section, pageants conducted by individuals or businesses to raise funds for nonprofit organizations shall award 100 percent of the moneys generated by the pageant to the nonprofit organization and the nonprofit organization may, if previously agreed, then pay the expenses incurred in producing the pageant. (Code 1981, § 10-1-833, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 4.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1994, a comma was inserted following "a ribbon" near the end of the first sentence, and "Code section" was substituted for "Code Section" near the beginning of the second sentence.

**10-1-834. Cancellation or default; refund of entrants' fees.**

If a beauty pageant is canceled or fails to take place, all entrants' fees shall be promptly refunded by the operator. For pageants subject to Code Section

10-1-832, the surety shall be liable for any unrefunded entrants' fees in the case of a default by the operator. (Code 1981, § 10-1-834, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 5.)

### 10-1-835. Civil violation; remedies.

Any violation of this article shall be considered a violation of Part 2 of Article 15 of this chapter, the "Fair Business Practices Act of 1975," as administered by the Governor's Office of Consumer Affairs, and all public and private remedies available under such part shall be available regarding violations of this article. (Code 1981, § 10-1-835, enacted by Ga. L. 1992, p. 3256, § 1; Ga. L. 1994, p. 1165, § 6.)

## JUDICIAL DECISIONS

**Attorney fees.** — O.C.G.A. § 10-1-835 adopts the private remedies available under the Fair Business Practices Act, O.C.G.A. § 10-1-390 et seq., which includes awards of reasonable attorney fees and litigation expenses under O.C.G.A. § 10-1-399(d). *Galardi v. Steele-Inman*, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to

O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

**Double recovery prohibited.** — Although an injured party could have recovered attorney fees for appellants' bad faith under O.C.G.A. § 13-6-11 or for their breach of the beauty pageant statutes under O.C.G.A. § 10-1-835, the law prohibited a double recovery of attorney fees and expenses as damages since the tortfeasors alleged that the injured party cheated in a beauty pageant, resulting in the injured party being effectively barred from the pageant, and causing the injured party to be unable to find work as an adult entertainer. *Galardi v. Steele-Inman*, 259 Ga. App. 249, 576 S.E.2d 555 (2002).

### 10-1-836. Criminal violation.

Any person, firm, corporation, organization, partnership, entity, or operator violating any provision of this article shall be guilty of a misdemeanor. (Code 1981, § 10-1-836, enacted by Ga. L. 1992, p. 3256, § 1.)

### 10-1-837. Escrow account.

In lieu of obtaining the bond required by Code Section 10-1-832, any operator may place all entrants' fees in an escrow account from which the operator cannot and does not withdraw any funds until the pageant has been held and all awards have been made. If the operator elects this option, in lieu of the information required by paragraph (6) of Code Section 10-1-831 the operator shall provide in the written statement the name, address, and telephone number of the financial institution where the escrow account is maintained and the account number of the escrow



account. The operator shall maintain a record of each escrow account established for a period of five years. (Code 1981, § 10-1-837, enacted by Ga. L. 1994, p. 1165, § 7.)

### JUDICIAL DECISIONS

**Attorney fees awarded.** — After the jury rendered a verdict in favor of the beauty pageant contestant, finding that the pageant promoters violated the statutory requirements regarding the providing of certain information to contestants, the posting of a bond, and the maintaining of an escrow

account, in violation of O.C.G.A. §§ 10-1-831, 10-1-832, and 10-1-837, the trial court's award of attorney fees and litigation expenses to the contestant pursuant to O.C.G.A. §§ 10-1-399 and 10-1-835 was proper. *Galardi v. Steele-Inman*, 266 Ga. App. 515, 597 S.E.2d 571 (2004).

### 10-1-838. Liability for failure to post bond or establish escrow account.

Any individual who fails to comply with either Code Section 10-1-832 or 10-1-837 shall be individually liable for any damages or losses suffered by any participant in a pageant, without regard to whether the pageant operator is structured as a corporation, partnership, limited partnership, or any other form of business entity. (Code 1981, § 10-1-838, enacted by Ga. L. 1994, p. 1165, § 7.)

## ARTICLE 31

### UNFAIR OR DECEPTIVE PRACTICES TOWARD THE ELDERLY

### 10-1-850. Definitions.

As used in this article, the term:

(1) “Disabled person” means a person who has a physical or mental impairment which substantially limits one or more of such person’s major life activities. As used in this paragraph, “physical or mental impairment” means any of the following:

(A) Any physiological disorder or condition, cosmetic disfigurement, or anatomical loss substantially affecting one or more of the following body systems: neurological; musculoskeletal; special sense organs; respiratory, including speech organs; cardiovascular; reproductive; digestive; genitourinary; hemic and lymphatic; skin; or endocrine; and

(B) Any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities. The term “physical or mental impairment” includes, but is not limited to, such diseases and conditions as orthopedic, visual, speech, and hearing impairment, cerebral palsy, epilepsy, muscular dystrophy, multiple sclerosis, cancer, heart disease, diabetes, mental retardation, and emotional illness.

(2) “Elder person” means a person who is 60 years of age or older.

(3) “Major life activities” includes functions such as caring for one’s self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working.

(4) “Substantially limits” means interferes with or affects over an extended period of time. Minor temporary ailments or injuries shall not be considered physical or mental impairments which substantially limit a person’s major life activities. Examples of minor temporary ailments are colds, influenza, or sprains or minor injuries. (Code 1981, § 10-1-850, enacted by Ga. L. 1993, p. 1092, § 2.)

### JUDICIAL DECISIONS

**Complaint only need allege one elderly victim.** — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly

person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one elderly person. *Kitchen v. Ameriquet Mortg. Co.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

### 10-1-851. Additional civil penalty for violation of Article 15, 17, or 21 of this chapter against elder or disabled persons.

When any person who is found to have conducted business in violation of Article 15, 17, or 21 of this chapter is found to have committed said violation against elder or disabled persons, in addition to any civil penalty otherwise set forth or imposed, the court may impose an additional civil penalty not to exceed \$10,000.00 for each violation. (Code 1981, § 10-1-851, enacted by Ga. L. 1993, p. 1092, § 2.)

### JUDICIAL DECISIONS

**Complaint only need allege one elderly victim.** — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the

language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; § 10-1-851 required only a showing that FBPA was violated against one elderly person. *Kitchen v. Ameriquet Mortg. Co.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

**10-1-852. Determination to impose civil penalty and amount thereof.**

In determining whether to impose a civil penalty under Code Section 10-1-851 and the amount thereof, the court shall consider the extent to which one or more of the following factors are present:

(1) Whether the defendant's conduct was in disregard of the rights of the elder or disabled persons;

(2) Whether the defendant knew or should have known that the defendant's conduct was directed to an elder person or disabled person;

(3) Whether the elder or disabled person was more vulnerable to the defendant's conduct because of age, poor health, infirmity, impaired understanding, restricted mobility, or disability than other persons and whether the elder or disabled person actually suffered substantial physical, emotional, or economic damage resulting from the defendant's conduct;

(4) Whether the defendant's conduct caused an elder or disabled person to suffer any of the following:

(A) Mental or emotional anguish;

(B) Loss of or encumbrance upon a primary residence of the elder or disabled person;

(C) Loss of or encumbrance upon the elder or disabled person's principal employment or principal source of income;

(D) Loss of funds received under a pension or retirement plan or a government benefits program;

(E) Loss of property set aside for retirement or for personal or family care and maintenance; or

(F) Loss of assets essential to the health and welfare of the elder or disabled person; or

(5) Any other factors the court deems appropriate. (Code 1981, § 10-1-852, enacted by Ga. L. 1993, p. 1092, § 2.)

**JUDICIAL DECISIONS**

**Complaint only need allege one elderly victim.** — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the

language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one



elderly person. *Kitchen v. Ameriquest Mortg. Co.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

**10-1-853. Cause of action for damage or injury from offense or violation under this article.**

An elder or disabled person who suffers damage or injury as a result of an offense or violation described in this article has a cause of action to recover actual damages, punitive damages, if appropriate, and reasonable attorney's fees. Restitution ordered pursuant to this Code section has priority over a civil penalty imposed pursuant to this article. (Code 1981, § 10-1-853, enacted by Ga. L. 1993, p. 1092, § 2.)

**JUDICIAL DECISIONS**

**Complaint only need allege one elderly victim.** — In an action in which the plaintiff consumer filed a complaint under the Georgia Fair Business Practices Act (FBPA), O.C.G.A. § 10-1-390 et seq., and the Georgia Unfair or Deceptive Practices Toward the Elderly Act, O.C.G.A. § 10-1-850 et seq., and the lender argued for dismissal because the language of O.C.G.A. § 10-1-851 required conduct directed at more than one elderly

person, the argument was rejected; consistent with O.C.G.A. § 1-3-1(d)(6), and the use of plurals or the singular form in O.C.G.A. §§ 10-1-850, 10-1-852, and 10-1-853, O.C.G.A. § 10-1-851 required only a showing that FBPA was violated against one elderly person. *Kitchen v. Ameriquest Mortg. Co.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 43937 (N.D. Ga. Apr. 29, 2005).

**10-1-854. State-wide educational initiatives as to consumer crimes against elder and disabled persons, applicable laws, and remedies available.**

The administrator may develop and implement state-wide educational initiatives to inform elder persons and disabled persons, law enforcement agencies, the judicial system, social services professionals, and the general public as to the prevalence and prevention of consumer crimes against elder and disabled persons, the provisions of Part 1 of Article 15 of this chapter, the "Uniform Deceptive Trade Practices Act," and Articles 17 and 21 of this chapter, the penalties for violations of such articles, and the remedies available for victims of such violations. (Code 1981, § 10-1-854, enacted by Ga. L. 1993, p. 1092, § 2.)

**10-1-855. Referral procedures to provide intervention and assistance.**

The administrator may establish and maintain referral procedures with the Division of Aging Services within the Department of Human Services in order to provide any necessary intervention and assistance to elder or disabled persons who may have been victimized by violations of this article. (Code 1981, § 10-1-855, enacted by Ga. L. 1993, p. 1092, § 2; Ga. L. 2009, p. 453, §§ 2-2, 2-5/HB 228.)

The 2009 amendment, effective July 1, 2009, substituted “Division of Aging Services” for “Office of Aging” and substituted

“Department of Human Services” for “Department of Human Resources” in this Code section.

**10-1-856. Construction with Part 2 of Article 15 of this chapter; confidentiality.**

Nothing in this article shall serve to prevent the administrator appointed under Code Section 10-1-395 from investigating and pursuing unfair and deceptive acts or practices committed under Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975.” Notwithstanding any other provision of law to the contrary, the names, addresses, telephone numbers, social security numbers, or any other information which could reasonably serve to identify any person making a complaint about unfair or deceptive practices under Part 2 of Article 15 of this chapter, the “Fair Business Practices Act of 1975,” shall be confidential. However, the complaining party may consent to public release of his or her identity by giving such consent expressly, affirmatively, and directly to the administrator or the administrator’s employees. Nothing contained in this Code section shall be construed to prevent the subject of the complaint, or any other person to whom disclosure of the complainant’s identity may aid in resolution of the complaint, from being informed of the identity of the complainant, to prohibit any valid discovery under the relevant discovery rules, or to prohibit the lawful subpoena of such information. (Code 1981, § 10-1-856, enacted by Ga. L. 1993, p. 1092, § 2.)

**10-1-857. Complaints, inquiries, investigations, and corrective action.**

The administrator shall receive all complaints under this article. He or she shall refer all complaints or inquiries concerning conduct specifically approved or prohibited by the Secretary of State, Department of Agriculture, Commissioner of Insurance, Public Service Commission, Department of Natural Resources, Department of Banking and Finance, or other appropriate agency or official of this state to that agency or official for initial investigation and corrective action other than litigation. (Code 1981, § 10-1-857, enacted by Ga. L. 1993, p. 1092, § 2.)

## ARTICLE 32

### ASSISTIVE TECHNOLOGY WARRANTIES

**Cross references.** — Motorized wheelchair warranties, § 10-1-890 et seq.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, this article,

which was enacted as Article 31, containing Code Sections 10-1-850 through 10-1-855, was redesignated as Article 32, containing Code Sections 10-1-870 through 10-1-875.

**10-1-870. Short title.**

This article shall be known and may be cited as the “Assistive Technology Warranty Act.” (Code 1981, § 10-1-870, enacted by Ga. L. 1993, p. 1797, § 1.)

**10-1-871. Definitions.**

As used in this article, the term:

(1) “Assistive technology device” means any device or equipment with a retail cost to a consumer of \$1,000.00 or more, that assists a person with disabilities to perform specific tasks such as moving, walking, standing, speaking, breathing, hearing, seeing, learning, working, sleeping, reaching, grasping, or caring for himself or herself that would not be possible for such person without an assistive technology device.

(2) “Assistive technology device dealer” means a person who is in the business of selling assistive technology devices.

(3) “Assistive technology device lessor” means a person who leases an assistive technology device to a consumer, or who holds the lessor’s rights under a written lease.

(4) “Collateral costs” means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of obtaining an alternative assistive technology device or other device used for mobility assistance.

(5) “Consumer” means any of the following:

(A) The purchaser of an assistive technology device, if the assistive technology device was purchased from an assistive technology device dealer or manufacturer for purposes other than resale;

(B) A person to whom the assistive technology device is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the assistive technology device;

(C) A person who may enforce the warranty; or

(D) A person who leases an assistive technology device from an assistive technology device lessor under a written lease.

(6) “Demonstrator” means an assistive technology device used primarily for the purpose of demonstration to the public.

(7) “Early termination cost” means any expense or obligation that an assistive technology device lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease



and the return of an assistive technology device to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-873. “Early termination cost” includes a penalty for prepayment under a finance arrangement.

(8) “Early termination savings” means any expense or obligation that an assistive technology device lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of an assistive technology device to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-873. “Early termination savings” includes an interest charge that the assistive technology device lessor would have paid to finance the assistive technology device or, if the assistive technology device lessor does not finance the assistive technology device, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(9) “Manufacturer” means a person who manufactures or assembles assistive technology devices and agents of that person, including an importer, a distributor, factory branch, distributor branch, and any warrantors of the manufacturer’s assistive technology devices but does not include an assistive technology device dealer.

(10) “Nonconformity” means a condition or defect that substantially impairs the use, value, or safety of an assistive technology device, and that is covered by an express warranty applicable to the assistive technology device or to a component of the assistive technology device, but does not include a condition or defect that is the result of abuse, neglect, or unauthorized modification or alteration of the assistive technology device by a consumer.

(11) “Reasonable attempt to repair” means any of the following occurring within the term of an express warranty applicable to a new assistive technology device or within one year after first delivery of the assistive technology device to a consumer, whichever is sooner:

(A) The same nonconformity with the warranty is subject to repair at least four times by the manufacturer, assistive technology device lessor, or any of the manufacturer’s authorized assistive technology device dealers and the nonconformity continues; or

(B) The assistive technology device is out of service for an aggregate of at least 30 days because of warranty nonconformities. (Code 1981, § 10-1-871, enacted by Ga. L. 1993, p. 1797, § 1; Ga. L. 1994, p. 97, § 10.)

**Code Commission notes.** — Pursuant to 10-1-873” was substituted for “Code Section 28-9-5, in 1993, “Code Section 10-1-853” in paragraphs (7) and (8), and

semicolons were substituted for periods at the end of subparagraphs (5)(A), (5)(B), and (5)(C) and subparagraph (11)(A).

### JUDICIAL DECISIONS

Cited in *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

#### **10-1-872. Express written warranties for assistive technology devices.**

A manufacturer who sells an assistive technology device to a consumer, either directly or through an assistive technology device dealer, shall furnish the consumer with an express written warranty for the assistive technology device. The warranty shall as a minimum warrant that there are no defects in parts or performance. The duration of the express written warranty shall be not less than one year after first delivery of the assistive technology device to the consumer. If a manufacturer fails to furnish an express written warranty as required by this Code section, the assistive technology device shall be covered by an express warranty as if the manufacturer had furnished an express written warranty to the consumer as required by this Code section. (Code 1981, § 10-1-872, enacted by Ga. L. 1993, p. 1797, § 1.)

#### **10-1-873. Repair of nonconforming assistive technology devices; refund or replacement of devices; sale or lease of returned device.**

(a) If a new assistive technology device does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the assistive technology device lessor, or any of the manufacturer's authorized assistive technology device dealers and makes the assistive technology device available for repair before one year after first delivery of the assistive technology device to a consumer, the nonconformity shall be repaired at the manufacturer's expense to correct the nonconformity regardless of whether the repairs are made after expiration of the warranty rights period. If in any subsequent proceeding it is determined that the consumer's repair did not qualify under this article, and the manufacturer was not otherwise obligated to repair the assistive technology device, the consumer shall be liable to the manufacturer for costs of repair.

(b)(1) If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer shall carry out the requirement under paragraph (2) or (3) of this subsection, whichever is appropriate.

(2) At the direction of a consumer as defined in subparagraph (A), (B), or (C) of paragraph (5) of Code Section 10-1-871, the manufacturer shall do one of the following:

(A) Accept return of the assistive technology device and replace the assistive technology device with a comparable new assistive technology device and refund any collateral costs; or

(B) Accept return of the assistive technology device and refund to the consumer and to any holder of a perfected security interest in the consumer's assistive technology device, as their interest may appear, the full purchase price plus any finance charge, amount paid by the consumer at the point of sale, and collateral costs, less a reasonable allowance for use. Under this subparagraph, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the assistive technology device by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the assistive technology device was used before the consumer first reported the nonconformity to the assistive technology device dealer.

(3)(A) At the direction of a consumer as defined in subparagraph (D) of paragraph (5) of Code Section 10-1-871, the manufacturer shall:

(i) Accept return of the assistive technology device;

(ii) Refund to the assistive technology device lessor and to any holder of a perfected security interest in the assistive technology device, as their interest may appear, the current value of the written lease as defined in subparagraph (B) of this paragraph; and

(iii) Refund to the consumer the amount that the consumer paid under the written lease plus any collateral costs, less a reasonable allowance for use as defined in subparagraph (C) of this paragraph.

(B) The current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination plus the assistive technology device dealer's early termination costs and the value of the assistive technology device at the lease expiration date if the lease sets forth that value, less the assistive technology device lessor's early termination savings.

(C) A reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the consumer drove the assistive technology device before first reporting the nonconformity to the manufacturer, assistive technology device lessor, or assistive technology device dealer.

(c) To receive a comparable new assistive technology device or a refund due under paragraph (1) or (2) of subsection (b) of this Code section, a consumer, as defined under subparagraph (A), (B), or (C) of paragraph (5)



of Code Section 10-1-871, shall offer to transfer possession of the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the consumer with a comparable new assistive technology device or a refund. When the manufacturer provides the new assistive technology device or refund, the consumer shall return the assistive technology device having the nonconformity to the manufacturer, along with any endorsements necessary to transfer legal possession to the manufacturer.

(d)(1) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a consumer as defined under subparagraph (D) of paragraph (5) of Code Section 10-1-871, shall offer to return the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the refund to the consumer. When the manufacturer provides the refund, the consumer shall return the assistive technology device having the nonconformity to the manufacturer.

(2) To receive a refund due under paragraph (3) of subsection (b) of this Code section, an assistive technology device lessor shall offer to transfer possession of the assistive technology device having the nonconformity to the manufacturer of that assistive technology device. No later than 30 days after that offer, the manufacturer shall provide the refund to the assistive technology device lessor. When the manufacturer provides the refund, the assistive technology device lessor shall provide any endorsements necessary to transfer legal possession to the manufacturer.

(3) No person may enforce the lease against the consumer after the consumer receives a refund due under paragraph (3) of subsection (b) of this Code section.

(e) No assistive technology device returned by a consumer or assistive technology device lessor in this state under subsection (b) of this Code section or by a consumer or assistive technology device lessor in another state under a similar law of that state may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee. (Code 1981, § 10-1-873, enacted by Ga. L. 1993, p. 1797, § 1; Ga. L. 1994, p. 97, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “Code Section 10-1-871” was substituted for “Code Section 10-1-851” in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and para-

graph (d)(1), and “paragraph (5)” was substituted for “paragraph (2)” in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and paragraph (d)(1).

**10-1-874. Thirty-day return privilege.**

A manufacturer or assistive technology device dealer who recommends and sells an assistive technology device to a consumer shall accept a return of the assistive technology device within 30 days after the purchase if the assistive technology device does not meet the needs of the person with the disability. The manufacturer or assistive technology dealer shall provide a refund in conformity with the provisions established within paragraph (2) of subsection (b) of Code Section 10-1-873. (Code 1981, § 10-1-874, enacted by Ga. L. 1993, p. 1797, § 1.)

**Code Commission notes.** — Pursuant to 10-1-873” was substituted for “Code Section 10-1-853” in the second sentence.

**10-1-875. Rights and remedies under other laws or contracts; waivers void; actions for damages.**

(a) This article shall not be deemed to limit rights or remedies available to a consumer under any other law or contract.

(b) Any waiver by a consumer of rights under this article is void.

(c) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this article. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss together with costs, disbursements, and reasonable attorney fees and any equitable relief that the court determines is appropriate. (Code 1981, § 10-1-875, enacted by Ga. L. 1993, p. 1797, § 1.)

**ARTICLE 33****MOTORIZED WHEELCHAIR WARRANTIES**

**Cross references.** — Assistive technology device warranties, § 10-1-870 et seq. which was enacted as Article 31, containing Code Sections 10-1-850 through 10-1-854,

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, this article, was redesignated as Article 33, containing Code Sections 10-1-890 through 10-1-894.

**10-1-890. Short title.**

This article shall be known and may be cited as the “Motorized Wheelchair Warranty Act.” (Code 1981, § 10-1-890, enacted by Ga. L. 1993, p. 1805, § 1.)

**10-1-891. Definitions.**

As used in this article, the term:

(1) “Collateral costs” means expenses incurred by a consumer in connection with the repair of a nonconformity, including the costs of

obtaining an alternative wheelchair or other device used for mobility assistance.

(2) "Consumer" means any of the following:

(A) The purchaser of a motorized wheelchair, if the motorized wheelchair was purchased from a motorized wheelchair dealer or manufacturer for purposes other than resale;

(B) A person to whom the motorized wheelchair is transferred for purposes other than resale, if the transfer occurs before the expiration of an express warranty applicable to the motorized wheelchair;

(C) A person who may enforce the warranty; or

(D) A person who leases a motorized wheelchair from a motorized wheelchair lessor under a written lease.

(3) "Demonstrator" means a motorized wheelchair used primarily for the purpose of demonstration to the public.

(4) "Early termination cost" means any expense or obligation that a motorized wheelchair lessor incurs as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motorized wheelchair to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-893. "Early termination cost" includes a penalty for prepayment under a finance arrangement.

(5) "Early termination savings" means any expense or obligation that a motorized wheelchair lessor avoids as a result of both the termination of a written lease before the termination date set forth in that lease and the return of a motorized wheelchair to a manufacturer under paragraph (3) of subsection (b) of Code Section 10-1-893. "Early termination savings" includes an interest charge that the motorized wheelchair lessor would have paid to finance the motorized wheelchair or, if the motorized wheelchair lessor does not finance the motorized wheelchair, the difference between the total amount for which the lease obligates the consumer during the period of the lease term remaining after the early termination and the present value of that amount at the date of the early termination.

(6) "Manufacturer" means a person who manufactures or assembles motorized wheelchairs and agents of that person, including an importer, a distributor, factory branch, distributor branch, and any warrantors of the manufacturer's motorized wheelchairs but does not include a motorized wheelchair dealer.

(7) "Motorized wheelchair" means any motor driven wheelchair, including a demonstrator, that a consumer purchases or accepts transfer of in this state.



(8) “Motorized wheelchair dealer” means a person who is in the business of selling motorized wheelchairs.

(9) “Motorized wheelchair lessor” means a person who leases a motorized wheelchair to a consumer, or who holds the lessor’s rights, under a written lease.

(10) “Nonconformity” means a condition or defect that substantially impairs the use, value, or safety of a motorized wheelchair, and that is covered by an express warranty applicable to the motorized wheelchair or to a component of the motorized wheelchair, but does not include a condition or defect that is the result of abuse, neglect, or unauthorized modification or alteration of the motorized wheelchair by a consumer.

(11) “Reasonable attempt to repair” means any of the following occurring within the term of an express warranty applicable to a new motorized wheelchair or within one year after first delivery of the motorized wheelchair to a consumer, whichever is sooner:

(A) The same nonconformity with the warranty is subject to repair at least four times by the manufacturer, motorized wheelchair lessor, or any of the manufacturer’s authorized motorized wheelchair dealers and the nonconformity continues; or

(B) The motorized wheelchair is out of service for an aggregate of at least 30 days because of warranty nonconformities. (Code 1981, § 10-1-891, enacted by Ga. L. 1993, p. 1805, § 1; Ga. L. 1994, p. 97, § 10.)

**Code Commission notes.** — Pursuant to 10-1-893” was substituted for “Code Section 10-1-893” in paragraphs (4) and (5).

#### **10-1-892. Express written warranties for motorized wheelchairs; failure to furnish warranty.**

A manufacturer who sells a motorized wheelchair to a consumer, either directly or through a motorized wheelchair dealer, shall furnish the consumer with an express written warranty for the motorized wheelchair warranting parts and performance. The duration of the express written warranty shall be not less than one year after first delivery of the motorized wheelchair to the consumer. If a manufacturer fails to furnish an express written warranty as required by this Code section, the motorized wheelchair shall be covered by an express warranty as if the manufacturer had furnished an express written warranty to the consumer as required by this Code section. (Code 1981, § 10-1-892, enacted by Ga. L. 1993, p. 1805, § 1.)

**10-1-893. Repair of nonconforming motorized wheelchairs; refund or replacement after reasonable attempt to repair; resale or lease of returned motorized wheelchair.**

(a) If a new motorized wheelchair does not conform to an applicable express warranty and the consumer reports the nonconformity to the manufacturer, the motorized wheelchair lessor, or any of the manufacturer's authorized motorized wheelchair dealers and makes the motorized wheelchair available for repair before one year after first delivery of the motorized wheelchair to a consumer, the nonconformity shall be repaired at the manufacturer's expense to correct the nonconformity regardless of whether the repairs are made after expiration of the warranty rights period. If in any subsequent proceeding it is determined that the consumer's repair did not qualify under this article, and the manufacturer was not otherwise obligated to repair the motorized wheelchair, the consumer shall be liable to the manufacturer for costs of repair.

(b)(1) If, after a reasonable attempt to repair, the nonconformity is not repaired, the manufacturer shall carry out the requirement under paragraph (2) or (3) of this subsection, whichever is appropriate.

(2) At the direction of a consumer as defined in subparagraph (A), (B), or (C) of paragraph (2) of Code Section 10-1-891, the manufacturer shall do one of the following:

(A) Accept return of the motorized wheelchair and replace the motorized wheelchair with a comparable new motorized wheelchair and refund any collateral costs; or

(B) Accept return of the motorized wheelchair and refund to the consumer and to any holder of a perfected security interest in the consumer's motorized wheelchair, as their interest may appear, the full purchase price plus any finance charge, amount paid by the consumer at the point of sale, and collateral costs, less a reasonable allowance for use. Under this subparagraph, a reasonable allowance for use may not exceed the amount obtained by multiplying the full purchase price of the motorized wheelchair by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the motorized wheelchair was driven before the consumer first reported the nonconformity to the motorized wheelchair dealer.

(3)(A) At the direction of a consumer as defined in subparagraph (D) of paragraph (2) of Code Section 10-1-891, the manufacturer shall:

(i) Accept return of the motorized wheelchair;

(ii) Refund to the motorized wheelchair lessor and to any holder of a perfected security interest in the motorized wheelchair, as their

interest may appear, the current value of the written lease as defined in subparagraph (B) of this paragraph; and

(iii) Refund to the consumer the amount that the consumer paid under the written lease plus any collateral costs, less a reasonable allowance for use as defined in subparagraph (C) of this paragraph.

(B) The current value of the written lease equals the total amount for which that lease obligates the consumer during the period of the lease remaining after its early termination plus the motorized wheelchair dealer's early termination costs and the value of the motorized wheelchair at the lease expiration date if the lease sets forth that value, less the motorized wheelchair lessor's early termination savings.

(C) A reasonable allowance for use may not exceed the amount obtained by multiplying the total amount for which the written lease obligates the consumer by a fraction, the denominator of which is 1,825 and the numerator of which is the number of days that the consumer drove the motorized wheelchair before first reporting the nonconformity to the manufacturer, motorized wheelchair lessor, or motorized wheelchair dealer.

(c) To receive a comparable new motorized wheelchair or a refund due under paragraph (1) or (2) of subsection (b) of this Code section, a consumer, as defined under subparagraph (A), (B), or (C) of paragraph (2) of Code Section 10-1-891, shall offer to transfer possession of the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the consumer with a comparable new motorized wheelchair or a refund. When the manufacturer provides the new motorized wheelchair or refund, the consumer shall return the motorized wheelchair having the nonconformity to the manufacturer, along with any endorsements necessary to transfer legal possession to the manufacturer.

(d)(1) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a consumer as defined under subparagraph (D) of paragraph (2) of Code Section 10-1-891, shall offer to return the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the refund to the consumer. When the manufacturer provides the refund, the consumer shall return the motorized wheelchair having the nonconformity to the manufacturer.

(2) To receive a refund due under paragraph (3) of subsection (b) of this Code section, a motorized wheelchair lessor shall offer to transfer possession of the motorized wheelchair having the nonconformity to the manufacturer of that motorized wheelchair. No later than 30 days after that offer, the manufacturer shall provide the refund to the motorized wheelchair lessor. When the manufacturer provides the refund, the



motorized wheelchair lessor shall provide any endorsements necessary to transfer legal possession to the manufacturer.

(3) No person may enforce the lease against the consumer after the consumer receives a refund due under paragraph (3) of subsection (b) of this Code section.

(e) No motorized wheelchair returned by a consumer or motorized wheelchair lessor in this state under subsection (b) of this Code section or by a consumer or motorized wheelchair lessor in another state under a similar law of that state may be sold or leased again in this state unless full disclosure of the reasons for return is made to any prospective buyer or lessee. (Code 1981, § 10-1-893, enacted by Ga. L. 1993, p. 1805, § 1; Ga. L. 1994, p. 97, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “Code Section 10-1-891” was substituted for “Code Section 10-1-851” in paragraph (b)(2) and subparagraph (b)(3)(A), subsection (c), and paragraph (d)(1).

**10-1-894. Other rights or remedies under other law or contract; waiver void; action for damages.**

(a) This article shall not be deemed to limit rights or remedies available to a consumer under any other law or contract.

(b) Any waiver by a consumer of rights under this article is void.

(c) In addition to pursuing any other remedy, a consumer may bring an action to recover for any damages caused by a violation of this article. The court shall award a consumer who prevails in such an action twice the amount of any pecuniary loss together with costs, disbursements, and reasonable attorney fees and any equitable relief that the court determines is appropriate. (Code 1981, § 10-1-894, enacted by Ga. L. 1993, p. 1805, § 1.)

## ARTICLE 34

### IDENTITY THEFT

**Cross references.** — Offense of identity fraud, § 16-9-121. Reporting suspected identity fraud, § 16-9-125.1.

### RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Identity Theft and Other Misuses of Credit and Debit Cards, 81 POF3d 113.

10-1-910. Legislative findings.

The General Assembly finds and declares as follows:

- (1) The privacy and financial security of individuals is increasingly at risk due to the ever more widespread collection of personal information by both the private and public sectors;
- (2) Credit card transactions, magazine subscriptions, real estate records, automobile registrations, consumer surveys, warranty registrations, credit reports, and Internet websites are all sources of personal information and form the source material for identity thieves;
- (3) Identity theft is one of the fastest growing crimes committed in this state. Criminals who steal personal information such as social security numbers use the information to open credit card accounts, write bad checks, buy cars, purchase property, and commit other financial crimes with other people’s identities;
- (4) Implementation of technology security plans and security software as part of an information security policy may provide protection to consumers and the general public from identity thieves;
- (5) Information brokers should clearly define the standards for authorized users of its data so that a breach by an unauthorized user is easily identifiable;
- (6) Identity theft is costly to the marketplace and to consumers; and
- (7) Victims of identity theft must act quickly to minimize the damage; therefore, expeditious notification of unauthorized acquisition and possible misuse of a person’s personal information is imperative. (Code 1981, § 10-1-910, enacted by Ga. L. 2005, p. 851, § 1/SB 230.)

**Law reviews.** — For article on 2005 enactment of this article, see 22 Ga. St. U.L. Rev. 1 (2005). For article, “The Growing Threat of Identity Theft and Its Implications for Employers,” see 11 Ga. St. B.J. 27 (No. 6, 2006).

RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Identity Theft and Other Misuses of Credit and Debit Cards, 81 POF3d 113.

10-1-911. Definitions.

As used in this article, the term:

- (1) “Breach of the security of the system” means unauthorized acquisition of an individual’s electronic data that compromises the security, confidentiality, or integrity of personal information of such individual maintained by an information broker or data collector. Good

faith acquisition or use of personal information by an employee or agent of an information broker or data collector for the purposes of such information broker or data collector is not a breach of the security of the system, provided that the personal information is not used or subject to further unauthorized disclosure.

(2) “Data collector” means any state or local agency or subdivision thereof including any department, bureau, authority, public university or college, academy, commission, or other government entity; provided, however, that the term “data collector” shall not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes or for purposes of providing public access to court records or to real or personal property information.

(3) “Information broker” means any person or entity who, for monetary fees or dues, engages in whole or in part in the business of collecting, assembling, evaluating, compiling, reporting, transmitting, transferring, or communicating information concerning individuals for the primary purpose of furnishing personal information to nonaffiliated third parties, but does not include any governmental agency whose records are maintained primarily for traffic safety, law enforcement, or licensing purposes.

(4) “Notice” means:

(A) Written notice;

(B) Telephone notice;

(C) Electronic notice, if the notice provided is consistent with the provisions regarding electronic records and signatures set forth in Section 7001 of Title 15 of the United States Code; or

(D) Substitute notice, if the information broker or data collector demonstrates that the cost of providing notice would exceed \$50,000.00, that the affected class of individuals to be notified exceeds 100,000, or that the information broker or data collector does not have sufficient contact information to provide written or electronic notice to such individuals. Substitute notice shall consist of all of the following:

(i) E-mail notice, if the information broker or data collector has an e-mail address for the individuals to be notified;

(ii) Conspicuous posting of the notice on the information broker’s or data collector’s website page, if the information broker or data collector maintains one; and

(iii) Notification to major state-wide media.

Notwithstanding any provision of this paragraph to the contrary, an information broker or data collector that maintains its own notification



procedures as part of an information security policy for the treatment of personal information and is otherwise consistent with the timing requirements of this article shall be deemed to be in compliance with the notification requirements of this article if it notifies the individuals who are the subjects of the notice in accordance with its policies in the event of a breach of the security of the system.

(5) “Person” means any individual, partnership, corporation, limited liability company, trust, estate, cooperative, association, or other entity. The term “person” as used in this article shall not be construed to require duplicative reporting by any individual, corporation, trust, estate, cooperative, association, or other entity involved in the same transaction.

(6) “Personal information” means an individual’s first name or first initial and last name in combination with any one or more of the following data elements, when either the name or the data elements are not encrypted or redacted:

(A) Social security number;

(B) Driver’s license number or state identification card number;

(C) Account number, credit card number, or debit card number, if circumstances exist wherein such a number could be used without additional identifying information, access codes, or passwords;

(D) Account passwords or personal identification numbers or other access codes; or

(E) Any of the items contained in subparagraphs (A) through (D) of this paragraph when not in connection with the individual’s first name or first initial and last name, if the information compromised would be sufficient to perform or attempt to perform identity theft against the person whose information was compromised.

The term “personal information” does not include publicly available information that is lawfully made available to the general public from federal, state, or local government records. (Code 1981, § 10-1-911, enacted by Ga. L. 2005, p. 851, § 1/SB 230; Ga. L. 2007, p. 450, § 2/SB 236.)

**The 2007 amendment**, effective May 24, 2007, inserted “or data collector” throughout this Code section; in paragraph (1), substituted “electronic” for “computerized” near the beginning of the first sentence and inserted “or use” near the beginning of the second sentence; added present paragraph (2); redesignated former paragraphs (2) through (5) as present paragraphs (3) through (6), respectively; added present sub-

paragraph (4)(B); redesignated former subparagraphs (3)(B) and (3)(C) as present subparagraphs (4)(C) and (4)(D), respectively; in the first sentence of subparagraph (4)(D), substituted “\$50,000.00” for “\$250,000.00” and substituted “100,000” for “500,000”; and inserted “or data collector’s” in the middle of division (4)(D)(ii).

**Editor’s notes.** — Ga. L. 2007, p. 450, § 1, not codified by the General Assembly, pro-

vides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

**10-1-912. Notification required upon breach of security regarding personal information.**

(a) Any information broker or data collector that maintains computerized data that includes personal information of individuals shall give notice of any breach of the security of the system following discovery or notification of the breach in the security of the data to any resident of this state whose unencrypted personal information was, or is reasonably believed to have been, acquired by an unauthorized person. The notice shall be made in the most expedient time possible and without unreasonable delay, consistent with the legitimate needs of law enforcement, as provided in subsection (c) of this Code section, or with any measures necessary to determine the scope of the breach and restore the reasonable integrity, security, and confidentiality of the data system.

(b) Any person or business that maintains computerized data on behalf of an information broker or data collector that includes personal information of individuals that the person or business does not own shall notify the information broker or data collector of any breach of the security of the system within 24 hours following discovery, if the personal information was, or is reasonably believed to have been, acquired by an unauthorized person.

(c) The notification required by this Code section may be delayed if a law enforcement agency determines that the notification will compromise a criminal investigation. The notification required by this Code section shall be made after the law enforcement agency determines that it will not compromise the investigation.

(d) In the event that an information broker or data collector discovers circumstances requiring notification pursuant to this Code section of more than 10,000 residents of this state at one time, the information broker or data collector shall also notify, without unreasonable delay, all consumer reporting agencies that compile and maintain files on consumers on a nation-wide basis, as defined by 15 U.S.C. Section 1681a, of the timing, distribution, and content of the notices. (Code 1981, § 10-1-912, enacted by Ga. L. 2005, p. 851, § 1/SB 230; Ga. L. 2007, p. 450, § 3/SB 236.)

**The 2007 amendment**, effective May 24, 2007, inserted "or data collector" throughout this Code section; and substituted "system within 24 hours" for "data immediately" in subsection (b).

**Editor's notes.** — Ga. L. 2007, p. 450, § 1, not codified by the General Assembly, provides: "This Act shall be known and may be cited as the 'Georgia Personal Identity Protection Act.'"

**10-1-913. Definitions for this Code section and Code Section 10-1-914.**

As used in this Code section and in Code Section 10-1-914, the term:

- (1) “Consumer” means a natural person residing in this state.
- (2) “Consumer credit report” means a “consumer report” as defined in 15 U.S.C. Section 1681a(d) that a consumer reporting agency furnishes to a person which it has reason to believe intends to use the information as a factor in establishing the consumer’s eligibility for credit to be used primarily for personal, family, or household purposes.
- (3) “Consumer credit reporting agency” means any person who, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer credit reports to third parties.
- (4) “Normal business hours” means any day, between the hours of 8:00 A.M. and 9:30 P.M., Eastern Standard Time.
- (5) “Person” means any individual, partnership, corporation, trust, estate, cooperative, association, government, or governmental subdivision or agency, or other entity.
- (6) “Proper identification” means information generally deemed sufficient to identify a person for consumer reporting agency purposes under 15 U.S.C. Section 1681 et seq.
- (7) “Security freeze” means a restriction placed on a consumer credit report at the request of the consumer that prohibits a consumer credit reporting agency from releasing all or any part of the consumer’s consumer credit report or any information derived from the consumer’s consumer credit report for a purpose relating to the extension of credit without the express authorization of the consumer. (Code 1981, § 10-1-913, enacted by Ga. L. 2008, p. 594, § 1/HB 130.)

**Effective date.** — This Code section became effective August 1, 2008. business associations, see 60 Mercer L. Rev. 35 (2008).

**Law reviews.** — For survey article on

**10-1-914. Consumer requested security freeze on credit report; timing; notifications; temporary lifting of freeze; application; fees.**

(a) A consumer may place a security freeze on the consumer’s credit report by making a request in writing by certified mail to a consumer credit reporting agency. No later than August 1, 2008, a consumer credit reporting agency shall make available to consumers an Internet based method of requesting a security freeze and a toll-free telephone number for consumers to use to place a security freeze, temporarily lift a security freeze, or completely remove a security freeze. A security freeze shall prohibit, subject



to exceptions in subsection (m) of this Code section, the consumer credit reporting agency from releasing the consumer's credit report or credit score without the prior express authorization of the consumer as provided in subsection (d) or (e) of this Code section. Nothing in this subsection prevents a consumer credit reporting agency from advising a third party that a security freeze is in effect with respect to the consumer's credit report.

(b) A consumer credit reporting agency shall place a security freeze on a consumer's credit report no later than three business days after receiving the consumer's written request sent by certified mail.

(c) The consumer credit reporting agency shall send a written confirmation of the security freeze to the consumer within ten business days of placing the security freeze and at the same time shall provide the consumer with a unique personal identification number or password, other than the consumer's social security number, to be used by the consumer when providing authorization for the release of the consumer's credit report for a specific period of time.

(d) If the consumer wishes to allow the consumer's credit report to be accessed for a specific period of time while a security freeze is in place, the consumer shall contact the consumer credit reporting agency through the contact method established by the consumer credit reporting agency, request that the security freeze be temporarily lifted, and provide all of the following:

(1) Proper identification;

(2) The unique personal identification number or password provided by the consumer credit reporting agency pursuant to subsection (c) of this Code section;

(3) The proper information regarding the time period for which the report shall be available to users of the consumer credit report; and

(4) The proper payment as may be required by the consumer credit reporting agency.

(e) A consumer credit reporting agency shall develop procedures involving the use of telephone, facsimile, the Internet, or other electronic media to receive and process a request from a consumer to temporarily lift a security freeze on a consumer credit report pursuant to subsection (d) of this Code section.

(f) A consumer credit reporting agency that receives a request from a consumer to temporarily lift a security freeze on a consumer credit report pursuant to subsection (d) or (e) of this Code section shall comply with the request:

(1) No later than three business days after receiving a written request;  
or

(2) Within 15 minutes after the request and payment are received by telephone or electronically by the contact method chosen by the consumer reporting agency during normal business hours and the request includes the consumer's proper identification, correct personal identification number or password, and the proper payment as may be required by the consumer credit reporting agency.

(g) A consumer reporting agency need not remove a security freeze within 15 minutes, as specified in paragraph (2) of subsection (f) of this Code section, if:

(1) The consumer fails to satisfy the requirements of subsection (d) of this Code section; or

(2) The consumer credit reporting agency's ability to remove the security freeze within 15 minutes is prevented by:

(A) An act of God, including fire, earthquakes, hurricanes, storms, or similar natural disaster or phenomenon;

(B) Unauthorized or illegal acts by a third party, including terrorism, sabotage, riot, vandalism, labor strikes or disputes disrupting operations, or similar occurrence;

(C) Operational interruption, including electrical failure, unanticipated delay in equipment or replacement part delivery, computer hardware or software failures inhibiting response time, or similar disruption;

(D) Governmental action, including emergency orders or regulations, judicial or law enforcement action, or similar directives;

(E) Regularly scheduled maintenance or updates, during other than normal business hours, to the consumer reporting agency's systems;

(F) Commercially reasonable maintenance of, or repair to, the consumer reporting agency's systems that is unexpected or unscheduled; or

(G) Receipt of a removal request outside of normal business hours.

(h) A consumer credit reporting agency shall only remove or temporarily lift a security freeze placed on a consumer's credit report:

(1) Upon the consumer's request, in compliance with the requirements of this Code section; or

(2) If the consumer's credit report was frozen due to a material misrepresentation of fact by the consumer. If a consumer credit reporting agency intends to remove a security freeze upon a consumer's credit report pursuant to this paragraph, the consumer credit reporting agency

shall notify the consumer in writing prior to removing the security freeze on the consumer's credit report.

(i) If a third party requests access to a consumer credit report on which a security freeze is in effect and this request is in connection with an application for credit or any other use related to the extension of credit and the consumer does not allow the consumer's credit report to be accessed for that specific period of time, the third party may treat the application as incomplete.

(j) If a consumer requests a security freeze pursuant to this Code section, the consumer credit reporting agency shall disclose to the consumer the process of placing and temporarily lifting a security freeze and the process for allowing access to information from the consumer's credit report for a specific period of time while the security freeze is in place.

(k) A security freeze shall remain in place until the consumer requests that the security freeze be removed. A consumer credit reporting agency shall remove a security freeze within three business days of receiving a request for removal from the consumer. The consumer shall provide all of the following:

(1) Proper identification;

(2) The unique personal identification number or password provided by the consumer credit reporting agency pursuant to subsection (c) of this Code section; and

(3) The proper fee as may be required by the consumer credit reporting agency.

(l) A consumer credit reporting agency shall require proper identification of the person making a request to place, temporarily lift, or remove a security freeze.

(m) By way of example only, and not intending to be exclusive, the provisions of this Code section shall not apply to the use of a consumer credit report by any of the following:

(1) A person, or the person's subsidiary, affiliate, agent, subcontractor, or assignee with whom the consumer has, or prior to assignment had, an account, contract, or debtor-creditor relationship for the purposes of reviewing the active account or collecting the financial obligation owing for the account, contract, or debt;

(2) A subsidiary, affiliate, agent, assignee, or prospective assignee of a person to whom access has been granted under subsection (d) of this Code section for purposes of facilitating the extension of credit or other permissible use;

(3) Any person acting pursuant to a court order, warrant, or subpoena;



(4) A state or local agency, or its agents or assigns, which administers a program for establishing and enforcing child support obligations;

(5) A state or local agency, or its agents or assigns, acting to investigate fraud, including Medicaid fraud; acting to investigate or collect delinquent taxes or assessments, including interest, penalties, and unpaid court orders; or acting to fulfill any of its other statutory responsibilities;

(6) A federal, state, or local governmental entity, including a law enforcement agency, court, or its agents or assigns;

(7) Any person for the use of a credit report for purposes permitted under 15 U.S.C. Section 1681b(c);

(8) Any person for the sole purpose of providing a credit file monitoring subscription service to which the consumer has subscribed;

(9) Any person for the purpose of providing a consumer with a copy of the consumer's credit report or credit score upon the consumer's request;

(10) Any depository financial institution for checking, savings, and investment accounts; or

(11) Any person or entity for insurance purposes, including use in setting or adjusting a rate, adjusting a claim, or underwriting.

(n) If a security freeze is in place, a consumer credit reporting agency shall not change any of the following official information in a credit report without sending a written confirmation of the change to the consumer within 30 days of the change being posted to the consumer's file: name, date of birth, social security number, and address. Written confirmation is not required for technical modifications of a consumer's official information, including name and street abbreviations, complete spellings, or transposition of numbers or letters. In the case of an address change, the written confirmation shall be sent to both the new address and the former address.

(o) The following persons shall not be required to place a security freeze in a consumer credit report pursuant to this Code section; provided, however, that any person that shall not be required to place a security freeze on a consumer credit report under the provisions of paragraph (3) of this subsection shall be subject to any security freeze placed on a consumer credit report by another consumer credit reporting agency from which it obtains information:

(1) A check services or fraud prevention services company, including reports on incidents of fraud, or authorizations for the purpose of approving or processing negotiable instruments, electronic funds transfers, or similar methods of payment;

(2) A deposit account information service company, which issues reports regarding account closures due to fraud, substantial overdrafts, automated teller machine abuse, or other similar negative information regarding a consumer to inquiring banks or other financial institutions for use only in reviewing a consumer request for a deposit account at the inquiring bank or financial institution;

(3) Resellers of consumer credit report information that assemble and merge information contained in a data base of one or more consumer credit reporting agencies and do not maintain a permanent data base of consumer credit information from which new consumer credit reports are produced; or

(4) A consumer credit reporting agency's data base or file which consists of information concerning, and used for, one or more of the following: criminal record information, fraud prevention or detection, personal claim loss history information, and employment, tenant, or individual background screening.

(p) This Code section shall not prevent a consumer credit reporting agency from charging a fee of no more than \$3.00 to a consumer for each security freeze placement, any permanent removal of the security freeze, or any temporary lifting of the security freeze for a period of time. A consumer credit reporting agency shall not charge a person age 65 or over for the placement of a security freeze. A consumer credit reporting agency shall not charge any fee to a victim of identity theft who has submitted a copy of a valid investigative or incident report or complaint with a law enforcement agency about the unlawful use of the victim's identifying information by another person that was filed with the law enforcement agency no more than 90 days prior to the consumer's request for a security freeze. A consumer credit reporting agency may charge a fee of no more than \$5.00 to a consumer for each replacement of a unique personal identification number or password.

(q) A person that violates this Code section may be investigated and prosecuted under the provisions of the Fair Business Practices Act, Code Section 10-1-390, et seq., and may be fined not more than \$100.00 for a violation concerning a specific consumer. (Code 1981, § 10-1-914, enacted by Ga. L. 2008, p. 594, § 1/HB 130.)

**Effective date.** — This Code section became effective August 1, 2008.

#### **10-1-915. Notice of right to security freeze.**

At any time that a consumer is required to receive a summary of rights required by 15 U.S.C. Section 1681g(d) of the federal Fair Credit Reporting Act, the consumer shall also be provided with the following notice:

“Georgia Consumers Have the Right to Obtain a Security Freeze.

You have a right to place a ‘security freeze’ on your credit report, which will prohibit a consumer reporting agency from releasing information in your credit report without your express authorization. A security freeze must be requested in writing by certified mail or by electronic means as provided by a consumer reporting agency. The security freeze is designed to prevent credit, loans, and services from being approved in your name without your consent. If you are actively seeking a new credit, loan, utility, telephone, or insurance account, you should understand that the procedures involved in lifting a security freeze may slow your applications for credit. You should plan ahead and lift a freeze in advance of actually applying for new credit. When you place a security freeze on your credit report, you will be provided a personal identification number or password to use if you choose to remove the freeze on your credit report or authorize the release of your credit report for a period of time after the freeze is in place.

To provide that authorization you must contact the consumer reporting agency and provide all of the following:

- (1) The personal identification number or password.
- (2) Proper identification to verify your identity.
- (3) The proper information regarding the period of time for which the report shall be available.

A consumer reporting agency must authorize the release of your credit report no later than fifteen (15) minutes after receiving the above information if the request is by electronic means or by telephone, or no later than three business days when a written request is submitted.

A security freeze does not apply to a person or entity, or its affiliates, or collection agencies acting on behalf of the person or entity, with which you have an existing account, that requests information in your credit report for the purposes of reviewing or collecting the account. Reviewing the account includes activities related to account maintenance. You have a right to bring civil action against anyone, including a consumer reporting agency, who improperly obtains access to a file, knowingly or willfully misuses file data, or fails to correct inaccurate file data. Unless you are a victim of identity theft with a police report or other official document acceptable to a consumer reporting agency to verify the crimes, or you are 65 or older, a consumer reporting agency has the right to charge you a fee of no more than \$3.00 to place a freeze on your credit report.”

(Code 1981, § 10-1-915, enacted by Ga. L. 2008, p. 594, § 1/HB 130.)

**Effective date.** — This Code section became effective August 1, 2008.



## CHAPTER 2

## WEIGHTS AND MEASURES

	<b>Article 1</b>	Sec.	
	<b>General Provisions</b>		
Sec.		10-2-20.	Enjoining violations.
10-2-1.	Definitions.	10-2-21.	Administrative penalty for violations; judicial review; proceedings for collection.
10-2-2.	Recognized systems of weights and measures.	10-2-22.	Criminal penalty for violations.
10-2-3.	Primary standards of weights and measures; prescribing and verifying secondary standards.	10-2-23.	Sale and measurement of pulpwood, sawtimber, poles, and other types of timber.
10-2-4.	Technical requirements for commercial weighing and measuring devices.		<b>Article 2</b>
10-2-5.	Powers and duties of Commissioner generally.		<b>Certified Public Weighers</b>
10-2-6.	Power of Commissioner to inspect commercial premises and vehicles; stop-use or stop-sale, hold, and removal orders; seizure.	10-2-40.	Persons who may be licensed and known as certified public weighers.
10-2-7.	Misrepresentation of quantity in selling or buying prohibited.	10-2-41.	License required; application; issuance.
10-2-8.	Misrepresentation or deception in pricing by weight, measure, or count prohibited.	10-2-42.	Duration of license; fees; cost of seals.
10-2-9.	Permissible methods of selling by quantity.	10-2-43.	Revocation of license permit for malfeasance or violation; notice and hearing.
10-2-10.	Delivery tickets for bulk sales and bulk deliveries of heating fuel.	10-2-44.	Surety bonds [Repealed].
10-2-11.	Information required on packages.	10-2-45.	Certified public weigher's official seal.
10-2-12.	Unit price required on packages with random weights.	10-2-46.	Issuance of official seals to licensed tobacco warehousemen.
10-2-13.	Advertisements of packaged commodities must state quantity with retail price.	10-2-47.	Return of seal on termination of duties.
10-2-14.	Using or possessing incorrect weight or measure; removing tags, seals, or marks; obstructing enforcement.	10-2-48.	Duties of certified public weighers.
10-2-15.	Grain moisture testing equipment — Standards; inspections.	10-2-49.	Use of untested weight, measure, or device prohibited.
10-2-16.	Grain moisture testing equipment — Operator to obtain permit.	10-2-50.	Weighing leaf tobacco and livestock.
10-2-17.	Inspection of scales used in intrastate shipments.	10-2-51.	Sale of coal or coke by itinerant dealer without having weight certified; penalty.
10-2-18.	When weight, measure, or weighing or measuring device presumed used in business.	10-2-52.	Commissioner of Agriculture to administer article; rules and regulations; regulation of livestock auction barns.
10-2-19.	Manner of display of measurement of compressed natural gas on dispensing devices.	10-2-53.	Administrative penalty for violation of article or order, rule, or regulation; judicial review; proceedings for collection.
		10-2-54.	Criminal penalties for violations by certified public weighers and others; revocation of licenses; forfeiture of seals.

**Administrative rules and regulations.** — Georgia, Georgia Department of Agriculture, Official Compilation of the Rules and Regulations of the State of Georgia, Chapters 40-15-1 through 40-15-8.

## OPINIONS OF THE ATTORNEY GENERAL

**Duties of Commissioner of Agriculture.** — The duties of the Commissioner of Agriculture are not all included in the agricultural provisions and may be found in the provisions governing weights and measures and in other parts of the Code. 1958-59 Op. Att’y Gen. p. 4.

## ARTICLE 1

### GENERAL PROVISIONS

**Cross references.** — Powers and duties of Commissioner of Agriculture with regard to misbranding or false advertisement of food, § 26-2-20 et seq.

#### 10-2-1. Definitions.

As used in this chapter and any rules or regulations promulgated pursuant to this chapter, the term:

(1) “Commissioner” means the Commissioner of Agriculture, the primary constitutional officer of the Georgia Department of Agriculture, charged with the responsibility of enforcing weights and measures laws and regulations.

(2) “Correct,” as used in connection with weights and measures, means conformance to all applicable requirements of this chapter.

(3) “Measure” means a volume of standard dry or liquid capacity.

(4) “Package” means any commodity put up or packaged in any manner, in advance of sale, in units suitable for either wholesale or retail sale.

(5) “Person” means and includes individuals, partnerships, firms, corporations, companies, societies, and associations.

(6) “Primary standards” means the physical standards of the State of Georgia which serve as the legal reference from which all other standards and weights and measures are derived.

(7) “Sale from bulk” or “bulk sale” means the sale of commodities when the quantity is determined at the time of the sale.

(8) “Secondary standards” means the physical standards which are traceable to the primary standards through comparisons, using acceptable laboratory procedures, and used in the enforcement of weights and measures laws and regulations.

(9) “Weight,” as used in connection with any commodity, means net weight.

(10) "Weights and measures" means all weights and measures of every kind, instruments and devices for weighing and measuring, and any appliance and accessories associated with any or all such instruments and devices. (Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — **C.J.S.** — 94 C.J.S., Weights and Measures, 25 Am. Jur. Pleading and Practice Forms, § 1.  
Weights, Measures, and Labels, § 2.

### 10-2-2. Recognized systems of weights and measures.

The system of weights and measures in customary use in the United States and the metric system of weights and measures are jointly recognized; and either one, or both, of these systems shall be used for all commercial purposes in the state. The definitions of basic units of weight and measure, the tables of weight and measure, and weights and measures equivalents as published by the National Bureau of Standards are recognized and shall govern weighing and measuring equipment and transactions in the State of Georgia. (Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 1 et seq., 36. **C.J.S.** — 94 C.J.S., Weights and Measures, § 1 et seq.

### 10-2-3. Primary standards of weights and measures; prescribing and verifying secondary standards.

Weights and measures that are traceable to the United States prototype standards supplied by the federal government, or approved as being satisfactory by the National Bureau of Standards, shall be the State of Georgia's primary standards of weights and measures and shall be maintained in such calibration as prescribed by the National Bureau of Standards. All secondary standards may be prescribed by the Commissioner and shall be verified upon their initial receipt, and as often thereafter as deemed necessary, by the Commissioner. (Ga. L. 1941, p. 510, § 1; Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 4, 34 et seq. **C.J.S.** — 94 C.J.S., Weights and Measures, § 1 et seq.



#### 10-2-4. Technical requirements for commercial weighing and measuring devices.

The specifications, tolerances, and other technical requirements for commercial weighing and measuring devices as adopted by the National Conference on Weights and Measures and published in the National Bureau of Standards Handbook 44, entitled "Specifications, Tolerances, and Other Technical Requirements for Commercial Weighing and Measuring Devices," and supplements thereto or revisions thereof, shall apply to commercial weighing and measuring devices in the State of Georgia, except insofar as modified or rejected by rules and regulations. (Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 1, 37 et seq.

**C.J.S.** — 94 C.J.S., Weights and Measures, §§ 1, 3 et seq.

#### 10-2-5. Powers and duties of Commissioner generally.

The Commissioner shall:

(1) Maintain traceability of the State of Georgia's standards to the National Bureau of Standards;

(2) Enforce this chapter;

(3) Promulgate, adopt, and issue reasonable rules and regulations for the enforcement of this chapter. Such rules and regulations shall have the force and effect of law;

(4) Establish standards of weight, measure, or count and reasonable standards of fill. The Commissioner is authorized to establish standards for the presentation of cost-per-unit information for any packaged commodity;

(5) Grant any exemptions from this chapter or any rules or regulations promulgated pursuant thereto when appropriate to the maintenance of good commercial practices within the state;

(6) Conduct investigations to ensure compliance with this chapter;

(7) Delegate to appropriate personnel any of these responsibilities for the proper administration of his office;

(8) Test the standards of weight and measure used by any inspector of the State of Georgia, adjust where necessary, and approve the same when found to be, or made to be, correct;

(9) Inspect and test weights and measures kept, offered, or exposed for sale;

(10) Inspect and test, to ascertain if they are correct, weights and measures commercially used:

(A) In determining the weight, measure, or count of commodities or things sold, or offered or exposed for sale, on the basis of weight, measure, or count; or

(B) In computing the basic charge or payment for services rendered on the basis of weight, measure, or count;

(11) Test all weights and measures used in checking the receipt or disbursement of supplies in every institution for the maintenance of which funds are appropriated by the General Assembly;

(12) Approve for use such weights and measures as he finds to be correct. The Commissioner, in his sole discretion, is authorized to mark approved weights and measures. He shall reject and mark as rejected any weights and measures he finds to be incorrect. Weights and measures that have been rejected may be seized if not corrected within the time specified or if used or disposed of in a manner not specifically authorized. The Commissioner shall condemn and may seize weights and measures found to be incorrect that are not capable of being made correct;

(13) Employ, in carrying out this Code section, testing, inspection, and sampling procedures which are in accordance with this chapter, rules and regulations promulgated pursuant to this chapter, or procedures designated in Handbooks 130 and 133 of the National Institute of Standards and Technology;

(14) Prescribe, by regulation, the appropriate term or unit of weight or measure to be used whenever he determines in the case of a specific commodity that an existing practice of declaring the quantity by weight, measure, numerical count, or combination thereof does not facilitate value comparisons by consumers or offers an opportunity for consumer confusion;

(15) Establish, by regulation, a schedule of fees to cover the costs of the inspection and certification of weighing and measuring devices, the registration of scale mechanics, the certifying of weights, and scale registration; and

(16) Allow reasonable variations from the stated quantity of contents. Such variations shall include those caused by loss or gain of moisture during the course of good distribution practices or by unavoidable deviations in good manufacturing practices only after the commodity has entered intrastate commerce. (Ga. L. 1941, p. 510, §§ 2, 3, 5; Ga. L. 1972, p. 654, § 1; Ga. L. 1991, p. 363, § 1; Ga. L. 1992, p. 1278, § 1; Ga. L. 1994, p. 97, § 10.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 10, 11.

**C.J.S.** — 94 C.J.S., Weight and Measures, § 3.

### 10-2-6. Power of Commissioner to inspect commercial premises and vehicles; stop-use or stop-sale, hold, and removal orders; seizure.

When necessary for the enforcement of this chapter or rules or regulations promulgated pursuant to this chapter, the Commissioner is:

(1) Authorized to enter any commercial premises when open for business, except that, in the event such premises are not open to the public, he shall first present his credentials and obtain consent before making entry thereto, unless a search warrant has previously been obtained;

(2) Empowered to issue stop-use, hold, and removal orders with respect to any commercially used weights and measures and stop-sale, hold, and removal orders with respect to any packaged commodities or bulk commodities kept, offered, or exposed for sale;

(3) Empowered to seize, for use as evidence, without formal warrant, any incorrect or unapproved weight, measure, package, or commodity found to be used, retained, offered, or exposed for sale or sold in violation of this chapter or rules or regulations promulgated pursuant thereto;

(4) Empowered to stop any commercial vehicle and, after presentation of his credentials, inspect the contents, require that the person in charge of the vehicle produce any documents in his possession concerning the contents of the vehicle, and require him to proceed with the vehicle to some specified place, which shall not be more than 25 miles distant from the location where the vehicle was stopped, for inspection;

(5) Authorized to investigate and prosecute any person violating this chapter. (Ga. L. 1941, p. 510, §§ 3, 5; Ga. L. 1972, p. 654, § 1.)

**Administrative rules and regulations.** — Weights and Measures, Official Compilation of the Rules and Regulations of the State of

Georgia, Georgia Department of Agriculture, Chapter 40-15-1.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 5 et seq., 10, 11.

**C.J.S.** — 94 C.J.S., Weights and Measures, §§ 3, 6, 7.

### 10-2-7. Misrepresentation of quantity in selling or buying prohibited.

No person shall sell, offer, or expose for sale less than the quantity he represents nor take any more than the quantity he represents when, as buyer, he furnishes the weight or measure by means of which the quantity is determined. (Ga. L. 1972, p. 654, § 1.)



**Cross references.** — Unfair or deceptive trade practices or consumer transactions, § 10-1-370 et seq. Criminal penalty for using

or possessing false weight or measure, selling less than represented quality or quantity of a commodity, etc., § 16-9-50.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 41.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 9 et seq.

### 10-2-8. Misrepresentation or deception in pricing by weight, measure, or count prohibited.

No person shall misrepresent the price of any commodity or service sold, offered, exposed, or advertised for sale by weight, measure, or count nor represent the price in any manner calculated to, or tending to, mislead or in any way deceive a person. (Ga. L. 1972, p. 654, § 1.)

**Cross references.** — Unfair or deceptive trade practices or consumer transactions, § 10-1-370 et seq. Criminal penalty for using

or possessing false weight or measure, selling less than represented quality or quantity of a commodity or other offenses, § 16-9-50.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 41.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 9 et seq.

### 10-2-9. Permissible methods of selling by quantity.

Except as otherwise provided by rules or regulations promulgated by the Commissioner, commodities in a liquid form shall be sold by liquid measure or by weight; and commodities not in the liquid form shall be sold only by weight, measure, or count, so long as the method of sale provides accurate quantity information. (Ga. L. 1941, p. 510, § 4; Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 67 Am. Jur. 2d, Sales, §§ 86, 87. 79 Am. Jur. 2d, Weights and Measures, § 28.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 4.

**ALR.** — Validity of statute or ordinance requiring commodities to be sold in a specified quantity or weight, 90 ALR 1290.

### 10-2-10. Delivery tickets for bulk sales and bulk deliveries of heating fuel.

Whenever the quantity is determined by the seller, bulk sales in excess of \$20.00 and all bulk deliveries of heating fuel shall be accompanied by a delivery ticket containing the following information:

- (1) The name and address of the vendor and purchaser;
- (2) The date delivered;

(3) The quantity delivered and the quantity upon which the price is based, if this differs from the delivered quantity;

(4) The identity of the goods or commodities in the most descriptive terms commercially practicable, including any quantity representation made in connection with the sale;

(5) The count of individually wrapped packages, if more than one. (Ga. L. 1972, p. 654, § 1.)

**Cross references.** — Protection of creditors in bulk transfers, Art. 6, T. 11.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 28.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 4.

**ALR.** — Validity of statute or ordinance regulating weighing of merchandise sold in load or bulk lots, 116 ALR 245.

#### 10-2-11. Information required on packages.

Except as otherwise provided in this chapter or by rules or regulations promulgated pursuant to this chapter, any package kept for the purpose of sale or offered or exposed for sale shall bear on the outside of the package a definite, plain, and conspicuous declaration of:

(1) The identity of the commodity in the package, unless the same can easily be identified through the wrapper or container;

(2) The quantity of contents in terms of weight, measure, or count;

(3) The name and place of business of the manufacturer, packer, or distributor in the case of any package kept, offered, exposed for sale, or sold in any place other than on the premises where packed. (Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 14.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 9 et seq.

#### 10-2-12. Unit price required on packages with random weights.

In addition to the declarations required by Code Section 10-2-11, any package which is one of a lot containing random weights of the same commodity and bearing the total selling price of the package shall contain a plain and conspicuous declaration of the price per single unit of weight on the outside of the package. (Ga. L. 1972, p. 654, § 1.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 14.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 4.

**10-2-13. Advertisements of packaged commodities must state quantity with retail price.**

Whenever a packaged commodity is advertised in any manner with the retail price stated, a declaration of quantity as is required by this article or by rule or regulation of the Commissioner of Agriculture shall appear on the package and shall be closely and conspicuously associated with the retail price. Where a dual declaration is required, only the declaration that sets forth quantity in terms of the smaller unit of weight or measure need appear in the advertisement. (Ga. L. 1972, p. 654, § 1; Ga. L. 1982, p. 3, § 10.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 14.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 4.

**10-2-14. Using or possessing incorrect weight or measure; removing tags, seals, or marks; obstructing enforcement.**

It shall be unlawful for any person to:

(1) Use or possess any incorrect weight or measure for use in commerce;

(2) Remove any tag, seal, or mark from any weight or measure without specific written authorization from the Commissioner;

(3) Hinder or obstruct the Commissioner or any deputy or other official designated by the Commissioner and charged with the enforcement of the laws of this state dealing with weights and measures in the performance of his duties. (Ga. L. 1941, p. 510, § 6; Ga. L. 1972, p. 654, § 1.)

**Cross references.** — Gasoline pumps, § 10-1-159.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 40 et seq.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 7 et seq.



**10-2-15. Grain moisture testing equipment — Standards; inspections.**

It shall be the duty of the Commissioner to adopt standards for moisture testing equipment utilized in determining the moisture content of grain offered for sale in this state. Upon the establishment of such standards, it shall be unlawful for any person to utilize any such equipment which does not comply with the standards established pursuant to this Code section. It shall be the duty of the Commissioner to enforce this Code section and to make such inspections as shall be necessary to assure that all moisture testing equipment complies with the standards. (Ga. L. 1962, p. 631, § 1; Ga. L. 1972, p. 654, § 1.)

**Cross references.** — Grain dealers generally, § 2-9-30 et seq.

**10-2-16. Grain moisture testing equipment — Operator to obtain permit.**

No person shall operate moisture testing equipment to determine the moisture content of grain offered for sale unless such person shall be trained in the operation thereof and shall have obtained a permit from the Commissioner after submitting proof to the Commissioner of his ability to such equipment. Any such permit shall be valid until suspended or revoked for cause after notice and hearing, in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” There shall be no fee for such permit. (Ga. L. 1972, p. 654, § 1.)

**Cross references.** — Official weigher’s certificate as constituting prima-facie evidence of its own authenticity and genuineness and of facts stated therein, § 11-1-202.

**10-2-17. Inspection of scales used in intrastate shipments.**

The Commissioner is authorized to inspect scales used for the calculation and determination of fees or charges for the transportation of bulk materials, packages, goods, and commodities in intrastate shipments by rail, parcel services, motor vehicles, motor transport, buses, and airlines. (Ga. L. 1972, p. 654, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 79 Am. Jur. 2d, *Weights and Measures*, §§ 17, 18.      **C.J.S.** — 94 C.J.S., *Weights and Measures*, § 5.

**10-2-18. When weight, measure, or weighing or measuring device presumed used in business.**

Whenever there shall exist a weight or measure or weighing or measuring device in or about any place in which or from which buying or selling is commonly carried on, there shall be a rebuttable presumption that such

weight or measure or weighing or measuring device is regularly used in the business conducted at such place. (Ga. L. 1972, p. 654, § 1.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 26. **C.J.S.** — 94 C.J.S., Weights and Measures, § 6.

### 10-2-19. Manner of display of measurement of compressed natural gas on dispensing devices.

(a) As used in this Code section, the term “compressed natural gas” means a mixture of hydrocarbon gases and vapors, consisting principally of methane in gaseous form, that has been compressed for use as a motor fuel.

(b) Notwithstanding any provision contained in the National Bureau of Standards Handbook or any other national standard that may be adopted in this state by law or regulation, any dispensing device used to dispense compressed natural gas for use as a motor vehicle fuel may display the measurement of compressed natural gas in gallon equivalent units or fractions thereof and may compute the sales price of compressed natural gas according to such units or fractions thereof; provided, however, that such gallon equivalent shall contain not less than 110,000 British thermal units. (Code 1981, § 10-2-19, enacted by Ga. L. 1993, p. 811, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, “Code section” was substituted for “Code Section” in subsection (a).

**Editor’s notes.** — Ga. L. 1993, p. 811, § 1, effective July 1, 1993, renumbered former Code Section 10-2-19 as present Code Section 10-2-20.

### 10-2-20. Enjoining violations.

The Commissioner or his representative, at the discretion of the Commissioner, is authorized to apply to any court of competent jurisdiction for a temporary or permanent injunction restraining any person from violating this chapter. (Ga. L. 1972, p. 654, § 1; Code 1981, § 10-2-19; Code 1981, § 10-2-20, as redesignated by Ga. L. 1993, p. 811, § 1.)

**Editor’s notes.** — Ga. L. 1993, p. 811, § 1, effective July 1, 1993, renumbered former Code Section 10-2-20 as present Code Section 10-2-21.

### 10-2-21. Administrative penalty for violations; judicial review; proceedings for collection.

(a) As an alternative to criminal or other civil enforcement, the Commissioner, in order to enforce this article or any orders, rules, or regulations promulgated pursuant thereto, after a hearing, may issue an administrative order imposing a penalty not to exceed \$1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person

has violated this article or any rules, regulations, or orders promulgated pursuant to this article. The hearing and any administrative review thereof shall be conducted in accordance with the procedure for contested cases under Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

(b) Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50.

(c) All penalties recovered as provided in this Code section shall be paid into the state treasury.

(d) The Commissioner may file in the superior court wherein the person under order resides or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal, whereupon the court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment had been rendered in an action duly heard and determined by the court.

(e) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any orders, rules, or regulations promulgated pursuant thereto. (Ga. L. 1979, p. 655, § 1; Code 1981, § 10-2-20; Code 1981, § 10-2-21, as redesignated by Ga. L. 1993, p. 811, § 1.)

**Editor’s notes.** — Ga. L. 1993, p. 811, § 1, Code Section 10-2-21 as present Code Section effective July 1, 1993, renumbered former 10-2-22.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 40.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 7.

#### 10-2-22. Criminal penalty for violations.

Any person, firm, partnership, corporation, society, or association who shall violate this article, relating to weights and measures in general, or any rule or regulation promulgated pursuant to this article, shall be guilty of a misdemeanor. (Laws 1833, Cobb’s 1851 Digest, p. 821; Ga. L. 1851-52, p. 263, § 1; Code 1863, § 4458; Ga. L. 1865-66, p. 231, § 5; Code 1868, § 4502; Code 1873, § 4590; Code 1882, § 4590; Penal Code 1895, § 661; Penal Code 1910, § 706; Code 1933, § 112-9901; Ga. L. 1941, p. 510, § 9;



Ga. L. 1972, p. 654, § 2; Code 1981, § 10-2-21; Code 1981, § 10-2-22, as redesignated by Ga. L. 1993, p. 811, § 1.)

### JUDICIAL DECISIONS

**Cited in** Haynie v. State, 46 Ga. App. 310, 167 S.E. 612 (1933); Scott v. State, 53 Ga. App. 61, 185 S.E. 131 (1936).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 4 et seq.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 7 et seq.

### 10-2-23. Sale and measurement of pulpwood, sawtimber, poles, and other types of timber.

All pulpwood, sawtimber, poles, and other types of timber sold or measured in this state by weight shall be sold on the basis of tonnage or pounds, with one ton equaling 2,000 pounds. Nothing in this Code section shall prohibit the sale or measurement of such products by measured volume, so long as such measurement is not calculated by weight. (Code 1981, § 10-2-23, enacted by Ga. L. 1993, p. 446, § 1.)

**Code Commission notes.** — Pursuant to section, enacted as Code Section 10-2-22, was Code Section 28-9-5, in 1993, this Code redesignated as Code Section 10-2-23.

## ARTICLE 2

### CERTIFIED PUBLIC WEIGHERS

**Cross references.** — Provision of certified public weighers by public warehouses, § 10-4-27. Provision of certified public weigher by person licensed to operate service for receiving flue-cured leaf tobacco for purpose of weighing, redrying, and storage, § 10-4-151.

### 10-2-40. Persons who may be licensed and known as certified public weighers.

Any person who shall weigh, measure, or record the indications or readings of weighing or measuring and declare the weight, measure, reading, or recording to be the true weight, measure, reading, or recording of any commodity, article, or product may be licensed under this article and shall be known as a certified public weigher of Georgia. (Ga. L. 1949, p. 1179, § 1.)

### OPINIONS OF THE ATTORNEY GENERAL

**Employment of weighers.** — The “any person” designation in this section indicates that certified public weighers can be employed by highway contractors or material producers. 1972 Op. Att’y Gen. No. 72-47.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, *Weights and Measures*, §§ 19, 24, 26.

**C.J.S.** — 94 C.J.S., *Weights and Measures*, §§ 5, 6.

**ALR.** — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.

10-241. License required; application; issuance.

(a) Any person who desires to be a certified public weigher in this state shall apply for and obtain a license permit from the Commissioner by filing a formal application as follows:

I, \_\_\_\_\_, a citizen of the United States, residing at \_\_\_\_\_, County of \_\_\_\_\_, having familiarized myself with the law relative to licensing of certified public weighers, do hereby make application for license permit as a certified public weigher.

I certify that I am morally and physically fit to perform the duties imposed upon a certified public weigher and that I will, if licensed, faithfully and accurately make true recordings and will comply with the law and rules and regulations relating to certified public weighers to the best of my knowledge and ability.

_____ Name	_____ Address
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We, the undersigned, being citizens of Georgia, do certify that the applicant herein is a person of good moral character and that the statements made in the foregoing application are true to the best of our knowledge and belief and that our endorsement is without fear of embarrassment.

_____ Name	_____ Address
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_____ Name	_____ Address
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_____ Name	_____ Address
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(b) Upon his appointment as a certified public weigher, a license permit shall be issued to him authorizing the applicant to weigh, measure, and record any and all commodities. (Ga. L. 1949, p. 1179, § 3.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, *Weights and Measures*, § 19.

**C.J.S.** — 94 C.J.S., *Weights and Measures*, § 6.

**10-2-42. Duration of license; fees; cost of seals.**

Certified public weighers shall be licensed for a period of one year beginning on July 1 and ending on June 30, next. A fee of \$5.00 shall be paid to the Commissioner by each person so licensed at the time application is filed. A fee of \$5.00 shall be required for each renewal of a license as a certified public weigher. In addition thereto, the applicant shall pay the actual cost of seals required under this article. (Ga. L. 1949, p. 1179, § 10; Ga. L. 1956, p. 334, § 3.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 19.

**C.J.S.** — 94 C.J.S., Weights and Measures, §§ 5, 6.

**10-2-43. Revocation of license permit for malfeasance or violation; notice and hearing.**

After reasonable notice and opportunity for a hearing before the Commissioner, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," any license permit as a certified public weigher may be revoked by the Commissioner for malfeasance in office or for the violation of this article or for violation of any rule or regulation promulgated under the terms of this article. (Ga. L. 1949, p. 1179, § 12.)

**Cross references.** — Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 19.

**C.J.S.** — 94 C.J.S., Weights and Measures, §§ 5, 6.

**10-2-44. Surety bonds.**

Reserved. Repealed by Ga. L. 1991, p. 322, § 1, effective July 1, 1991.

**Editor's notes.** — This Code section was based on Ga. L. 1949, p. 1179, § 5; Ga. L. 1956, p. 334, § 1; Ga. L. 1956, p. 631, § 6; and Ga. L. 1981, Ex. Sess., p. 8.

**10-2-45. Certified public weigher's official seal.**

It shall be the duty of every certified public weigher licensed under this article to obtain through the Department of Agriculture an official seal which shall have inscribed thereon the following words: "Georgia Certified Public Weigher" or such other design or legend as the Commissioner may deem appropriate. The seal shall be stamped or impressed upon each and every weight, measure, count, reading, or recording certificate issued by such certified public weigher. When so applied, the certificate shall be recognized and accepted as a declaration of the official, true, and accurate



weight, measure, count, reading, or recording of the commodity, product, or article weighed, measured, or counted with the tolerance allowed by Article 1 of this chapter. (Ga. L. 1949, p. 1179, § 6.)

**Cross references.** — Provision that official weigher's certificate constitutes prima-facie evidence of its own authenticity and genuineness and of facts stated therein, § 11-1-202.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 19.      **C.J.S.** — 94 C.J.S., Weights and Measures, §§ 5, 6.

### 10-2-46. Issuance of official seals to licensed tobacco warehousemen.

For the weighing of leaf tobacco sold or offered for sale at a licensed tobacco warehouse, an official seal for certification of all weights made at the warehouse may be issued directly to the licensed warehouseman and may be used for all weighings made at the warehouse, provided that all weighings shall be made by certified public weighers. (Ga. L. 1975, p. 1302, § 1; Ga. L. 1982, p. 3, § 10.)

### 10-2-47. Return of seal on termination of duties.

In the interest of public welfare, the seal provided for a certified public weigher shall be the property of the State of Georgia and shall be returned to the Commissioner upon termination of the duties as a certified public weigher. (Ga. L. 1949, p. 1179, § 11.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 19.      **C.J.S.** — 94 C.J.S., Weights and Measures, §§ 5, 6.

### 10-2-48. Duties of certified public weighers.

It shall be the duty of bonded certified public weighers licensed under this article to issue certificates of weight, measure, count, or recording on forms to be approved by the Commissioner and to comply with this article and the rules and regulations promulgated relating thereto. (Ga. L. 1949, p. 1179, § 4; Ga. L. 1956, p. 631, § 5.)

**Cross references.** — Requirements regarding weighing of railroad cars by certified public weighers, § 46-9-50.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, § 19.      **C.J.S.** — 94 C.J.S., Weights and Measures, §§ 5, 6.

**10-2-49. Use of untested weight, measure, or device prohibited.**

It shall be unlawful for any certified public weigher to use any weights, measures, reading, or recording device which has not been tested and approved by the Commissioner or his assistant, deputy, or inspector in accordance with Article 1 of this chapter. (Ga. L. 1949, p. 1179, § 9.)

**RESEARCH REFERENCES**

C.J.S. — 94 C.J.S., Weights and Measures,  
§ 8.

**10-2-50. Weighing leaf tobacco and livestock.**

(a) On and after March 9, 1956, all leaf tobacco sold, or offered for sale, in a tobacco warehouse shall be weighed by a certified public weigher who has been licensed by the Commissioner.

(b) Livestock of any kind sold or offered for sale at any sales or auction barn shall be weighed by a certified public weigher who has been licensed by the Commissioner. (Ga. L. 1956, p. 631, §§ 2, 3; Ga. L. 1991, p. 322, § 2.)

**OPINIONS OF THE ATTORNEY GENERAL**

Section is applicable to any place where  
livestock is sold or offered for sale. 1954-56  
Op. Att'y Gen. p. 10.

**10-2-51. Sale of coal or coke by itinerant dealer without having weight certified; penalty.**

Any itinerant dealer who shall sell or offer to sell coal or coke by a weight other than a weight certified by a person licensed under this article shall be guilty of a misdemeanor. (Ga. L. 1957, p. 374, § 1.)

**RESEARCH REFERENCES**

C.J.S. — 94 C.J.S., Weights and Measures,  
§ 4.

**10-2-52. Commissioner of Agriculture to administer article; rules and regulations; regulation of livestock auction barns.**

This article shall be administered by the Commissioner of Agriculture, and he is empowered to make and promulgate rules and regulations necessary for the enforcement of this article and may regulate sales order of livestock at auction sales barns. (Ga. L. 1949, p. 1179, § 2; Ga. L. 1956, p. 631, § 4.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, *Weights and Measures*, § 10.

**C.J.S.** — 94 C.J.S., *Weights and Measures*, §§ 2, 3.

**10-2-53. Administrative penalty for violation of article or order, rule, or regulation; judicial review; proceedings for collection.**

(a) As an alternative to criminal or other civil enforcement, the Commissioner, in order to enforce this article or any orders, rules, and regulations promulgated pursuant thereto, after a hearing, may issue an administrative order imposing a penalty not to exceed \$1,000.00 for each violation whenever the Commissioner, after a hearing, determines that any person has violated this article or any rules, regulations, or orders promulgated under this article. The hearing and any administrative review thereof shall be conducted in accordance with the procedures for contested cases under Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

(b) Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by any final order or action of the Commissioner shall have the right of judicial review thereof in accordance with Chapter 13 of Title 50.

(c) All penalties recovered as provided in this Code section shall be paid into the state treasury.

(d) The Commissioner may file in the superior court wherein the person under order resides, or, if said person is a corporation, in the county wherein the corporation maintains its principal place of business, or in the county wherein the violation occurred, a certified copy of a final order of the Commissioner unappealed from, or of a final order of the Commissioner affirmed upon appeal, whereupon said court shall render judgment in accordance therewith and notify the parties. The judgment shall have the same effect, and all proceedings in relation thereto shall thereafter be the same, as though the judgment has been rendered in a suit duly heard and determined by the court.

(e) The penalty prescribed in this Code section shall be concurrent, alternative, and cumulative with any and all other civil, criminal, or alternative rights, remedies, forfeitures, or penalties provided, allowed, or available to the Commissioner with respect to any violation of this article and any orders, rules, or regulations promulgated pursuant thereto. (Ga. L. 1979, p. 654, § 1.)

**10-2-54. Criminal penalties for violations by certified public weighers and others; revocation of licenses; forfeiture of seals.**

(a) Any certified public weigher who shall issue a certificate giving a false weight, measure, count, or reading, or who shall misrepresent the weight,



measure, count, or reading of any commodity, produce, or article, or who shall otherwise violate this article or any of the rules promulgated by authority of this article shall be guilty of a misdemeanor; and, in addition thereto, his license as a certified public weigher shall be revoked and he shall forfeit his seal, which, when so forfeited, shall be turned over to the Commissioner.

(b) Any person, firm, or corporation who shall request a certified public weigher to weigh, measure, count, read, or record any commodity, product, or article falsely or incorrectly or who shall request a false or inaccurate certificate of weight, measure, count, reading, or recording; or any person issuing a certificate of weight, measure, count, or recording within the meaning of this article who is not licensed as a certified public weigher in accordance with this article; or any person who shall in any way impersonate by acting as, or for, a certified public weigher; or any person who shall erase, change, or alter any certificate issued by a certified public weigher, shall be guilty of a misdemeanor.

(c) Failure or refusal of a person licensed as a certified public weigher under this article to surrender the official seal to the Commissioner upon termination of his license or for malfeasance in office shall be a misdemeanor, and any person convicted thereof shall be punished by a fine of not less than \$10.00 nor more than \$200.00, or by imprisonment for not more than three months, in the discretion of the court. (Ga. L. 1949, p. 1179, §§ 7, 8, 11; Ga. L. 1956, p. 334, § 2.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 79 Am. Jur. 2d, Weights and Measures, §§ 6 et seq., 24, 26, 40 et seq.

**C.J.S.** — 94 C.J.S., Weights and Measures, § 5 et seq.

**ALR.** — Liability of public weigher, 23 ALR 1429.

CHAPTER 3

NOTES AND OTHER EVIDENCES OF DEBT

Sec.		Sec.	
10-3-1.	Transfer of secured note carries security.	10-3-4.	Certain notes or contracts for patent rights, copyrights, or proprietary rights; purchaser takes subject to equities.
10-3-2.	Endorser sued with maker, drawer, or acceptor.		
10-3-3.	Certain notes or contracts for patent rights, copyrights, or proprietary rights — Consideration to be stated.	10-3-5.	Certain notes or contracts for patent rights, copyrights, or proprietary rights — Penalty for violation of Code Section 10-3-3.

10-3-1. Transfer of secured note carries security.

The transfer of notes secured by a mortgage or otherwise conveys to the transferee the benefit of the security. If more than one note is secured and the mortgagee transfers some and retains others, the holder of the transferred notes has a preference over the mortgagee if the security is insufficient to pay all the notes. (Civil Code 1895, § 3684; Civil Code 1910, § 4276; Code 1933, § 14-1802.)

**History of Code section.** — This Code section is derived from the decisions in *Roberts v. Manfield*, 32 Ga. 228 (1861), and *Crowder v. Dunbar*, 74 Ga. 109 (1884).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- CONSTRUCTION AND APPLICATION
- EFFECT OF TRANSFER
- ENFORCEMENT OF RIGHTS
  - 1. IN GENERAL
  - 2. JOINDER OF PARTIES
  - 3. RES JUDICATA

General Consideration

**Express assignment not affected.** — This section refers to implied transmission of title to the security, but does not purport to exclude transmission by express written assignment of the notes and security, or to qualify the effect of such written assignment. *Cross v. Citizens Bank & Trust Co.*, 160 Ga. 647, 128 S.E. 898 (1925); *Georgia Land & Sec. Co. v. Citizens Bank*, 164 Ga. 852, 139 S.E. 557 (1927).

**All or part of debt and security transferrable.** — If land has been conveyed by security deed, the creditor may transfer the whole or any part of the debt and with it

the real estate as security. *Hunt v. New England Mtg. Sec. Co.*, 92 Ga. 720, 19 S.E. 27 (1893); *Moss & Co. v. Stokely*, 107 Ga. 233, 33 S.E. 61 (1899); *Cumming v. McDade*, 118 Ga. 612, 45 S.E. 479 (1903).

**Defense of conversion of collateral in suit on note.** — In a suit brought upon a note which recites that certain collateral is given to secure its payment and in which suit the collateral is neither tendered nor satisfactorily accounted for, it is error to strike a defense which alleges that such collateral was actually deposited and in which the ability of the plaintiff to produce the collateral is denied. Such an allegation practically

**General Consideration** (Cont'd)

amounts to an allegation that the collateral has been converted, and if this was true, the defendant would have the right to recoup the value of the converted security, as against the payment of the note. *Turner v. Commercial Sav. Bank*, 17 Ga. App. 631, 87 S.E. 918 (1916).

**Cited in** *Radcliffe v. Jones*, 46 Ga. App. 33, 166 S.E. 450 (1932); *Redwine v. Frizzell*, 184 Ga. 230, 190 S.E. 789 (1937); *Alropa Corp. v. Richardson*, 58 Ga. App. 656, 199 S.E. 666 (1938); *Robbins v. Welfare Fin. Corp.*, 95 Ga. App. 90, 96 S.E.2d 892 (1957).

**Construction and Application**

**"Otherwise" defined.** — Word "otherwise" includes any form of security which may be taken for the purpose of securing an indebtedness evidenced by a series of notes. *Merchants' & Citizens' Bank v. Bogle*, 174 Ga. 612, 163 S.E. 489 (1932).

The word "otherwise," in this section, covers notes secured by security deed. *Alley v. First Nat'l Bank*, 46 Ga. App. 527, 168 S.E. 317 (1933).

**Section is applicable to security deed** where title is transferred to the mortgagee. *In re R.H. Elrod & Son*, 215 F. 253 (N.D. Ga. 1913).

This section says that transfer of notes secured by a mortgage or otherwise conveys to transferee the benefit of the security. *Alley v. First Nat'l Bank*, 46 Ga. App. 527, 168 S.E. 317 (1933).

**Title transferred by transfer of secured note.** — Whether or not the purported transfer of the security deed by the executors of an estate was effectual either in law or equity, where it appears that they also transferred the note secured by the deed, as a result of such transfer the transferee acquired an equitable title to the security. *Chapman v. McPherson*, 184 Ga. 618, 192 S.E. 423 (1937).

**Effect of Transfer**

**Endorsement of note conveys mortgage lien.** — The endorsement by a payee of the payee's name on the back of a mortgage note, for value, conveyed such note together with the mortgage lien to the holder thereof, and the transferee could foreclose the same

in the transferee's own name. *Setze v. First Nat'l Bank*, 140 Ga. 603, 79 S.E. 540 (1913).

**Restricted endorsement.** — This section applies where the transfer is by endorsement of the note without recourse as well as where the endorsement is not restricted. *Berry v. Van Hise*, 148 Ga. 27, 95 S.E. 690 (1918).

**Delivery of note reserving title to personalty.** — The mere delivery of a note containing a reservation of title to personalty, while sufficient to transfer the evidence of the debt, is insufficient to establish such privity between the maker of the note and the transferee as will continue or keep alive the right of retaking the chattel. *Swann Davis Co. v. Stanton*, 7 Ga. App. 668, 67 S.E. 888 (1910).

**Transfer of purchase money note without recourse.** — Where purchase money notes are transferred by the vendor of land without recourse or without guaranty, the notes lose their character as purchase money notes, insofar as the notes entitle the holder to a lien on the property. *McLeod v. Bank of Abbeville*, 147 Ga. 33, 92 S.E. 645 (1917).

**Transfer of purchase money note with reserved title.** — When a promissory note for the purchase money of personal property which contains a reservation of title until the note is paid is by the payee transferred for value to a third person without recourse, the title reserved for securing the payment is divested. If at the time of such transfer the title is not likewise transferred to the purchaser of the note as security in the purchaser's hands, it vests in the maker, and the transferee becomes an ordinary creditor of such maker. *Mills v. Pope*, 20 Ga. App. 820, 93 S.E. 559 (1917).

**"Payment guaranteed" endorsed on note with signature transfers security.** — The words "payment guaranteed," signed by the payees and entered upon the back of a promissory note which contains a retention of title to property therein described, to secure the note's payment, is sufficient as an endorsement to transfer the title both of the note and of the property. *Hendrix v. Bauhard Bros.*, 138 Ga. 473, 75 S.E. 588, 43 L.R.A. (n.s.) 1028, 1913D Ann. Cas. 688 (1912); *Hooper v. Bank of Hiawassee*, 29 Ga. App. 459, 116 S.E. 32 (1923).

**Loss of status as purchase money notes does not apply to mortgage.** — Decisions such as that in *Neal v. Murphey & Co.*, 60 Ga.



388 (1978), to the effect that when purchase money notes for land for which bond for title has been given are transferred by the vendor without recourse, the notes lose their character as purchase money notes insofar as the notes entitle the vendor to an interest in the land, and have no application to the case of a transfer of a note secured by mortgage. *Berry v. Van Hise*, 148 Ga. 27, 95 S.E. 690 (1918).

**Delivery of note transfers security represented by bond for title to land.** — The assignee of a note given by the holder of a bond for title for part of the purchase-money of land, payable to the vendor or bearer, and transferred by the vendor by delivery, is subrogated to the rights of the vendor, and is entitled to a lien against the land for the purchase-money. The principle of this section applies when a note is indorsed without recourse. This principle applies when the note is payable to a named payee or order, and is transferred by mere delivery. *Holbrook v. Adams*, 166 Ga. 871, 144 S.E. 657 (1928).

**General personal verdict against transferor without recourse not authorized.** — Where note secured by mortgage is transferred without recourse to one who transferred to another and suit was instituted thereon by the last transferee to recover a general judgment and set up the mortgage lien upon the property, while it was proper, under the disputed facts, to direct a verdict setting up a mortgage lien on the property for the amount of the note, it was erroneous to direct a general verdict in personam against the mortgagee who had transferred the note without recourse. *Berry v. Van Hise*, 148 Ga. 27, 95 S.E. 690 (1918).

**Transferee of one of several notes preferred.** — Since a security deed secured several notes, and one of the notes was transferred to the mortgagee's creditor, the latter was entitled to preference out of the proceeds of the sale of the property. *In re R.H. Elrod & Son*, 215 F. 253 (N.D. Ga. 1913).

**Transferee has preference over secured payee.** — The transfer of notes which are in any wise secured conveys to the transferee the benefit of the security, and if several notes thus secured are executed and delivered to a creditor as payee and the latter transfers some and retains others, the holder of the transferred notes has a preference

over the secured payee, if the security is insufficient to pay all the notes. *Merchants' & Citizens' Bank v. Bogle*, 174 Ga. 612, 163 S.E. 489 (1932).

In the absence of a special contract, where a mortgagee or grantee in a security deed transfers one of the secured notes and the transferee brings an equitable foreclosure thereon, the transferee will have priority over the mortgagee or grantee in the security deed holding the untransferred notes, if the amount realized at the foreclosure sale is insufficient to pay all the notes. *Rembert v. Ellis*, 195 Ga. 807, 25 S.E.2d 681 (1943).

**Security need not be transferred to give transferee preference.** — The holder of notes of a series to whom the notes have been transferred has a preference over the secured payee who retains a portion of the evidence of indebtedness, if the security is insufficient to pay all the note, and there need not be a transfer of the security in order to entitle the transferee to this preference. *Merchants' & Citizens' Bank v. Bogle*, 174 Ga. 612, 163 S.E. 489 (1932).

**Transferee takes general power of sale.** — Where one becomes owner of title conveyed by security deed and of indebtedness secured thereby, and the power of sale is not expressed in the deed as limited to grantee, but is conferred upon grantee or "assigns," one is entitled to exercise the power to same extent as grantee. *Universal Chain Theatrical Enters., Inc. v. Oldknow*, 176 Ga. 492, 168 S.E. 239 (1933).

**Waiver of transferee's right to preference.** — Generally, the transferee of one or more of several notes secured by deed to a single tract of land is entitled to preference in payment to the payee of the mortgage or security deed, but this preference may be waived. Such transferee of one of the notes may not only expressly waive one's right to preference in the distribution of funds arising from the sale of the land given as security for the payment of the debt, but one may also expressly contract that preference in the payment of the proceeds of such sale shall be retained by the holder of the security deed, and thereby agree and contract that a distribution of the proceeds of the sale of the land securing both notes shall be different from that ordinarily enforceable by law. *Ottawaquechee Sav. Bank v. Elliott*, 172 Ga. 656, 158 S.E. 316 (1931).

## Enforcement of Rights

### 1. In General

**Transferee may subject land to debt.** — Under former Civil Code 1910, §§ 6037 and 6039, the transferee and holder of a promissory note given for the purchase money of land may, in appropriate proceedings, subject the land to the transferee's debt. *Guarantee Trust & Banking Co. v. American Nat'l Bank*, 15 Ga. App. 778, 84 S.E. 222 (1915).

**Recovery of personality where title reserved.** — If one sells personal property, taking a purchase money note reserving title in the property until the note is paid, the holder of such note may recover the property in an action of trover upon failure of the maker of the note to pay the note. *Jordan Mercantile Co. v. Brooks*, 149 Ga. 157, 99 S.E. 289, answer conformed to, 24 Ga. App. 3, 99 S.E. 475 (1919); *Hooper v. Bank of Hiawassee*, 29 Ga. App. 459, 116 S.E. 32 (1923).

**Any transferee may foreclose.** — If one or more of several notes secured are held by one person and others of the secured notes are held by other parties, each of the noteholders is entitled to the security executed to secure all the notes, and any one of the holders may foreclose, giving the notice required by law to all holders concerned. *Irons v. American Nat'l Bank*, 178 Ga. 160, 172 S.E. 629 (1933).

**Enforcement of landlord's lien despite payment to transferor.** — If a tenant gives two negotiable promissory notes payable to the landlord for rent and the landlord transfers one of the notes and retains the other, in the absence of any agreement to the contrary, the lien right is split, and the interests of the landlord and the transferee in the security provided by the landlord's liens are several, and the interest of the transferee is not subject to the control of the landlord. If in such a case the tenant sells and disposes of a part of the crops raised upon the premises during the year and pays the entire proceeds to the landlord, who does not produce the transferred note, and if such sale and disposition of the proceeds are without the authority or consent of the transferee, the latter will not be estopped by such application of the proceeds from asserting the fact of such sale and removal as ground for distraining for the amount of rent repre-

sented by the transferred note before the note's maturity. *International Agric. Corp. v. Powell*, 31 Ga. App. 348, 120 S.E. 668 (1923).

**Equity will give effect to transferee's rights.** — If the security is a deed conveying the legal title, the transfer carries with the transfer an equitable interest in the security, though not the legal title; and a court of equity will give effect to the transferee's rights in the premises. *Henry v. McAllister*, 93 Ga. 667, 20 S.E. 66 (1894); *Van Pelt v. Hurt*, 97 Ga. 660, 25 S.E. 489 (1896); *Carter v. Johnson*, 156 Ga. 207, 119 S.E. 22 (1923); *First Nat'l Bank v. Pounds*, 163 Ga. 551, 136 S.E. 528 (1927).

When the transferee of a purchase money note reduces the note to judgment, it is the duty of the vendor to convey the land by quitclaim deed to the purchasers, to enable the transferee to levy upon and sell the land under an execution issued upon the judgment obtained for the purchase money; and upon refusal of the vendor to make such conveyance when requested to do so by a transferee, a court of equity will compel the vendor to make such conveyance. *Holbrook v. Adams*, 166 Ga. 871, 144 S.E. 657 (1928).

**Lien enforceable without regard to equitable principles.** — Under former Civil Code 1910, §§ 3346 and 4276, a transferee of notes may ask in a court of law, without asking for intervention of equitable principles, that a judgment rendered on such notes be declared to be a special lien on the land or other property which is described in the instrument securing such notes. *Alley v. First Nat'l Bank*, 46 Ga. App. 527, 168 S.E. 317 (1933).

### 2. Joinder of Parties

**Transferees joinable with mortgagor.** — A petition was not rendered multifarious by the joinder of the holders of a transferred note with the mortgagor, because the petition set forth one connected interest among them all, centering in the point in issue in the cause. *Conley v. Buck*, 100 Ga. 187, 28 S.E. 97, later appeal, 102 Ga. 752, 29 S.E. 710 (1897).

**Immaterial whether note preferred or not.** — It is immaterial under this section whether the note is preferred or postponed in payment to those held by the mortgagee. *Willingham & Cone v. Huguenin*, 129 Ga. 835, 60 S.E. 186 (1908).

**All transferees must be made parties, if possible.** — All the holders of notes secured by a mortgage must be brought before the court as defendants before a decree is made; it is best, both for the holders of the notes and the mortgagor, that the foreclosure sale shall remove the whole lien from the property, so that contemplating purchasers may bid with the assurance that the lien of the mortgagor will be entirely divested from the land, but this is not to be understood as requiring the impossible; it was not intended to require the exercise of that extraterritorial jurisdiction which is forbidden by law. *Irons v. American Nat'l Bank*, 178 Ga. 160, 172 S.E. 629 (1933).

### 3. Res Judicata

**Decrees and orders bind grantee made party or subsequent transferees.** — If a foreclosure proceeding by a transferee of one of the secured notes has been completed and the grantee in the security deed was a party to the proceeding, the decree and orders therein are *res judicata* as to any further rights of the grantee or the grantee's

transferees who may acquire title after such decree and orders. *Rembert v. Ellis*, 195 Ga. 807, 25 S.E.2d 681 (1943).

Where the transferee of a note secured by a deed forecloses thereon in equity and makes the receiver of the insolvent assignor a party, and the receiver raises no question as to a partly erroneous description of the property in the petition and proceedings, but acknowledges service of a petition and rule nisi to confirm the sale of the property, as correctly advertised, sold, and described in the petition for confirmation, and the sale is thus confirmed with a correct deed to the purchaser, one who subsequently buys another note secured by the same deed is bound by such foreclosure. One cannot maintain on one's note a second foreclosure on the theory that the first proceeding was void because the pleadings and procedure therein contained the partly erroneous description of the property since one was a privy of the insolvent assignor and its receiver. Accordingly, the judge properly found for the defendants on their pleas of *res judicata* and *estoppel*. *Rembert v. Ellis*, 195 Ga. 807, 25 S.E.2d 681 (1943).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 55 Am. Jur. 2d, Mortgages, § 1019.

**C.J.S.** — 10 C.J.S., Bills and Notes; Letters of Credit, §§ 127, 138.

**ALR.** — Assumption of mortgage by grantee as affecting right of mortgagee to proceed against mortgagor, 41 ALR 317.

### 10-3-2. Endorser sued with maker, drawer, or acceptor.

In all cases the endorser may be sued in the same action and in the same county with the maker or drawer or acceptor. (Laws 1826, Cobb's 1851 Digest, p. 594; Code 1863, § 2732; Code 1868, § 2740; Code 1873, § 2782; Code 1882, § 2782; Civil Code 1895, § 3691; Civil Code 1910, § 4283; Code 1933, § 14-1803.)

**Law reviews.** — For note discussing problems with venue in Georgia and proposing statutory revisions to improve the resolution

of venue questions, see 9 Ga. St. B.J. 254 (1972).

### JUDICIAL DECISIONS

**Former exception as to state-chartered banks.** — Section originally excepted notes to be negotiated or deposited with state-chartered banks for collection.

*Beckwith v. Carleton & Co.*, 14 Ga. 691 (1854).

**Permitting joint suit changed law merchant.** — The suit against the maker and



endorser in one action is entirely of statutory origin. A suit against the maker and endorser was unknown to the law merchant, under which it was necessary to obtain a judgment against the maker before the liability of the endorser was established. *Wilson v. Exchange Bank*, 122 Ga. 495, 50 S.E. 357, 69 L.R.A. 97, 2 Ann. Cas. 597 (1905).

**Formerly, section not applicable to bills of exchange.** — Prior to adoption of what is now the state Constitution, while the endorser and maker of a promissory note living in different counties may have been joined in the same action, this rule was not applicable to bills of exchange. *Vinson v. Platt & McKenzie*, 21 Ga. 135 (1857); *Cox v. Mechanics' Sav. Bank*, 28 Ga. 529 (1859).

**Joinder of principal and guarantor.** — Under the state Constitution where the contract signed by the defendant was one of guaranty, not endorsement, one cannot be sued jointly with the principal, but a separate suit must be entered against each in the county of one's residence. *Geiser Mfg. Co. v. Jones & Toole*, 90 Ga. 307, 17 S.E. 81 (1892); *Georgia Cas. Co. v. Dixie Trust & Sec. Co.*, 23 Ga. App. 447, 98 S.E. 414 (1919).

**Joinder of maker and endorser.** — The maker of a note and the one who endorses the note, "to be liable in the second instance," cannot be sued together in the same action. *Bartlett v. Byers*, 35 Ga. 142 (1866).

**Joinder of maker and one who promised to become joint maker.** — If one promised to become the joint maker of a note with another but fails to do so, one cannot be joined with the maker in an action in the county of such maker, if one lives in a different county. *Adams v. Williams*, 125 Ga. 430, 54 S.E. 99 (1906).

**Joinder of joint makers or maker and endorser.** — Where one signs one's name on the face of a note with the word "endorser" thereafter, one is either a joint maker or an endorser and may be sued with the other maker. *McLendon v. McLendon*, 61 Ga. 110 (1878).

**Endorser may prove different relationship.** — Where one signs one's name on the back of a nonnegotiable note in blank one is an ordinary endorser and not a guarantor and is, therefore, suable in the same action with the maker in the county of the latter's residence. Such endorser may plead and prove, however,

that according to the intention and agreement of the parties one's relationship with the paper was not that of an endorser. *Saussy & Huxford v. Weeks*, 122 Ga. 70, 49 S.E. 809 (1905). See *Walker v. Carpenter*, 5 Ga. App. 427, 63 S.E. 576 (1908).

**Defendant sued in two capacities.** — A defendant may be sued in the same action as an executor of the maker of a promissory note and as an individual endorser. *Roark v. Turner*, 29 Ga. 455 (1859).

**Joinder drawer and endorser may be joined without acceptor.** — The drawer and the endorser may be sued together without joining the acceptor. If the suit is against such parties the parties should be so described in the plaintiff's pleading, but the failure to do so may be cured by amendment where there is enough set forth to amend by. *Ware v. City Bank*, 59 Ga. 840 (1877).

**Acceptor of bill of exchange may sue drawer and accommodation endorser** in the same action in the county of the drawer. *Ross v. Saulsbury, Respass & Co.*, 52 Ga. 379 (1874).

**Effect of bankruptcy of maker.** — If there is a suit against maker and endorser, the suit will not be stayed upon the application of the endorser because of the pending of bankruptcy proceedings against the maker. *Johnson v. Waxelbaum Co.*, 1 Ga. App. 511, 58 S.E. 56 (1907).

**Maker's right to be sued in county of residence.** — As a general rule where the endorser and maker reside in different counties, suit may be brought on the note in either county, but the maker of a note cannot be deprived of one's constitutional right to be sued in the county of one's own residence by an endorsement secured by the payee without the knowledge and consent of the maker and for the sole purpose of conferring jurisdiction upon the courts of the county of the endorser's residence. *Arnold v. Atlanta Oil & Fertilizer Co.*, 11 Ga. App. 581, 75 S.E. 900 (1912).

**Joint suit must be in county of drawer's residence.** — If the drawer of a check and the endorsers thereon are residents of different counties, a joint suit against the drawer and the endorsers must be brought in the county of the drawer's residence, in the absence of a waiver by the drawer of jurisdiction over the drawer's person. *Pioneer Prods., Inc. v. Sinclair*, 92 Ga. App. 95, 88 S.E.2d 43 (1955).

**Court in county of endorsers' residence lacks jurisdiction of nonresident drawer.** —

If a check was drawn by the defendant corporation incorporated in one county and having and maintaining an office and place of business only in another county, payable to the order of the endorsers, a partnership composed of partners resident in a third county, and plaintiff instituted suit upon the check against the drawer and the endorsers in a city court in the third county, that court

was without jurisdiction of the defendant drawer. *Pioneer Prods., Inc. v. Sinclair*, 92 Ga. App. 95, 88 S.E.2d 43 (1955).

**Residence does not confer jurisdiction if suit otherwise barred.** — If suit against two makers of a promissory note was barred by reason of a former recovery, the maker's residence did not confer jurisdiction upon the court of the county in the subsequent suit against the other makers and endorsers. *Fullington v. Killen*, 65 Ga. 575 (1880).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Bills and Notes, § 459 et seq.

**C.J.S.** — 10 C.J.S., Bills and Notes; Letters of Credit, § 257.

**ALR.** — Liability of endorser, other than payee or transferee, of nonnegotiable instrument, 18 ALR3d 647.

### 10-3-3. Certain notes or contracts for patent rights, copyrights, or proprietary rights — Consideration to be stated.

All promissory notes, contracts, or other evidences of debt taken by any person, agent, company, or corporation for the purchase price of any patent right, copyright, or proprietary right or territory for the sale of any such right or for the sale of any patented article or thing or copyrighted article or thing or where there is a proprietary ownership or right and sold by such person, agent, company, or corporation through or by any peddler, agent, or traveling salesman traveling for the purpose of making such sales shall have expressed on the face of such note, contract, or other evidence of debt the consideration of the same, stating the thing or article for which the same was given, provided this Code section shall not apply to merchants or manufacturers selling and delivering such goods directly from their stores or warehouses in the regular course of business. (Ga. L. 1897, p. 81, § 1; Civil Code 1910, § 4293; Code 1933, § 14-1804.)

### JUDICIAL DECISIONS

**Purpose.** — The main purpose of Ga. L. 1897, p. 81, §§ 1-3 was to so mark patent-right notes that, if possible, purchasers would hesitate to buy the notes even before maturity; and thus behind that was the purpose to protect, if possible, those of our population who are too gullible, both by decreasing the number of such purchases (generally worthless) and by affording to those so unwary as to be caught, rights which, as to bona fide purchasers, are not allowed to any other class. *Lee v. Hightower*, 3 Ga. App. 226, 59 S.E. 597 (1902).

The purpose of former Civil Code 1910, §§ 4293 and 4294 was to place a purchaser of a note, expressing on the note's face that the consideration was a patent right, in the same position as the payee with reference to the note's enforcement. *Hunt v. McKinney*, 11 Ga. App. 301, 75 S.E. 144 (1912).

**Effect of failure to express consideration.**

— A note given for a patent right but not expressing upon the note's face its consideration is not void under Ga. L. 1897, p. 81, §§ 1 and 2 in the hands of a bona fide holder. *Smith v. Wood*, 111 Ga. 221, 36 S.E.

649 (1900); Parr v. Erickson, 115 Ga. 873, 42 S.E. 240 (1902); Lee v. Hightower, 3 Ga. App. 226, 59 S.E. 597 (1907); Hunt v. McKinney, 11 Ga. App. 301, 75 S.E. 144 (1912); Heard v. National Bank, 143 Ga. 48, 84 S.E. 129 (1915) (construing former Ga. L. 1912, p. 153, relating to sales of corporate stock).

If the consideration is not expressed in a patent-right note, the right to enforce the note is governed by the same rules as are applicable to a note founded upon any other valid consideration. Hunt v. McKinney, 11 Ga. App. 301, 75 S.E. 144 (1912).

**Where endorsee takes subject to defenses.**

— It is only where the consideration is expressed in the note that the endorsee, before maturity and for value, takes it subject to all defenses. Parr v. Erickson, 115 Ga. 873,

42 S.E. 240 (1902); Simmons v. Council, 5 Ga. App. 386, 63 S.E. 238 (1908); Ferguson v. Bank of Dawson, 50 Ga. App. 604, 179 S.E. 236 (1935) (construing former Ga. L. 1912, p. 153, relating to sale of corporate stock).

**Defenses limited to those between original parties.** — The maker of a note under this section may set up by way of defense, in a suit on the same, all the equities existing between the original parties, or make any defense that one could have made against the original payee; but one cannot set up, against an innocent purchaser of the note before due and without notice, any equities or defenses against every person who may at any time have held the note as a bearer. Tate v. Little, 141 Ga. 799, 82 S.E. 129 (1914).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 144.

**C.J.S.** — 10 C.J.S., Bills and Notes; Letters of Credit, §§ 15, 127.

**ALR.** — Right to inventions as between employer and employee, 32 ALR 1037; 44 ALR 593; 85 ALR 1512; 153 ALR 983; 61 ALR2d 356.

Assignability of licensee's rights under patent licensing contract, 66 ALR2d 606.

Duration of liability to pay royalty under

agreement for publication of material subject to copyright not limited as to time, 69 ALR2d 1317.

Validity of agreement to pay royalties for use of patented articles beyond patent expiration date, 3 ALR3d 770.

Construction and effect of provision of employment contract giving employer right to inventions made by employee, 66 ALR4th 1135.

### 10-3-4. Certain notes or contracts for patent rights, copyrights, or proprietary rights; purchaser takes subject to equities.

Any person, firm, company, or corporation who may purchase any note, contract, or other evidence of debt given for any of the articles or things set forth in Code Section 10-3-3 when the consideration of said note is expressed on the face thereof as is provided in said Code section, whether before due and without notice or otherwise, where the consideration is so expressed, shall take the same with all the equities existing between the original parties; and the maker of such note, contract, or other evidence of debt shall have the right to make any defense to the payment of same as against such purchasers that could have been made against the original payee. (Ga. L. 1897, p. 81, § 2; Civil Code 1910, § 4294; Code 1933, § 14-1805.)

### JUDICIAL DECISIONS

**Innocent purchaser protected unless consideration stated.** — This section clearly

contemplates that an innocent purchaser of a negotiable instrument before due and



without notice will be protected, except if the consideration is stated on the face of the instrument. *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

**Protection extends to defense of want of consideration.** — If a note does not express upon the note's face the note's consideration, the principle that a bona fide holder of a negotiable promissory note, purchased for value and before maturity, is protected against a defense that the note was without consideration is applicable. *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

**Presumption that holder took before maturity, for value, and without notice.** — If a note does not express upon the note's face the note's consideration, the principle that

where a negotiable note payable at a future date was endorsed by the payee to the plaintiff, in the absence of proof to the contrary the law will presume that the plaintiff took before maturity, for value, and without notice, is applicable. *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

**Actual notice of consideration to director of bank.** — Actual notice to a director of a bank, who is also on the loan committee of the bank, as to the consideration for a note about to be discounted by the bank, is sufficient notice to the bank of that fact, so as to let in all defenses against it that existed between the original parties. *Ferguson v. Bank of Dawson*, 50 Ga. App. 604, 179 S.E. 236 (1935) (construing former Ga. L. 1912, p. 153, as to sales of corporate stock).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 144.

**C.J.S.** — 10 C.J.S., Bills and Notes; Letters of Credit, §§ 15, 127.

**ALR.** — Right to inventions as between employer and employee, 32 ALR 1037; 44 ALR 593; 85 ALR 1512; 153 ALR 983; 61 ALR2d 356.

### 10-3-5. Certain notes or contracts for patent rights, copyrights, or proprietary rights — Penalty for violation of Code Section 10-3-3.

If any person shall violate Code Section 10-3-3 by selling any of the articles mentioned in that Code section without expressing on the face of notes or contracts or other evidences of debt given for the purchase price the article or thing for which the same was given, he shall be guilty of a misdemeanor. (Ga. L. 1897, p. 81, § 3; Penal Code 1910, § 635; Code 1933, § 14-9901.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 11 Am. Jur. 2d, Bills and Notes, § 144.

**C.J.S.** — 10 C.J.S., Bills and Notes; Letters of Credit, §§ 15, 127.

## CHAPTER 4

## WAREHOUSEMEN

## Article 1

## State Licensed and Bonded Warehouses

Sec.	
10-4-1.	Short title.
10-4-2.	Definitions.
10-4-3.	State warehouse section established; supervisor of section.
10-4-4.	Exemptions from article; warehousemen electing to be covered.
10-4-5.	Powers and duties of Commissioner; annual reports; adoption of rules and regulations.
10-4-6.	Procedure for adopting or changing rules and regulations; administrative review of objections.
10-4-7.	Uniform application of orders, fees, rules, and regulations.
10-4-8.	Existing interstate commerce regulations not affected.
10-4-9.	Judicial review of administrative decision.
10-4-10.	Annual license required; issuance by Commissioner; application for license or renewal.
10-4-11.	License for person electing to comply with article and regulations.
10-4-12.	Bond required; additional bond.
10-4-13.	Bonded and licensed warehouse may be designated as state bonded.
10-4-14.	Actions on bonds.
10-4-15.	Inspections of warehouses; reports as evidence.
10-4-16.	Inspectors and examiners to be bonded.
10-4-17.	License fees.
10-4-18.	Delivery to warehouse presumably for storage.
10-4-19.	Warehouse receipts required; obtaining printed forms; use of electronic receipts authorized.
10-4-20.	Essential terms of warehouse receipts; liability for omission.
10-4-21.	Obligation of warehouseman to

## Sec.

	deliver; effect of loss or damage.
10-4-22.	Surrender and cancellation of warehouse receipts on delivery.
10-4-23.	Records of warehousemen.
10-4-24.	Inspection of records; preservation of records when license terminated.
10-4-25.	When insurance on stored products required.
10-4-26.	Schedules of charges to be filed; changes in charges; special rates for United States; duplication of charges prohibited.
10-4-27.	Certified public weighers to be provided.
10-4-28.	Scales to be provided; examination; disapproved scales not to be used.
10-4-29.	Suspension of license pending investigation or correction of violation; impoundment of records and commodities.
10-4-30.	Suspension or revocation of license for violation; liquidation proceedings; impoundment of unused receipts.
10-4-31.	Publishing lists of licensed and bonded warehouses, license terminations, and findings as to violations.
10-4-32.	Criminal penalties for violations; immunity of sureties.
10-4-33.	Duty of persons accepting warehouse receipts to take adequate measures regarding goods.

## Article 2

## State Warehouse Commissioner; Cotton Warehousing

## PART 1

## STATE WAREHOUSE COMMISSIONER

10-4-50.	Designation of commissioner.
10-4-51.	Bond of commissioner.
10-4-52.	Appointment and bonding of necessary employees; promulgation of rules and regulations.

Sec.	
10-4-53.	Actions by and against commissioner; limitations on liability; "linters" not to be stored.
10-4-54.	Duties of commissioner generally.
10-4-55.	Acquisition of property; encouraging erection of warehouses.
10-4-56.	Purchase or lease of, or contracting for, compress plant by commissioner.
10-4-57.	Fire insurance on property owned by or in possession of commissioner.
10-4-58.	Annual report.
10-4-59.	Cooperation with other states.
10-4-60.	State debt not to be created.

## PART 2

## STORAGE OF COTTON

10-4-70.	Standards and classifications of cotton.
10-4-71.	Storing lint cotton; inspection tags; issuance, contents, transfer, and cancellation of receipts.
10-4-72.	Fixing terms and rate of storage.
10-4-73.	Commissioner may negotiate loans on receipts and sale of stored cotton.
10-4-74.	Commissioner's charges and commissions.
10-4-75.	Warehouse receipt books; execution and sealing of receipts.
10-4-76.	Investigation of liens and titles by warehouseman; priority of claim of receipt holder.
10-4-77.	Penalty for failure to give notice of lien on cotton.
10-4-78.	Penalty for false affidavit as to lien on cotton.
10-4-79.	Penalties for delivering cotton without production of receipt or failing to cancel receipt.
10-4-80.	Penalties for issuing receipt for cotton not in warehouse.
10-4-81.	Penalty for issuing duplicate or additional receipt; lost or destroyed receipts.

## Article 3

## Tobacco Warehousing

## PART 1

## LEAF TOBACCO SALES AND STORAGE

10-4-100.	Legislative intent and findings.
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Sec.	
10-4-101.	Licenses for flue-cured leaf tobacco auction sales; "clean-up" sale licenses.
10-4-102.	Physical standards for leaf tobacco warehouses; compliance as prerequisite for license.
10-4-103.	Insurance as prerequisite for license.
10-4-104.	Allocating sales opportunities among licensed warehouses.
10-4-105.	Denial of issuance or suspension or revocation of license.
10-4-106.	Georgia Tobacco Marketing Act of 1995.
10-4-107.	Warehousemen to render itemized statements.
10-4-107.1.	Tobacco contract.
10-4-108.	Records and reports by warehousemen.
10-4-109.	Commissioner of Agriculture to keep sales records; publication.
10-4-110.	Advisory board; creation; membership; compensation; expenses [Repealed].
10-4-111.	Meetings of advisory board; duties; fixing opening date of marketing season; revocation of license for early sale.
10-4-112.	Limitations on sales hours and days of warehouses.
10-4-113.	Maximum rate of sales.
10-4-114.	Auction tobacco dealers; licenses; regulations as to reports and records; refusal, suspension, or revocation of license.
10-4-114.1.	Grading by the Agriculture Marketing Service; alternatives if graders unavailable [Repealed].
10-4-115.	Nonauction tobacco dealers licensed; bond or trust fund agreement; records and reports; certified public weighers provided; penalty.
10-4-116.	Inspection of premises and records.
10-4-117.	Certified public weighers to be provided by licensees.
10-4-117.1.	Detention of tobacco; notice; condemnation; cost of testing.
10-4-118.	Enforcement of part; notice and hearing in revocation or suspension proceedings.
10-4-119.	Suspension or revocation of li-



Sec.	
	cense or registration pending investigation and correction of violation.
10-4-120.	Enjoining violations.
10-4-121.	Procedure for adopting or changing rules and regulations; administrative review of objections.
10-4-122.	Judicial review of administrative decision.
10-4-123.	General penalty for violation of part.

## PART 2

## CARRY-OVER LEAF TOBACCO STORAGE AND SALE

10-4-140.	Legislative intent and findings.
10-4-141.	Definitions.
10-4-142.	Licenses for carry-over tobacco services.
10-4-143.	Fire and extended coverage insurance on stored tobacco.
10-4-144.	Each licensee to be bonded.
10-4-145.	Maximum charges and expenses.
10-4-146.	Licensees to render statements upon receipt of tobacco.
10-4-147.	Division of money received above contract sales price plus charges and expenses.
10-4-148.	Licensees' records and reports.
10-4-149.	Commissioner of Agriculture to keep storage and sale records; publication.
10-4-150.	Tender for storage not deemed sale; sale not consummated before next season.
10-4-151.	Certified public weighers to be provided by licensees.
10-4-152.	Regulations and physical standards for premises; inspection of premises.
10-4-153.	Enforcement of part; revocation or suspension of licenses.
10-4-154.	Enjoining violations.
10-4-155.	Penalty for violating part or rules or regulations.

## PART 3

## TOBACCO WAREHOUSEMEN'S ASSOCIATIONS

10-4-170.	Local boards of trade and state-wide organization of warehousemen authorized.
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Sec.	
10-4-171.	Arbitrating organization of board of trade.
10-4-172.	Rules and regulations of boards of trade and state-wide organization.
10-4-173.	Local and state-wide membership fees.
10-4-174.	Membership in board of trade and state-wide organization as conditions for operating warehouse.
10-4-175.	Categories of membership; participation in allocating sale time; liability for board's acts.
10-4-176.	Appealing suspension or expulsion from board of trade or state-wide organization.
10-4-177.	Price fixing or restraint of trade not authorized; regulation of leaf tobacco selling unaffected.

## Article 4

## Convenience Warehousing

10-4-190.	Short title.
10-4-191.	Definitions; exemption of state licensed or bonded warehouses.
10-4-192.	Convenience warehouseman to obtain and retain certain information; property ownership statement.
10-4-193.	Penalties.

## Article 5

## Self-Service Storage Facilities

10-4-210.	Short title.
10-4-211.	Definitions.
10-4-212.	Lien of owner of self-service storage facility upon property located at facility; priority; attachment.
10-4-213.	Enforcement of lien without judicial intervention.
10-4-214.	Right of parties to create additional rights, duties, and obligations not impaired; rights under article additional.
10-4-215.	Rental agreements entered into before July 1, 1982, not affected.

**Administrative rules and regulations.** — Rules governing state warehouses, Official Compilation of the Rules and Regulations of the State of Georgia, Rules of Georgia Department of Agriculture, Chapters 40-14-1 through 40-14-5.

**Law reviews.** — For article discussing ambiguity in the law regarding the operation of warehouses storing nonagricultural products as it applies to foreign enterprises, see 27 Mercer L. Rev. 629 (1976).

ARTICLE 1

STATE LICENSED AND BONDED WAREHOUSES

OPINIONS OF THE ATTORNEY GENERAL

**Preemption of other laws.** — Subject of bonded and licensed warehouses is fully covered by this article and it would appear to preempt all matters pertaining to bonded and licensed warehouses. 1968 Op. Att’y Gen. No. 68-118.

**Exemption of federally licensed warehousemen.** — Any warehouse storing agricultural products in this state that is licensed for the storage of agricultural products pursuant to the United States Warehouse Act is

exempt from the provisions of this article, including the licensing and bonding requirements contained therein. 1977 Op. Att’y Gen. No. 77-40.

Federally licensed warehousemen do not have to acquire separate bonding and licensing mandated by the Georgia grain dealing legislation, but are accorded the exemption now provided by paragraph (3) of Ga. L. 1977, p. 245, § 1. 1978 Op. Att’y Gen. No. 78-11.

RESEARCH REFERENCES

**ALR.** — Nature and validity of “hedging” transactions on the commodity market, 20 ALR 1422.

Relationship of bailor and bailee as between owner of goods in bonded warehouse and proprietor of warehouse, 77 ALR 1502.

Statutory warehousing as determined by character of property stored, 132 ALR 532.

Liability of warehouseman or other bailee for loss of goods stored at other than agreed-upon place, 76 ALR4th 883.

10-4-1. Short title.

This article shall be cited as the “Georgia State Warehouse Act.” (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 1.)

10-4-2. Definitions.

As used in this article, the term:

(1) “Agricultural product” means individually and collectively all grains, cotton, meat, fruits, vegetables, and other farm products offered or accepted for storage in their raw or natural state; provided, however, that products which have been processed only to the extent of shelling, cleaning, and grading shall be included; and, provided, further, that any warehouseman storing refrigerated or processed agricultural products may, at his option, come under the operation of this article.

(2) “Commissioner” means the Commissioner of Agriculture.

(3) "Grain" means all products commonly classed as grain, such as wheat, corn, oats, barley, rye, rice, field peas, soybeans, clover, grain sorghum, and other products ordinarily stored in grain warehouses.

(4) "Person" means any individual, partnership, firm, corporation, association, or other organized group having a joint or common interest.

(5) "Producer" means a farmer or grower of agricultural products.

(6) "Public warehouse" or "warehouse" means any building, structure, or other enclosure other than a refrigerated building or structure in this state at which any agricultural product is received from the public for storage for hire.

(7) "Receipt" means a warehouse receipt issued under this article.

(8) "Storer" means the depositor of agricultural products stored under a nonnegotiable receipt or the holder of a negotiable receipt for such products issued by a warehouseman licensed under this article.

(9) "Warehouseman" means a person engaged in the business of operating a warehouse or any person who uses or undertakes to use a warehouse for the purpose of storing agricultural products for compensation for more than one person; provided, however, any person operating a warehouse not covered by this article may elect to come under this article. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 2; Ga. L. 1982, p. 3, § 10.)

#### OPINIONS OF THE ATTORNEY GENERAL

**"Agricultural product" includes pine cones.** — Pine cones may come under this article being includable in "agricultural product" as used therein. 1958-59 Op. Att'y Gen. p. 14.

**Lumber is not an "agricultural product"** within the meaning of this article. 1958-59 Op. Att'y Gen. p. 12.

**Warehouse storing cotton linters, cotton mill waste, and rayon** can be licensed under this article if the warehouseman requests to be licensed. 1957 Op. Att'y Gen. p. 3.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 2.

**Am. Jur. Pleading and Practice Forms.** — 24B Am. Jur. Pleading and Practice Forms, Warehouses, § 3.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 1.

#### 10-4-3. State warehouse section established; supervisor of section.

Within the police powers of the state and for the general welfare, there is established as provided in this article a warehouse system for the State of Georgia as a section of the Marketing Division of the Department of Agriculture under the supervision and control of the Commissioner of Agriculture. The Commissioner is authorized to appoint a supervisor of such section, subject to the provisions of Chapter 20 of Title 45. The



supervisor shall give bond in such amount as the Commissioner shall determine for the faithful performance of his duties and the proper accounting of all funds coming into his hands. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 4; Ga. L. 1959, p. 246, § 1.)

RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11. **C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

10-4-4. Exemptions from article; warehousemen electing to be covered.

- (a) The provisions of this article shall not be construed to apply to:
- (1) Any warehouse licensed under the United States Warehouse Act, as amended, if the licensee has in effect a federal bond in an amount not less than the amount of the bond which would be required under subsections (a) and (b) of Code Section 10-4-12; or
- (2) Any warehouse kept or maintained by any warehouseman on the premises of any other person under a contract between the warehouseman and the other person for the primary purpose of storage therein of agricultural products of the other person, provided that no agricultural products are stored therein for the account of any producer other than the other person; provided, however, that such warehouseman may come under this article at his option.
- (b) Any person, firm, corporation, or association storing peanuts, cottonseed, or tobacco may be required only, at his or its option, by application, to qualify and come under this article. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 30; Ga. L. 1983, p. 946, § 1.)

**U.S. Code.** — The United States Warehouse Act, referred to in subsection (a) of this section, is codified as 7 U.S.C. § 241 et seq.

OPINIONS OF THE ATTORNEY GENERAL

**Warehouse storing cotton linters, cotton mill waste, and rayon** can be licensed under this article if the warehouseman requests to be licensed under the article. 1957 Op. Att’y Gen. p. 3.

**Exemption of federally licensed agricultural warehouse.** — Any warehouse storing agricultural products in this state that is licensed for the storage of agricultural products pursuant to the United States Warehouse Act is exempt from this article, including the licensing and bonding requirements contained therein. 1977 Op. Att’y Gen. No. 77-40.

RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 2, 6, 8, 12 et seq.

**10-4-5. Powers and duties of Commissioner; annual reports; adoption of rules and regulations.**

(a) It shall be the duty of the Commissioner to foster and promote in every possible way good warehousing practices so as to afford proper storage of agricultural products; to enforce with vigilance this article; to promulgate such rules and regulations having the force and effect of law as will effectuate the purposes of this article.

(b) The Commissioner shall, on or before January 1, prepare and submit to the Governor and the General Assembly a report covering all the activities of the Commissioner for the preceding year which shall, among other things, show the number of licenses issued, the number of warehouse examinations made on application for license, and the number of examinations of warehouses to ascertain whether their operation, condition, and business are in compliance with this article and the rules and regulations promulgated under this article. The report shall account for all fees collected and money expended and shall indicate the fiscal needs for administration of this article for the succeeding year. The report may be printed by the Commissioner and distributed to any persons, organizations, and public officials as may be interested.

(c) The Commissioner is authorized to investigate the storage and weighing of agricultural products; at any time, to examine or cause to be examined all warehouses under this article and all agricultural products stored therein; to determine whether such warehouses are suitable for the proper storage of the agricultural product or products stored or proposed to be stored therein; and to classify such warehouses in accordance with their ownership, location, surroundings, capacity, conditions, and other qualities, and as to the kinds of licenses issued or that may be issued for them pursuant to this article.

(d) The Commissioner may make such rules and regulations as are necessary or appropriate governing the operation of warehouses under this article with respect to their receipt, care, and delivery of and responsibility for agricultural products received at such warehouses for storage; the issuance, cancellation, division, and consolidation of receipts and other matters relative to the management of the business of such warehouses; and such other rules and regulations as are necessary or appropriate to carry out this article, to the end that any farmer or producer or storer of agricultural commodities may be assured that agricultural products stored by him are maintained in as nearly the same status as practicable according to the grade, standard, and condition as when stored. (Ga. L. 1953, Nov-Dec. Sess., p. 412, §§ 3, 25; Ga. L. 1989, p. 14, § 10.)

**Cross references.** — Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

RESEARCH REFERENCES

<p><b>Am. Jur. 2d.</b> — 78 Am. Jur. 2d, Warehouses, §§ 4, 11, 13.</p>	<p><b>C.J.S.</b> — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 3, 6.</p>
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**10-4-6. Procedure for adopting or changing rules and regulations; administrative review of objections.**

(a) Prior to the adoption or change of any rule or regulation, the Commissioner shall promulgate the proposed rule or regulation or change and afford interested persons opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule or regulation of the Commissioner and who believes that the Commissioner, in the promulgation or enforcement of such rule or regulation, has exceeded authority vested in him by the General Assembly under the Constitution of Georgia or of the United States shall have the right to petition the Commissioner of Agriculture for the repeal or revision of such rule by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within 30 days and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within 30 days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy; and every person affected by any rule or regulation or any act of the Commissioner is required to exhaust this remedy before taking any other steps, except as otherwise provided in Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

(c) All hearings before the Commissioner shall be stenographically reported by a qualified court reporter and shall be available to any interested party upon payment of the stenographic costs. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 26; Ga. L. 1989, p. 14, § 10.)

RESEARCH REFERENCES

<p><b>Am. Jur. 2d.</b> — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.</p>	<p><b>C.J.S.</b> — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 3, 6.</p>
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**10-4-7. Uniform application of orders, fees, rules, and regulations.**

All rules and regulations, orders, schedules of charges, and fees approved or promulgated or issued by the Commissioner under the terms of this



article shall be of uniform application to all warehouses of the same class throughout the state. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 27.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 3, 6.

#### 10-4-8. Existing interstate commerce regulations not affected.

Nothing contained in this article shall be interpreted so as to conflict with any existing regulations of the federal government, or of the federal and state governments jointly, governing inspection of goods in interstate commerce. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 31.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 2, 6, 12 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 3, 4.

#### 10-4-9. Judicial review of administrative decision.

Any person aggrieved by a final determination or decision of the Commissioner in any matter in which a hearing is required or authorized by this article or the state or federal constitutions is entitled to judicial review thereof in accordance with the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," for the judicial review of contested cases. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 29.)

#### RESEARCH REFERENCES

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 6.

#### 10-4-10. Annual license required; issuance by Commissioner; application for license or renewal.

(a) No person shall operate a warehouse as defined under this article in this state unless he or she has a valid, effective license issued by the Commissioner pursuant to this article for such warehouse. All such licenses shall expire on June 30 of each year. No license so issued shall describe more than one warehouse nor grant permission to operate any warehouse other than the one described therein, except that, if a warehouseman operates two or more warehouses in the same county or in adjoining counties or operates two or more grain warehouses in nonadjoining counties in conjunction with each other and if but one set of books and records is kept with respect to weight certificates, scale tickets, inspection certificates, and receipts issued for agricultural products stored in all such

warehouses, only one license shall be required for the operation of all such warehouses.

(b) The Commissioner is authorized to issue to any warehouseman a license for the conduct of a warehouse or warehouses in accordance with this article and with such rules and regulations as may be made under this article, provided that each warehouse is found suitable for the proper storage of the particular agricultural product or products for which a license is to be issued and that such warehouseman agrees, as a condition to the granting of the license, to comply with all the terms of this article and the rules and regulations prescribed under this article. It shall be the duty of the Commissioner to issue a license to any responsible person applying therefor who can show that he is ready, willing, and able to meet the requirements of this article and the regulations under this article.

(c)(1) Each applicant for a license or renewal shall furnish with his application a current financial statement which shall include:

- (A) A balance sheet;
- (B) A profit and loss statement of income;
- (C) A statement of retained earnings; and
- (D) A statement of changes in financial position.

(2) The chief executive officer for the business shall certify under penalties of perjury that the statements as prepared accurately reflect the financial condition of the business as of the date named and fairly represent the results of operations for the period named.

(3) Except as otherwise provided in this paragraph, each applicant shall have the financial statements required in paragraph (1) of this subsection audited by an independent certified public accountant. Alternatively, financial statements audited or reviewed by an independent public accountant will be accepted with the understanding that the applicant will be subject to an additional on-site examination by the Commissioner and to an audit by the Commissioner. Audits and reviews by independent certified public accountants and independent public accountants specified in this Code section shall be made in accordance with standards established by the American Institute of Certified Public Accountants. The accountant's certification, assurances, opinion, comments, and notes on such statements, if any, shall be furnished along with the statements. Applicants who cannot immediately meet these requirements may apply to the Commissioner for a temporary waiver of this provision. The Commissioner may grant such waiver for a temporary period not to exceed 180 days if the applicants can furnish evidence of good and substantial reasons therefor. This paragraph shall not be applicable to any applicant who maintains a bond in the maximum amount required by subsection (a) of Code Section 10-4-12. (Ga. L. 1953,

Nov.-Dec. Sess., p. 412, § 5; Ga. L. 1983, p. 946, § 2; Ga. L. 1984, p. 22, § 10; Ga. L. 1985, p. 645, § 1; Ga. L. 1988, p. 750, § 1; Ga. L. 1990, p. 340, § 1; Ga. L. 2001, p. 1070, § 2.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Warehouse storing cotton linters, cotton mill waste, and rayon** can be licensed under this article if the warehouseman requests to be licensed under this article. 1957 Op. Att'y Gen. p. 3.

**Pine cone warehouse.** — The Commissioner of Agriculture may license a warehouse storing pine cones under this article. 1958-59 Op. Att'y Gen. p. 14.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

**ALR.** — Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied

with statutory conditions necessary to become a public warehouseman, 108 ALR 928.

Right of one who acquires title to, or other interest in, real property to benefit of a license previously issued by the public, permitting use of property for a specified purpose, 131 ALR 1339.

#### 10-4-11. License for person electing to comply with article and regulations.

If not otherwise required by this article, any person operating a warehouse for the storage of agricultural products may elect to come within this article and, upon approval of the Commissioner, may be licensed under this article. As a condition to the granting of a license under this article, the applicant must agree to comply with this article and any and all regulations promulgated under this article, as well as any and all regulations issued by the Commissioner relating to the storage of agricultural products in the warehouse of the applicant. (Ga. L. 1959, p. 246, § 5; Ga. L. 1977, p. 289, § 2.)

#### OPINIONS OF THE ATTORNEY GENERAL

**Licensing not restricted to agricultural warehouses.** — Although warehousemen engaged in the storage of agricultural products automatically come within the purview of this article, the licensing privilege is not restricted to such persons; any person operating a warehouse not covered by the provisions of the article may elect to become regulated in accordance with the requirements set forth therein. 1974 Op. Att'y Gen. No. 74-18.

**Any warehouseman may elect to come under article.** — While not automatically covered by this article, any person operating a warehouse for storage of products other than agricultural products may elect to come within its provisions, and upon approval of the Commissioner of Agriculture may be licensed, provided the applicant agrees to comply with the provisions of the article and all regulations promulgated thereunder. 1974 Op. Att'y Gen. No. 74-18.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.



**10-4-12. Bond required; additional bond.**

(a) Every person intending to engage in business as a warehouseman under this article shall, prior to commencing such business and periodically thereafter as the Commissioner shall require, execute and file with the Commissioner a good and sufficient bond to the state to secure the faithful performance of his or her obligation as a warehouseman under the terms of this article and the rules and regulations prescribed under this article, such bond to be computed in direct ratio to the licensed storage capacity of the warehouse bonded. The bond shall be executed by a surety corporation authorized to transact business in this state and approved by the Commissioner. Such bond shall be upon forms prescribed by the Commissioner. Any and all bond applications shall be accompanied by a certificate of "good standing" issued by the Commissioner of Insurance. If any company issuing a bond shall be removed from doing business in this state, it shall be the duty of the Commissioner of Insurance to notify the Commissioner of Agriculture within 30 days. The Commissioner shall have authority to fix the bond for any part of licensed storage capacity of the warehouse being used; but in no event shall the amount of the bond be required to exceed 12 percent of the value of the products stored and the bond shall be in such form and amount and shall have such surety or sureties, subject to service of process in actions on the bonds with this state, as the Commissioner may prescribe; provided, however, the minimum bond to be posted for each warehouse shall be \$20,000.00 and the maximum bond to be required for each warehouse shall be \$150,000.00.

(b) If a warehouseman is also a grain dealer, the amount of the required bond shall be the greater of the bond required by subsection (a) of this Code section or the bond required under Code Section 2-9-34 for grain dealers who are not licensed under this article.

(c) Whenever the Commissioner shall determine that a previously approved bond has for any cause become insufficient, the Commissioner may require an additional bond or bonds to be given by the warehouseman concerned, conforming with the requirements of this Code section. Unless the additional bond or bonds are given within the time fixed by a written demand therefor, or if the bond of the warehouseman is canceled, the license of such warehouseman shall be immediately revoked by operation of law without notice or hearing. Code Sections 10-4-6 and 10-4-7 shall apply to this as well as all other Code sections of this article. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 6; Ga. L. 1956, p. 688, § 1; Ga. L. 1977, p. 289, § 1; Ga. L. 1981, p. 929, § 1; Ga. L. 1983, p. 946, § 3; Ga. L. 1985, p. 645, § 2; Ga. L. 1999, p. 800, § 7.)

**JUDICIAL DECISIONS**

**Summary judgment denied despite evidence of default and insufficient collateral.**  
— A genuine issue of material fact existed,

thus precluding summary judgment in favor of a surety despite overwhelming evidence that the principal was in default during the

bond period and failed to maintain and store sufficient inventory as collateral. *Planters & Citizens Bank v. Home Ins. Co.*, 786 F.

Supp. 977 (S.D. Ga. 1992), *aff'd*, 992 F.2d 328 (11th Cir. 1993).

### OPINIONS OF THE ATTORNEY GENERAL

**Department of Agriculture may fix percentage ratio to be applied** to the storage capacity of warehouse facilities in order to

set individual warehouse bond amounts. 1976 Op. Att'y Gen. No. 76-60.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 79 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 16 et seq.

**ALR.** — Warehouseman's bond as covering warehouse receipts issued by warehouse to itself or for its own property, 61 ALR 331.

Legal effect of transaction by which grain or other commodity is received for storage by one who has not complied with statutory conditions necessary to become a public warehouseman, 108 ALR 928.

Validity of statute or ordinance which re-

quires liability or indemnity insurance or bond as condition of license for conducting business or profession, 120 ALR 950.

Liability of warehouseman, and of surety on bond, in respect of collection and remittance of proceeds of sale of merchandise, 121 ALR 1155.

Suspicion, or reasons for suspicion, of wrongdoing by officer or employee covered by fidelity bond or policy, as requiring obligee to comply with conditions of bond with respect to notice of discovery or knowledge of loss, 129 ALR 1411.

### 10-4-13. Bonded and licensed warehouse may be designated as state bonded.

Upon the filing with and approval by the Commissioner of a bond, in compliance with this article, for the conduct of a warehouse under this article, such warehouse may be designated as state bonded under this article; but no warehouse shall be designated as a state bonded warehouse under this article and no name or description conveying the impression that it is so bonded shall be used unless a bond, as provided for in Code Section 10-4-12, has been filed with and approved by the Commissioner and unless a license issued under this article for the conduct of such warehouse is valid and effective. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 8.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 79 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 16 et seq.

### 10-4-14. Actions on bonds.

(a) Any person claiming that he or she has been damaged by a breach of the conditions of a bond given by a licensee as provided in Code Section 10-4-12 may enter a complaint to the Commissioner. Such complaint shall be a written statement of the facts constituting the complaint and must be made within 180 days of the alleged breach. If the Commissioner deter-

mines that the complaint is prima facie a breach of the bond, and the matter can not be amicably resolved within 15 days, the Commissioner shall publish a solicitation for additional complaints regarding breaches of the bond for a period of not less than five consecutive issues in a newspaper of general circulation and in such other publications as the Commissioner shall prescribe. Additional complaints must be filed within 60 days following initial public notification of a breach of the bond. Civil actions on the breach of such bond shall not be commenced less than 120 days nor more than 547 days from the initial date of public notification of such breach of the bond.

(b) Upon the filing of the complaint in the manner provided in this Code section, the Commissioner shall investigate the charges made and, at his discretion, order a hearing before him or his hearing officer giving all parties concerned notice of the filing of such complaint and the time and place of such hearing. At the conclusion of the hearing, the Commissioner shall report his findings and render his conclusion concerning the complaint to the complainant and respondent in the case, who shall have 15 days following such report in which to make effective and satisfy the Commissioner's conclusions.

(c) If such settlement is not effected within such time, the Commissioner or the claimant may institute appropriate legal proceedings to enforce the claim. If the claimant is not satisfied with the ruling of the Commissioner, he may commence and maintain an action against the principal and surety on the bond of the parties against whom the complaint is registered, as in any civil action.

(d) If the bond or collateral posted is insufficient to pay the valid claims of claimants in full, the Commissioner may direct that the proceeds of the bond shall be divided pro rata among the claimants. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 7; Ga. L. 1985, p. 645, § 3; Ga. L. 1998, p. 556, § 3.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 80.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 16 et seq.

**ALR.** — Liability of warehouseman, and of surety on bond, in respect of collection and

remittance of proceeds of sale of merchandise, 121 ALR 1155.

Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 ALR 1112.

#### 10-4-15. Inspections of warehouses; reports as evidence.

In addition to the general powers conferred by Code Section 10-4-5, the Commissioner and his duly authorized agents or employees shall have full power and authority to inspect public warehouses operated under this article, to inventory, and to check the agricultural products stored so as to ascertain the conditions of such products and to determine whether or not



the business is conducted in such a manner as to protect the interest of persons who are storing or may store such products. The inspectors shall make sworn reports of their findings to the Commissioner, who shall hold and keep such reports in the records of his office. Such reports when sworn to shall be public records and shall be admissible as evidence. Such inspections shall be made as often as deemed necessary by the Commissioner, but not less than twice during any license period and, in addition, as often as requested by the warehouseman. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 9.)

### JUDICIAL DECISIONS

**Negligence of inspectors.** — Allegations that an inspection of a public warehouseman were negligent and that the reconciliation of inventory reports were inaccurate were insufficient to warrant summary judgment although the warehouse receipt holders submitted the deposition testimony of the inspector and the Assistant Commissioner of the Warehouse Division, in which the inspec-

tor's breach of duty appeared clear, the other evidence submitted by the defendant supported his contention that the receipt holder had not established negligence as a matter of law. *Planters & Citizens Bank v. Pennsylvania Millers Mut. Ins. Co.*, 786 F. Supp. 991 (S.D. Ga. 1992), *aff'd*, 992 F.2d 328 (11th Cir. 1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositories, § 3.

### 10-4-16. Inspectors and examiners to be bonded.

Each inspector and examiner employed by the Commissioner for the inspection and examination of warehouses licensed under this article shall be bonded in an amount not less than \$5,000.00, or in such greater amount as the Commissioner deems necessary, for the faithful performance of his duties and for the proper accounting of all funds coming into his hands. The cost of the bond shall be paid by the Department of Agriculture. (Ga. L. 1959, p. 246, § 2.)

### 10-4-17. License fees.

Warehousemen coming under this article shall pay an annual license fee which includes all inspections in an amount based on storage capacity in an amount fixed by rule or regulation of the Commissioner. These fees shall not exceed actual cost of inspections and are inclusive. The amount paid shall be based on storage capacity and shall be at least \$500.00 and no more than \$2,000.00 for grain or cotton warehouses and \$500.00 to \$1,000.00 for other agricultural products facilities desiring to come under this article. Each license so issued shall expire on June 30 of each year, and each application for license must be accompanied by the license fee. (Ga. L.

1953, Nov.-Dec. Sess., p. 412, § 10; Ga. L. 1955, p. 261, § 1; Ga. L. 1992, p. 2553, § 1; Ga. L. 2001, p. 1070, § 3.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

#### 10-4-18. Delivery to warehouse presumably for storage.

Any agricultural product delivered to a warehouse under this article shall be presumed to be delivered for storage. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 11.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 168.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 94 et seq.

#### 10-4-19. Warehouse receipts required; obtaining printed forms; use of electronic receipts authorized.

(a) Unless otherwise required by law or by rule or regulation, an original receipt shall be issued for cotton and, at the option of the warehouseman or depositor, for any other agricultural products owned or stored by the warehouseman under this article. No receipt shall be issued, however, unless such products are actually stored in the warehouse at the time of the issuance of the receipt. The receipted agricultural product will remain the property of the depositor until it is transferred or sold by him or her. Initial receipts for cotton shall be issued in the name of the producer. Transfers or sales from the cotton producer shall be endorsed by his or her signature on forms authorized by the Commissioner.

(b) To regulate receipts issued by warehousemen licensed under this article, receipts issued by such warehousemen shall be obtained by warehousemen from approved printers and delivered through the Department of Agriculture at the expense of the warehousemen. Orders of the warehousemen for receipts from printers approved by the Commissioner shall be forwarded to the Department of Agriculture for approval as to the form and source of supply of the receipts. To regulate further the receipts issued under this article, the printer shall transmit all receipts printed for a warehouseman to the Department of Agriculture, so as to enable the Commissioner to maintain an accurate record of the numbers of such receipts and the quantity delivered. It shall be a violation of this article for any warehouseman to issue any warehouse receipt except upon receipts obtained as provided in this Code section. It shall be unlawful for any printer to print any warehouse receipt for any warehouseman licensed under this article without the approval of the Commissioner.

(c) The Commissioner is authorized to permit the use of warehouse receipts obtained prior to March 17, 1959, upon receipt by the Commissioner of proof satisfactory to the Commissioner of the quantities and sources of such receipts held by the warehouseman.

(d) The Commissioner is authorized to accept as full compliance with this Code section the submission of a sample of the receipts to be printed and a copy of the invoice covering the shipment of such receipts that shows the quantity and quality of the receipts printed for the warehousemen.

(e) The Commissioner is authorized to permit the use of electronic warehouse receipts and to accept as full compliance with this Code section electronic warehouse receipts obtained by warehousemen from insured electronic warehouse receipt providers approved by and under an operational agreement with the Department of Agriculture. A computer printout issued on behalf of a state licensed warehouse by an approved electronic warehouse receipt provider shall be sufficient to comply with this article if such printout is sufficient to meet existing requirements of the electronic warehouse receipt program administered by the United States Department of Agriculture. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 12; Ga. L. 1955, p. 261, § 2; Ga. L. 1959, p. 246, § 3; Ga. L. 1981, p. 656, § 1; Ga. L. 1996, p. 1200, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1998, p. 1384, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2007, p. 462, § 1/SB 220.)

**The 2007 amendment**, effective July 1, 2007, in subsection (b), deleted “and bonded” following “from approved” in the first sentence and following “printers approved” in the second sentence.

**Cross references.** — Provisions of the “Uniform Commercial Code” dealing with warehouse receipts, § 11-7-201 et seq.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 27 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 23 et seq.

**ALR.** — Nature and validity of “hedging” transactions on the commodity market, 20 ALR 1422.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

“Warehouse purchase receipt” as bailment or contract of sale, 91 ALR 907.

Validity as against third person of sale or pledge of goods, or receipts issued for goods, retained in warehouse on premises of seller or pledgor (field warehousing), 133 ALR 209.

Warehouseman’s liability for loss occasioned by failure to issue a proper receipt to depositor, 168 ALR 945.

#### 10-4-20. Essential terms of warehouse receipts; liability for omission.

(a) Warehouse receipts need not be in any particular form, but every such receipt must embody within its written or printed terms:

- (1) The location of the warehouse where the goods are stored;
- (2) The date of issue of the receipt;



- (3) The consecutive number of the receipt;
  - (4) A statement whether the goods received will be delivered to the bearer, to a specified person, or to a specified person or his order;
  - (5) The rate of storage charges;
  - (6) A description of the goods or of the packages containing them;
  - (7) The signature of the warehouseman, which may be made by his authorized agent;
  - (8) If the receipt is issued for goods of which the warehouseman is owner, either solely or jointly or in common with others, the fact of such ownership;
  - (9) A statement of the amount of advances made and of liabilities incurred for which the warehouseman claims a lien. If the precise amount of such advances made or of such liabilities incurred is, at the time of the issue of the receipt, unknown to the warehouseman or to his agent who issues it, a statement of the fact that advances have been made or liabilities incurred and the purpose thereof is sufficient; and
  - (10) The amount and rate of insurance on the goods, provided that, if there is no insurance thereon by reason of an agreement with the depositor, the receipt shall be so stamped.
- (b) A warehouseman shall be liable to any person injured thereby for all damage caused by the omission from a negotiable receipt of any of the terms required by this Code section. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 13.)

**Cross references.** — Form of warehouse receipts, § 11-7-202.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 31.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 23 et seq.

**ALR.** — Necessity of bringing to bailor's attention provision in warehouse receipt limiting liability of warehouseman, 160 ALR 1112.

#### 10-4-21. Obligation of warehouseman to deliver; effect of loss or damage.

Every warehouseman conducting a warehouse under this article shall, without unnecessary delay, deliver the agricultural product as described on each warehouse receipt issued by him upon a demand made by the holder of a receipt for such agricultural product if the demand be accompanied by:

- (1) An offer to satisfy the warehouseman's lien;

(2) An offer to surrender the receipt and, if negotiable, with such endorsements as would be necessary for the negotiation of the receipt; and

(3) An offer to sign, when the product is delivered, an acknowledgment that it has been delivered if such signature is requested by the warehouseman;

provided, however, that where an agricultural product is stored identity preserved, the actual agricultural product shall be delivered; provided, further, that no warehouseman shall be deemed to have violated this Code section by failure to deliver any agricultural product in accordance with its provisions, if such failure is due to loss or damage of the product from a hazard against which insurance is not required under Code Section 10-4-25 and the regulations issued by the Commissioner pursuant thereto and where such loss or damage does not result from a failure of such warehouseman to exercise that degree of care which an ordinarily prudent person would exercise in the care and protection of his own property; and, provided, further, that in case of an insured loss such demand may be satisfied by payment of the market value of the product lost or damaged. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 15; Ga. L. 1982, p. 3, § 10.)

**Cross references.** — Warehousemen's liens generally, §§ 11-7-209, 11-7-210.

### JUDICIAL DECISIONS

**Warehouseman may be liable without demand.** — Although the general rule is that a warehouseman's duty to deliver goods will not arise until there has been a demand, where demand would clearly have been unavailing, a warehouseman may be held liable

for failure to deliver the goods in the absence of any demand. *Planters & Citizens Bank v. Home Ins. Co.*, 786 F. Supp. 977 (S.D. Ga. 1992), *aff'd*, 992 F.2d 328 (11th Cir. 1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 122 et seq.

**Am. Jur. Proof of Facts.** — Warehouseman's Failure to Care for Stored Property — Deterioration of Perishable Goods, 20 POF2d 371.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 80 et seq.

**ALR.** — Law regarding confusion of goods as applied to livestock, 10 ALR 765.

Right of purchaser of warehouse receipt against warehouseman, 38 ALR 1205.

Statute of limitations governing damage action against warehouseman for loss of or damage to stored goods, 23 ALR2d 1466.

Damages recoverable from warehouseman for negligence causing injury to, or destruction of, goods of a perishable nature, 32 ALR2d 910.

Confusion of goods by accident, mistake, or act of a third person, 39 ALR2d 555.

Warehouseman's liability for injury to or destruction of stored goods from floods, heavy rains, or the like, 60 ALR2d 1097.

Sufficiency of warehouseman's precautions to protect goods against fire, 42 ALR3d 908.

**10-4-22. Surrender and cancellation of warehouse receipts on delivery.**

Except as provided in Code Section 11-7-601, no warehouseman conducting a warehouse under this article shall deliver any agricultural product for which a warehouse receipt has been issued by him unless the receipt has been first surrendered to him. Immediately upon delivery by him of the agricultural product, he shall cancel upon the face thereof such receipt surrendered to him. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 16.)

**Cross references.** — Warehouse receipts,  
§ 11-7-201 et seq.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 130 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 91.

**10-4-23. Records of warehousemen.**

Every warehouseman conducting a warehouse under this article shall keep for inspection for such period as the Commissioner may prescribe, in a place of safety, complete and correct records of all agricultural products received at the warehouse for storage or delivered therefrom, including a separate account of all such agricultural products owned by the warehouseman, of all warehouse receipts issued by him, and of the receipts returned to and canceled by him. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 17.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-24. Inspection of records; preservation of records when license terminated.**

The Commissioner is authorized through officials, employees, or agents designated by him to inspect all receipt records and inventory records of warehouses under this article. In the event of suspension, revocation, or other termination of a license issued under this article, the former licensee or his successor in interest, if any, shall preserve, for such period of time as may be prescribed by the Commissioner, all such books, papers, accounts, and other records relating to the operation of the warehouse during the effective period of the license; and such books, papers, accounts, and other records shall be subject to inspection by the Commissioner or his agents, during such period of time as the Commissioner may prescribe. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 19.)



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-25. When insurance on stored products required.**

All agricultural products stored for the producer in their raw or natural state, and cotton in any form stored for the producer, in storage in a warehouse under this article or deposited temporarily in such a warehouse pending storage shall be kept insured at full market value by the warehouseman against loss or damage by fire, lightning, and extended coverage, except that cotton shall be insured against loss or damage by fire and lightning only. Such insurance shall be carried in an insurance company or companies of the warehouseman's choice authorized to do business in this state, and evidence of such insurance coverage in form to be approved by the Commissioner of Insurance shall be filed with the Commissioner of Agriculture. Such insurance shall be provided by, and carried in the name of, the warehouseman; provided, however, that a producer depositing or storing agricultural products who does not wish to have his products insured by the warehouseman may relieve the warehouseman of that duty by notifying the warehouseman in writing that he does not wish his agricultural products insured. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 20; Ga. L. 1989, p. 14, § 10.)

**Cross references.** — Placement of risk of loss of goods held by bailee, § 11-2-509.

## OPINIONS OF THE ATTORNEY GENERAL

**Authorized insurer requirement mandatory.** — The requirement of this section that the policy be issued by a company "authorized to do business in this state" is mandatory. 1969 Op. Att'y Gen. No. 69-498.

**Insurance not required for nonproducers.** — This article does not require insurance on agricultural products stored by a warehouseman for other than producers. 1969 Op. Att'y Gen. No. 69-498.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 112 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 73.

**ALR.** — Right in proceeds of insurance

taken out by warehouseman on goods stored, 53 ALR 1409.

Right of owner to sue on fire or marine policy taken out by warehouseman, bailee, or carrier, 61 ALR 720.

**10-4-26. Schedules of charges to be filed; changes in charges; special rates for United States; duplication of charges prohibited.**

(a) Prior to transaction of any warehouse business at any warehouse under this article and annually thereafter, the warehouseman shall file with the Commissioner a schedule of charges to be made by the warehouse. All

charges and regulations affecting such charges made by any warehouse licensed under this article for the storage of agricultural products shall be just, fair, and reasonable. No additional charge shall be made by any such warehouse other than as specified in its filed schedule. No change shall be made in a filed schedule of charges during a current year unless the Commissioner consents thereto. Any upward revision of charges of any such warehouse during any current year shall be applicable only to products received at such warehouse or services performed pursuant to instructions received from the storer after the Commissioner's approval of the upward revisions.

(b) Notwithstanding the provisions of subsection (a) of this Code section, any warehouseman under this article may establish and charge special rates as required by contract with the United States, or any agency of or corporation controlled by the United States, and none of the restrictions or requirements of subsection (a) of this Code section shall apply to such rates.

(c) No warehouseman shall make any charge for any service unless he has then on file a schedule of charges to be made by the warehouse for that service.

(d) No warehouseman shall make a duplicate collection of tariff charges for the first month's service of the warehouseman. It is the intent and purpose of this Code section to prevent a duplication of the collection of such charges in any manner or fashion. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 21; Ga. L. 1959, p. 246, § 4.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 66.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 99 et seq.

#### 10-4-27. Certified public weighers to be provided.

All warehouses licensed under this article shall provide not less than one certified public weigher for each warehouse in accordance with Code Sections 10-2-40 through 10-2-54. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 22.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 14.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-28. Scales to be provided; examination; disapproved scales not to be used.**

Each warehouse under this article must be equipped with suitable scales in good order and so arranged that all agricultural products for storage can be weighed by the warehouseman. The scales in any such warehouse shall be subject to examination by representatives of the Commissioner and to disapproval by the Commissioner. If the Commissioner disapproves any weighing apparatus, it shall not thereafter be used in ascertaining the weight of agricultural products for the purposes of this article until such disapproval shall be withdrawn. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 23.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 14.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-29. Suspension of license pending investigation or correction of violation; impoundment of records and commodities.**

At such time as the Commissioner or supervisor deems there has been a violation of the law and the rules and regulations, he shall have the power and authority, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," to suspend the license of the warehouseman pending the investigation of the violation or until at such time the violation has been corrected to the satisfaction of the Commissioner or supervisor, and during the period of time of any investigation of a violation the Commissioner or supervisor shall have the power and authority to impound all books and records and withhold all commodities from moving until the investigation is completed. (Ga. L. 1956, p. 688, § 3.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

**10-4-30. Suspension or revocation of license for violation; liquidation proceedings; impoundment of unused receipts.**

(a) The Commissioner, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," may suspend or revoke any license issued to any warehouseman to conduct a public warehouse under this article for any violation of or failure to comply with any provisions of this article or the rules and regulations made under this article.

(b) In the event the Commissioner after a hearing finds and determines that a public warehouse is being operated in violation of the laws and regulations and in jeopardy of the public interest, he, in addition to



revoking the license to operate such public warehouse, may, in his discretion, file a petition for receivership and liquidation in the superior court of the county in which the warehouse is located.

(c) When any license has been suspended or revoked, the Commissioner or his authorized agents shall have the power and authority to take possession of all unused state bonded receipts and impound them until such time that said license has been reinstated. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 28; Ga. L. 1956, p. 688, § 4.)

**Cross references.** — Authority of Commissioner to impose penalty in lieu of other action, § 2-2-10.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

#### 10-4-31. Publishing lists of licensed and bonded warehouses, license terminations, and findings as to violations.

The Commissioner may publish the names and locations of warehouses licensed and bonded, the names and addresses of persons licensed under this article, and lists of all licenses terminated under this article and the causes therefor. Whenever it is found, under this article, that such warehouseman is not performing the duties imposed on him by this article and the rules and regulations made under this article, the Commissioner may publish his findings. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 18; Ga. L. 1956, p. 688, § 2.)

#### 10-4-32. Criminal penalties for violations; immunity of sureties.

(a) Every person who, without lawful authority, shall convert to his own use, or use for purposes of securing a loan, or remove from a warehouse under this article, contrary to this article or the regulations promulgated under this article, any agricultural product received at such warehouse for storage; or who shall forge, alter, counterfeit, simulate, or falsely misrepresent, or without proper authority use any license issued by the Commissioner under this article; or who shall issue or utter a false or fraudulent receipt or certificate of weight or grade or other class for any agricultural product under this article; or change with fraudulent intent in any manner an original receipt or such a certificate subsequent to issuance, shall be guilty of a felony and shall be fined not less than \$2,000.00 nor more than \$20,000.00 or double the value of the products involved if such double value exceeds \$20,000.00, or imprisoned for not less than two years nor more than ten years, or both.

(b) Every person who shall fraudulently alter or falsely represent a sample drawn under this article; or who shall fraudulently grade, otherwise classify, or weigh, or draw with intent to deceive a false sample of any agricultural product received at any warehouse under this article for storage; or who otherwise shall violate any provision of this article or of the regulations promulgated under this article, shall be guilty of a misdemeanor.

(c) For the purposes of this Code section the bondsman bonding such person or warehouseman shall not be liable for the criminal penalties provided in this Code section. (Ga. L. 1953, Nov.-Dec. Sess., p. 412, § 24.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 178 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 135, 136.

### 10-4-33. Duty of persons accepting warehouse receipts to take adequate measures regarding goods.

This article shall not relieve any person, including, but not limited to, any bank, savings and loan, or other financial lending institution, that requires, solicits, or otherwise accepts warehouse receipts issued in accordance with this article as collateral or security for a debt, account, promissory note, or any type of loan from any duty otherwise imposed to take necessary and reasonable adequate measures to ensure that the goods represented by the warehouse receipts are present and accounted for and are in suitable condition. (Code 1981, § 10-4-33, enacted by Ga. L. 1992, p. 2553, § 2.)

## ARTICLE 2

### STATE WAREHOUSE COMMISSIONER; COTTON WAREHOUSING

#### PART 1

#### STATE WAREHOUSE COMMISSIONER

### 10-4-50. Designation of commissioner.

The Commissioner of Agriculture shall be the state warehouse commissioner. (Ga. L. 1918, p. 246, § 1; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-301.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-51. Bond of commissioner.**

The state warehouse commissioner shall give bond payable to the Governor and his successors in office for the faithful performance of his duties, in the sum of \$25,000.00, such bond to be approved as other bonds of state officers. (Ga. L. 1918, p. 246, § 14; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-302.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-52. Appointment and bonding of necessary employees; promulgation of rules and regulations.**

(a) The commissioner shall have the power to appoint graders, officers, clerks, and all necessary employees to carry out this article and fix the salaries of same. He shall also have the power, and is directed, to safeguard the interests of the state by requiring bonds from such officers, clerks, and employees for the performance of their duties.

(b) The commissioner shall also prescribe rules and regulations not inconsistent with the intent and spirit of this article to carry the same into effect. (Ga. L. 1918, p. 246, § 5; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-303.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-53. Actions by and against commissioner; limitations on liability; “linters” not to be stored.**

(a) The commissioner shall have power to sue and be sued, plead and be impleaded, upon the same terms as an individual or corporation, the action to be against or by the commissioner, and not as an individual, except in case of tort or neglect of duty, when the action may be upon the bond of the commissioner. Actions may be brought in Fulton County or in the county in which the cause of action shall arise.

(b) The weights, classes, and grades of cotton on storage are, under this article, only guaranteed by the commissioner in favor of those who lend money or buy cotton through the commissioner, provided the commissioner shall not be responsible for such fluctuation in weight as represents ordinary climatic conditions.



(c) Cotton designated as “linters” shall not be received for storage under this article. (Ga. L. 1918, p. 246, § 6; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-305; Ga. L. 1982, p. 3, § 10.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 8, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### 10-4-54. Duties of commissioner generally.

It shall be the duty of the commissioner to study the condition under which cotton is grown, harvested, ginned, baled, covered, stored, and marketed and as a result of such investigation to organize a system that will bring about needed reforms and provide for the most economical and scientific handling of this crop from the fields to the mill and, when he shall have determined upon the best system of ginning, baling, and covering, to recommend its adoption by all ginners as fast as practicable, without undue expense. (Ga. L. 1918, p. 246, § 2; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-307.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 8, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### 10-4-55. Acquisition of property; encouraging erection of warehouses.

The commissioner shall have power to acquire property. It shall be his duty to foster and encourage the erection of warehouses in the various counties, upon plans and specifications adopted by him. (Ga. L. 1918, p. 246, § 4; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-306.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### 10-4-56. Purchase or lease of, or contracting for, compress plant by commissioner.

The commissioner shall have the right to erect, buy, lease, or otherwise contract for a compress plant, or make contract or contracts with existing compress owners for the compression of cotton, as may be necessary in the conduct of the business under this article. (Ga. L. 1918, p. 246, § 11; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-309.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 4, 8, 11.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

### 10-4-57. Fire insurance on property owned by or in possession of commissioner.

The commissioner shall insure against fire all buildings, machinery, or other property owned by the commissioner in the name of the state. The commissioner shall have insured all buildings or machinery leased, owned, or in his possession other than the state's property when requested to do so by the owners thereof. Further, he shall effect fire insurance on cotton that may be insured in such warehouses when so requested by the owner or owners thereof in the name of the owner. All insurance obtained by the commissioner under this Code section shall be placed in fire insurance companies authorized by law to do business in this state, provided that the commissioner shall not act in any capacity for any insurance company or receive any compensation from any insurance company, insurance agent, broker, or any person representing any insurance company as aforesaid, by division of commission or otherwise, in connection with the placing of any insurance. (Ga. L. 1918, p. 246, § 23; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-317.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 113 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 73.

### 10-4-58. Annual report.

(a) The state warehouse commissioner shall make an annual report to the General Assembly, setting forth:

(1) Number and location of each warehouse where cotton has been received for storage by the state;

(2) Cotton on storage and that delivered on presentation of receipts; and

(3) Such further information as the commissioner may think would be of benefit to the public.

(b) The state warehouse commissioner shall not be required to distribute copies of the annual report to the members of the General Assembly but shall notify the members of the availability of the annual report in the manner which he or she deems to be most effective and efficient. (Ga. L. 1918, p. 246, § 13; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-318; Ga. L. 2005, p. 1036, § 2/SB 49.)

**10-4-59. Cooperation with other states.**

The commissioner shall cooperate with other states where a state warehouse system is in operation and promote the formation of an interstate board so that there may be uniformity in handling and marketing the crop in all the states; and the commissioner is authorized to spend such sums as may be necessary for this purpose. (Ga. L. 1918, p. 246, § 21; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-320.)

**10-4-60. State debt not to be created.**

No debt shall be created against the state by reason or operation of this article. (Ga. L. 1918, p. 246, § 22; Code 1933, § 5-319.)

**PART 2****STORAGE OF COTTON**

**Cross references.** — Stamping of weight on bales or packages of cottonseed hulls, § 2-14-20.

**10-4-70. Standards and classifications of cotton.**

The state warehouse commissioner shall accept as authoritative the standards and classifications of cotton established by the federal government. (Ga. L. 1918, p. 246, § 3; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-308.)

**10-4-71. Storing lint cotton; inspection tags; issuance, contents, transfer, and cancellation of receipts.**

(a) The state warehouse commissioner may receive for storage lint cotton, properly baled, with an inspection tag showing that it has been legally weighed and that a federal or state grader has graded such cotton.

(b) There shall be receipts issued for such cotton under the seal in the name of the commissioner, stating location of warehouse, identification mark on each bale, its weight and grade, and whether long or short staple, so as to be able to deliver on surrender of receipts the identical cotton for which each was given. The receipt for cotton so stored is transferable only by written assignment and actual delivery. The cotton which the receipt represents shall be delivered only upon physical presentation of the receipt or satisfactory proof of loss of the receipt. The receipt shall be marked "canceled" when the cotton is taken from the warehouse.

(c) The grades, weights, and identification marks provided for by this article shall be evidenced by tags affixed to the bale of cotton; and the receipts issued must be a duplicate of the identification upon the tags. (Ga. L. 1918, p. 246, §§ 7, 8; Ga. L. 1920, p. 282, § 1; Code 1933, §§ 5-310, 5-311.)



**Cross references.** — Warehouse receipts generally, Art. 7, T. 11.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 27 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 23 et seq.

#### 10-4-72. Fixing terms and rate of storage.

The state warehouse commissioner shall settle the terms upon which cotton may be stored in the local warehouses coming under this article and fix the rate of storage thereon in such manner that these warehouses shall pay expenses, it being the declared purpose of this article that the system shall be self-sustaining and without cost to the state. (Ga. L. 1918, p. 246, § 9; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-312.)

#### 10-4-73. Commissioner may negotiate loans on receipts and sale of stored cotton.

The state warehouse commissioner may, upon the request of the owner of warehouse receipts, negotiate loans upon the same, or make sale of the cotton on storage, and shall notify the holders of cotton of the steps which will be necessary to avail themselves of aid in obtaining loans upon cotton or making sale thereof. (Ga. L. 1918, p. 246, § 10; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-313.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 123.

**ALR.** — Federal crop loans, 1 ALR2d 712.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### 10-4-74. Commissioner's charges and commissions.

The state warehouse commissioner shall provide for the cost of maintaining this system by assessing a charge upon each bale of cotton offered for storage, and for negotiation of loans or selling cotton, a commission, all of which charges shall be uniform, and due notice thereof given, it being the declared purpose of this article to operate at cost, without profit to the state. (Ga. L. 1918, p. 246, § 12; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-314.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 66, 70.

**ALR.** — Federal crop loans, 1 ALR2d 712.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 99 et seq.

**10-4-75. Warehouse receipt books; execution and sealing of receipts.**

The warehouse receipt books shall be designed by the state warehouse commissioner and furnished the manager of each warehouse. Receipts shall be numbered, and the warehouse receiving such books shall be accountable for each receipt. The receipts in such books may have the lithographed or engraved signature of the state warehouse commissioner, but the name of the manager of the local warehouse shall be signed by the manager with pen and ink. The state warehouse commissioner shall have a seal, which shall be affixed to each receipt. (Ga. L. 1918, p. 246, § 15; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-315.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 27 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 23 et seq.

**10-4-76. Investigation of liens and titles by warehouseman; priority of claim of receipt holder.**

(a) If the warehouseman to whom cotton is offered for storage shall have cause to believe there is an adverse lien, title, or claim to the cotton, he shall make reasonable investigation; and to that end he may require the party so offering the cotton for storage to make affidavit in writing as to such liens, adverse title, or claims.

(b) Any transferee or holder for value of any receipt issued under this article, without notice of any adverse lien, title, or claim to the cotton represented by such receipt, shall have a superior claim to the cotton as against such adverse lien, title, or claim, unless the holder of the adverse lien, title, or claim within seven days after the date on which the cotton was so stored in such warehouse shall begin action on such lien, title, or adverse claim in a court of competent jurisdiction, and give to the warehouse where the cotton is stored written notice of such action. (Ga. L. 1918, p. 246, § 20; Code 1933, § 5-316.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 67 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 106 et seq.

**10-4-77. Penalty for failure to give notice of lien on cotton.**

Any person who shall deposit, or attempt to deposit, cotton upon which a lien, mortgage, or adverse claim exists, without notifying the manager of the warehouse thereof and having this fact so entered on the warehouse receipt, shall be guilty of a misdemeanor. (Ga. L. 1918, p. 246, § 19; Code 1933, § 5-9905.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 77.

**10-4-78. Penalty for false affidavit as to lien on cotton.**

Should any party required by Code Section 10-4-76 to make an affidavit as to an adverse lien, title, or claim to cotton offered to a warehouseman for storage make a false affidavit, he shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment and labor in the penitentiary for not less than three years nor more than ten years. (Ga. L. 1918, p. 246, § 20; Code 1933, § 5-9906.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 178.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 136.

**10-4-79. Penalties for delivering cotton without production of receipt or failing to cancel receipt.**

Any manager, employee, agent, officer, or other person who shall deliver cotton from a warehouse under this article, except upon the production of the receipt therefor, or who shall fail to mark such receipt “canceled” on the delivery of the cotton shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than \$5,000.00, or imprisonment for not more than five years in the state penitentiary, or both, in the discretion of the court. (Ga. L. 1918, p. 246, § 18; Code 1933, § 5-9902.)

## RESEARCH REFERENCES

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 136.

**10-4-80. Penalties for issuing receipt for cotton not in warehouse.**

The manager of any warehouse, or agent, employee, or servant, who issues or aids in issuing a receipt for cotton, knowing that such cotton has not been actually placed in the warehouse under the control of the manager thereof, shall be guilty of a felony and, upon conviction thereof, shall be punished for each offense by imprisonment in the state penitentiary for a period of not less than one nor more than five years, or by a fine not exceeding \$5,000.00. (Ga. L. 1918, p. 246, § 16; Code 1933, § 5-9903.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 178.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 136.



**10-4-81. Penalty for issuing duplicate or additional receipt; lost or destroyed receipts.**

Any manager, employee, servant, or other person who shall issue or aid in issuing a duplicate or additional receipt for cotton, knowing that the former receipt or any part thereof is outstanding, commits the offense of forgery in the first degree, provided that the party applying for a duplicate, upon the representation that the original has been lost or destroyed, may receive the same upon giving an indemnifying bond to the state warehouse commissioner to protect the commissioner against any loss that might occur thereby. (Ga. L. 1918, p. 246, § 17; Ga. L. 1920, p. 282, § 1; Code 1933, § 5-9904.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 178.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 136.

**ARTICLE 3****TOBACCO WAREHOUSING**

**Administrative rules and regulations.** — the State of Georgia, Georgia Department of Licensing Leaf Tobacco Dealers, Official Compilation of the Rules and Regulations of Agriculture, Chapter 40-18-2.

**PART 1****LEAF TOBACCO SALES AND STORAGE****10-4-100. Legislative intent and findings.**

It is the intent and purpose of this part to enable producers to have sufficient time to cure, prepare, and market their flue-cured leaf tobacco in a proper and orderly manner. It is found by the General Assembly that the provisions of this part are necessary to the proper marketing of flue-cured leaf tobacco.

It is further found that external disruptive forces and influences upon buyers and sales opportunity have operated to effect discrimination and disadvantage upon flue-cured leaf tobacco producers in this state in the free entry and sale of their tobacco in interstate commerce. It is the intent and purpose of this part to eliminate discrimination in the entry and sale of tobacco in commerce by providing for equitable allocation of sales opportunity and by providing for licensing of flue-cured leaf tobacco auction sales which will optimize the movement and sale in commerce of tobacco produced in this state and eliminate discrimination against such movement and sale. (Ga. L. 1960, p. 214, § 1; Ga. L. 1968, p. 1242, § 1; Ga. L. 1974, p. 518, § 1.)

JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 8.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 2.

**10-4-101. Licenses for flue-cured leaf tobacco auction sales; “clean-up” sale licenses.**

No person, real or corporate, shall operate, hold, or conduct an auction sale for the sale of flue-cured leaf tobacco within this state without first having obtained a license for the regular selling season in which the sale is made from the Commissioner of Agriculture. Each license so issued shall automatically expire at the end of the regular selling season. The regular selling season shall be deemed to have ended at the close of business on the marketing day any regulatory group or committee shall cause any of the sets of buyers normally assigned to the Georgia flue-cured leaf tobacco auction markets to be withdrawn for the purpose of reassigning them to auction markets in other tobacco belts. The Commissioner, in his discretion, may issue additional licenses to warehousemen at the end of the regular selling season as he deems necessary and desirable for “clean-up” sales or special sales, such licenses to terminate at the conclusion of the “clean-up” or special sale. The license fee shall be \$100.00 for each regular selling season with no additional fee for licenses issued for “clean-up” or special sales. Licenses shall be subject to renewal from one regular selling season to another under such rules and regulations as the Commissioner shall prescribe. (Ga. L. 1960, p. 214, § 2; Ga. L. 1968, p. 1242, § 2; Ga. L. 1970, p. 4, § 1; Ga. L. 1992, p. 1023, § 1.)

JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 8, 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 2, 4.

**10-4-102. Physical standards for leaf tobacco warehouses; compliance as prerequisite for license.**

In addition to other authority granted him by this part, the Commissioner of Agriculture shall be authorized to promulgate regulations prescribing physical standards for buildings used as warehouses for the storage or sale

of leaf tobacco. Such standards shall be reasonably designed to ensure the protection of producers and others from loss or damage to tobacco while held or stored in such warehouses and to provide for the safety and welfare of such persons while upon the warehouse premises. It shall be a prerequisite to the issuance of a license under this part that the applicant has complied with all standards promulgated pursuant to this Code section. (Ga. L. 1972, p. 351, § 1; Ga. L. 1994, p. 97, § 10.)

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### 10-4-103. Insurance as prerequisite for license.

As a prerequisite to the issuance of a license under this part, each applicant shall furnish evidence to the Commissioner of Agriculture that he has in force a standard fire and extended coverage insurance policy for the full market value of the tobacco in his sales warehouse for the marketing season for which the license is sought. The insurance policy shall be written by an insurance company, of the warehouseman's choice, authorized to transact business in this state, and such insurance coverage shall be approved in form by the Commissioner of Insurance, and a copy of the insurance policy shall be filed with the Commissioner of Agriculture. The policy shall cover both first-hand and resale tobacco. The insurance policy shall contain an endorsement requiring notification to the Commissioner of Agriculture by the insurance company of its intention to cancel the policy at least ten days prior to cancellation. (Ga. L. 1960, p. 214, § 3; Ga. L. 1970, p. 222, § 1; Ga. L. 1989, p. 14, § 10.)

#### JUDICIAL DECISIONS

**Cited in** *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 112 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 50 et seq.

#### 10-4-104. Allocating sales opportunities among licensed warehouses.

In the event sales opportunity shall be designated or allocated to this state by any regulatory group or committee, the Commissioner of Agriculture shall be authorized to allocate such sales opportunity among the warehouses operating under license issued under this part in such manner as to effectuate the expressed intent and purpose of this part. The Commissioner may consider, among other factors, the history factor used by the regulatory



group or committee for assigning sales opportunity for cross-belt tobacco, the previous five-year sales history of such licensees, and the previous five-year sales history of such licensees of selling Georgia grown tobacco in order to effectuate an allocation which will eliminate or reduce discrimination against producers in this state in the entry and sale of their tobacco in commerce. In recognition of the unique characteristics of the marketing of tobacco by auction, and the necessity of immediate response to marketing conditions, such allocation of sales time need not be effected by the promulgation of regulations but may be issued and published in such manner as the Commissioner deems necessary and expedient, provided that no such allocation shall be effective upon less than 24 hours' actual notice to the affected licensee. (Ga. L. 1974, p. 518, § 3.)

#### **10-4-105. Denial of issuance or suspension or revocation of license.**

In addition to other authority granted him by this part, the Commissioner of Agriculture shall be authorized to deny issuance of, or to suspend or revoke, any license provided in this part for any violation of this part, or upon a finding that the applicant or licensee has engaged in conduct contrary to the expressed intent and purpose of this part with respect to discrimination in the sale of tobacco. In the determination of discrimination in the sale of tobacco, the Commissioner is authorized to consider, among other factors, the solicitation of tobacco for auction by an applicant or licensee in such manner as to deplete unreasonably sales opportunity required for the equitable movement and sale of tobacco produced in this state. (Ga. L. 1974, p. 518, § 2.)

**Cross references.** — Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

#### **10-4-106. Georgia Tobacco Marketing Act of 1995.**

(a) This Code section shall be known and may be cited as “The Georgia Tobacco Marketing Act of 1995.”

(b) The maximum charges and expenses of handling and selling leaf tobacco by warehousemen licensed under this part shall not exceed the following schedule, to wit:

(1) Reserved;

(2) Reserved;

(3) For commissions on the gross sales of leaf tobacco in said warehouses, not to exceed 3.5 percent of said gross sales. (Ga. L. 1960, p. 214, § 4; Ga. L. 1990, p. 137, § 1; Ga. L. 1995, p. 104, § 1.)

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the provisions, decisions under former Ga. L. 1935, p. 476, are included in the annotations for this Code section.

**Fixing reasonable maximum charges is not an arbitrary and capricious exercise of state power,** repugnant to the fourteenth amendment of the federal Constitution, as placing

a direct burden upon interstate commerce in violation of the commerce clause. *Townsend v. Yeomans*, 301 U.S. 441, 57 S. Ct. 842, 81 L. Ed. 1210 (1937) (decided under former Ga. L. 1935 p. 476).

**Cited in** *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

### OPINIONS OF THE ATTORNEY GENERAL

**Tobacco sheet program fees.** — Where the Flue-Cured Tobacco Cooperative Stabilization Corporation intends to establish a program involving the states of Virginia, North Carolina, South Carolina, Georgia, and Florida to purchase, collect, manage, handle, and make necessary repairs to tobacco sheets (burlap sheets used to wrap the

bales of tobacco) used in the tobacco industry, a warehouseman may collect a twenty-five cent fee from the seller and the buyer, and, along with the warehouseman's fees for the program, submit such funds to the corporation, as such participation would not be in violation of O.C.G.A. § 10-4-106. 1989 Op. Att'y Gen. No. 89-17.

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 66.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 99 et seq.

### 10-4-107. Warehousemen to render itemized statements.

The licensee of each and every warehouse shall render to each seller of tobacco of his warehouse an itemized statement plainly stating the amount charged for weighing and handling, the amounts charged for auction fees, and the amounts charged for commission on each sale. (Ga. L. 1960, p. 214, § 5.)

### JUDICIAL DECISIONS

**Cited in** *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 13.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.

**10-4-107.1. Tobacco contract.**

(a) As used in this Code section, the term “tobacco contract” means any contract between a tobacco company and a tobacco grower under which the tobacco company contracts to purchase tobacco to be grown by the tobacco grower other than at a tobacco auction.

(b) No tobacco contract for the purchase of tobacco grown in this state shall be valid or binding unless:

(1) The tobacco grower is given the opportunity to have the proposed tobacco contract reviewed outside the business premises of the tobacco company or its agents by an attorney or adviser of the tobacco grower’s choosing prior to execution;

(2) The tobacco contract is written in plain English; and

(3) The tobacco contract quotes the provisions of subsection (c) of this Code section.

(c)(1) The tobacco grower shall have a right to cancel a tobacco contract until 12:00 Midnight of the third business day after the day on which the tobacco grower signs the contract.

(2) Notice of cancellation under this subsection shall be given to the tobacco company at the place of business as set forth in the tobacco contract by certified mail or statutory overnight delivery, return receipt requested, which shall be posted not later than 12:00 Midnight on the third business day following execution of the tobacco contract.

(3) In the event of cancellation pursuant to this subsection, the tobacco grower shall refund to the tobacco company within ten days after the cancellation any consideration received by the tobacco grower from the tobacco company under the tobacco contract.

(4) Notice of cancellation given by the tobacco grower need not take any particular form and, however expressed, is effective if it indicates the intention of the tobacco grower not to be bound by the tobacco contract. (Code 1981, § 10-4-107.1, enacted by Ga. L. 2000, p. 561, § 1; Ga. L. 2001, p. 4, § 10; Ga. L. 2001, p. 1212, § 2.)

**Editor’s notes.** — Ga. L. 2001, p. 1212, § 7, not codified by the General Assembly, provides that the Act is applicable with respect to notices delivered on or after July 1, 2001.

**10-4-108. Records and reports by warehousemen.**

Each licensee shall keep a correct daily account of the number of pounds of leaf tobacco sold upon the floor of his warehouse. On or before Monday of each week, the licensee shall make a statement under oath of all of the tobacco sold upon the floor of his warehouse during the preceding week



and shall transmit each report to the Commissioner of Agriculture. The report shall be so arranged and classified as to show the number of pounds of tobacco sold for producers, the number of pounds sold for dealers, and the number of pounds resold by the licensee for his own account or for the account of some other warehouse or licensee. In addition thereto, each licensee shall indicate the number of pounds of Type 14 flue-cured leaf tobacco sold upon the floor of his warehouse for producers thereof and the number of pounds of Type 14 flue-cured leaf tobacco sold by persons other than producers upon the floor of his warehouse. The licensee shall report the total number of pounds of other than Type 14 flue-cured leaf tobacco sold for producers and persons other than producers. In addition thereto, each licensee shall make such additional reports as shall be prescribed by the Commissioner. (Ga. L. 1960, p. 214, § 6.)

#### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### **10-4-109. Commissioner of Agriculture to keep sales records; publication.**

The Commissioner of Agriculture shall cause to be kept and compiled the information submitted to him as to the sales of tobacco in this state. He shall cause such records to be kept in a manner so as to show the number of pounds of Type 14 tobacco sold by each warehouse as well as the number of pounds of other than Type 14 tobacco sold by each warehouse. He shall cause such records to be kept in a manner so as to show separately the number of pounds of Type 14 tobacco and other types sold by producers and the number of pounds of each type of tobacco resold. The Commissioner is authorized to cause such information to be published in a manner that he deems most beneficial. (Ga. L. 1960, p. 214, § 7.)

#### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### **10-4-110. Advisory board; creation; membership; compensation; expenses.**

Reserved. Repealed by Ga. L. 2008, p. 1015, § 2, effective May 14, 2008.

**Editor's notes.** — This Code section was based on Ga. L. 1960, p. 214, § 8; Ga. L. 1970, p. 6, § 1.

**10-4-111. Meetings of advisory board; duties; fixing opening date of marketing season; revocation of license for early sale.**

(a) The board shall meet in June of each year, or upon the call of the chairman, to survey the condition of the tobacco crop and recommend an opening date of the marketing season. The chairman shall determine the time and place of the meeting.

(b) The board shall recommend to the Commissioner of Agriculture a date for the opening of the tobacco marketing season. The Georgia Commissioner of Agriculture shall invite the Florida Commissioner of Agriculture and one member of the Florida Tobacco Advisory Board to attend meetings of the Georgia Tobacco Advisory Board to submit evidence as to the opening date best suited to meet the needs of the Florida flue-cured leaf tobacco producers. The Commissioner shall cause two members of the Tobacco Advisory Board to attend the meeting of the board of governors of the Bright Belt Warehouse Association to make known the recommendations as to the opening of the marketing season in Georgia. One of these members shall be a legislative member and the other member a tobacco farmer member of the board.

(c) The Commissioner shall determine and announce the opening date of the tobacco marketing season in this state. If any licensee shall hold a sale prior to the date determined by the Commissioner, the license of the licensee shall be revoked in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," and shall not be reinstated or reissued in the calendar year of the revocation. The revocation provided in this subsection shall be in addition to the other penalties provided for the violation of this part. It is the intent and purpose of this Code section to provide a procedure for the fixing of the opening date of the tobacco marketing season and to place the final authority to fix said date in the Commissioner of Agriculture. (Ga. L. 1960, p. 214, § 9; Ga. L. 1970, p. 6, § 2.)

**JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**10-4-112. Limitations on sales hours and days of warehouses.**

(a) The operating day of each flue-cured leaf tobacco warehouse shall not exceed the number of hours required to handle and sell adequately and efficiently the number of pounds or piles of tobacco allowed to be sold each day.

(b) The operating week of such warehouse shall be limited to five actual selling days, provided that no sale shall be held on Saturday or Sunday.

(c) All tobacco warehouses shall be closed on Sunday for the purpose of receiving, unloading, weighing, or placing tobacco on a warehouse floor between the hours of 12:01 A.M., Sunday and 12:01 A.M., Monday. (Ga. L. 1960, p. 214, § 10; Ga. L. 1968, p. 1242, § 3; Ga. L. 1970, p. 4, § 2.)

#### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### RESEARCH REFERENCES

**ALR.** — Power of municipal corporation to legislate as to Sunday observance, 37 ALR 575.

Power to extend Sunday observance laws beyond Sunday hours, 50 ALR 628.

Validity, construction, and effect of "Sunday closing" or "blue" laws — modern status, 10 ALR4th 246.

#### 10-4-113. Maximum rate of sales.

The maximum rate of sales at any flue-cured leaf tobacco warehouse shall not exceed 500 baskets during any one hour, nor shall the rate of sales during any one day or week exceed 500 baskets per hour. (Ga. L. 1960, p. 214, § 12; Ga. L. 1969, p. 941, § 1.)

#### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### 10-4-114. Auction tobacco dealers; licenses; regulations as to reports and records; refusal, suspension, or revocation of license.

(a) Any person, firm, or corporation purchasing tobacco at auction at any flue-cured leaf tobacco auction sales establishment licensed under this Code section shall be deemed to be a tobacco dealer. It shall be unlawful for any person, firm, or corporation to engage in the business of a tobacco dealer without first having secured a license therefor from the Commissioner of Agriculture. There shall be no charge for such license, which shall be issued on an annual basis. Employees of a licensed tobacco dealer need not be individually licensed.

(b) The Commissioner is authorized to provide by rule or regulation for the filing of reports and records by licensed tobacco dealers containing such information as the Commissioner shall deem necessary for the proper enforcement of this part.

(c) The Commissioner may refuse, suspend, or revoke any such license upon a showing of violation of this part or any rule or regulation promulgated and adopted pursuant to this part. (Ga. L. 1974, p. 518, § 4.)



**10-4-114.1. Grading by the Agriculture Marketing Service; alternatives if graders unavailable.**

Repealed by Ga. L. 2005, p. 622, § 1, effective July 1, 2005.

**Editor's notes.** — This Code section was based on Code 1981, § 10-4-114.1, enacted by Ga. L. 2001, p. 900, § 3. Ga. L. 2006, p. 72, § 10, repealed the reservation of this Code section.

**10-4-115. Nonauction tobacco dealers licensed; bond or trust fund agreement; records and reports; certified public weighers provided; penalty.**

(a) Any person, firm, or corporation purchasing flue-cured leaf tobacco from producers other than at auction sales shall be required to apply to and obtain from the Commissioner of Agriculture a nonauction tobacco dealer's license prior to engaging in such purchase operations. Such license shall be renewable on an annual basis. There shall be an annual fee for each such license issued by the Commissioner. The amount of such fee shall be established by the Commissioner in an amount not to exceed \$100.00 per annum. Each applicant for a nonauction tobacco dealer's license shall indicate in writing to the Commissioner each year before the first auction sale of the tobacco-selling season an intent to buy flue-cured leaf tobaccos from producers other than at auction in order to be eligible for a nonauction tobacco dealer's license for that selling season.

(b) Prior to the issuance or renewal of a nonauction tobacco dealer's license to an applicant or a licensee, the applicant or licensee shall post with the Commissioner a surety bond or trust fund agreement in the amount of 20 percent of the total purchases made by the applicant or licensee of flue-cured leaf tobacco from producers other than at auction during the preceding tobacco-selling season. The bond or trust fund agreement shall guarantee the purchases made by the applicant or licensee from producers other than at auction sales and shall in no instance be less than \$20,000.00 nor more than \$200,000.00.

(c) Each nonauction tobacco dealer shall compile and maintain such records and periodic reports pertaining to the purchase of tobacco from producers other than at auction sales as the Commissioner may require and shall make such records and reports available for inspection by the Commissioner or his representative during any business hours.

(d) It shall be the duty of each licensed nonauction tobacco dealer to provide or have access to a certified public weigher for the weighing of tobacco purchased by a nonauction dealer from producers other than at auction sales.

(e) It shall be unlawful for any person, firm, or corporation to purchase flue-cured leaf tobacco from producers other than at auction sales without

complying with this Code section. Any person violating this Code section shall be guilty of a misdemeanor. (Ga. L. 1977, p. 189, § 1; Ga. L. 2001, p. 900, § 2.)

#### **10-4-116. Inspection of premises and records.**

The Commissioner of Agriculture, himself or through his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner in such manner as to show accurately the origin and disposition of each type of flue-cured leaf tobacco. (Ga. L. 1960, p. 214, § 17.)

#### **JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### **10-4-117. Certified public weighers to be provided by licensees.**

It shall be the duty of each licensee to provide a certified public weigher for the weighing of tobacco upon his premises; and it shall be unlawful for any person to weigh tobacco for sale who is not a certified public weigher. (Ga. L. 1960, p. 214, § 18.)

**Cross references.** — Certified public weigher generally, Art. 2, Ch. 2, T. 10.

#### **JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### **10-4-117.1. Detention of tobacco; notice; condemnation; cost of testing.**

(a) Whenever a duly authorized agent of the Commissioner finds or has probable cause to believe that any tobacco has been treated with any pesticide not currently registered by the United States Environmental Protection Agency or the Commissioner, or both, for use on tobacco or

contains a residue of any pesticide or other substance at a level which exceeds the current residue standard established for that pesticide or other substance by the United States Agricultural Stabilization and Conservation Service to protect and ensure the orderly marketing of Georgia grown tobacco, the agent shall affix to such tobacco or otherwise give to the owner or custodian of such tobacco a notice advising that such tobacco is being detained by the Commissioner. Such notice of detention shall apply to all tobacco produced by that grower during that season, including tobacco already harvested or tobacco to be harvested. It shall be unlawful for any person to remove any such notice affixed to tobacco or to remove or dispose of such tobacco by sale or otherwise without written permission from the Commissioner's agent or a court of competent jurisdiction.

(b) If the Commissioner finds that no residue of pesticides or other substances in the detained tobacco exceeds any residue standard as specified in subsection (a) of this Code section, the Commissioner shall promptly remove all markings from such tobacco and release it from detention, in writing.

(c) When any tobacco detained under subsection (a) of this Code section has been found by the Commissioner to contain any residue in excess of those specified in subsection (a) of this Code section, the Commissioner shall bring an action for condemnation of such tobacco in the superior court of the county where the tobacco is being detained. After the Commissioner has made an initial finding of any residue in the detained tobacco in excess of any residue standard established by the United States Agricultural Stabilization and Conservation Service as provided for in subsection (a) of this Code section, the costs of all subsequent testing which the Commissioner shall require to confirm that residues in such detained tobacco do not exceed any residue standard established by the United States Agricultural Stabilization and Conservation Service shall be borne by the producers and such tests shall be performed only by a laboratory approved by the Commissioner. (Code 1981, § 10-4-117.1, enacted by Ga. L. 1988, p. 373, § 1.)

**10-4-118. Enforcement of part; notice and hearing in revocation or suspension proceedings.**

It shall be the duty of the Commissioner of Agriculture to enforce this part and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. The Commissioner is authorized to revoke or suspend any license or registration issued under this part to any person violating this part or any rule or regulation adopted pursuant to this part, after notice and hearing before the Commissioner in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Ga. L. 1960, p. 214, § 19.)



**JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**10-4-119. Suspension or revocation of license or registration pending investigation and correction of violation.**

At such time as the Commissioner of Agriculture deems there has been a violation of this part and the rules and regulations promulgated under this part, he shall have the power and authority, in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," to suspend the license or registration pending investigation of the violation and until such time as the violation has been corrected to the satisfaction of the Commissioner. During the period of time of any investigation of a violation, the Commissioner shall have the power and authority to impound all books and records and to preserve and maintain evidence until the investigation is completed; provided, however, that the investigation shall be completed at the earliest practicable time. (Ga. L. 1960, p. 214, § 23.)

**JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**10-4-120. Enjoining violations.**

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy of law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court; and such court shall have jurisdiction, upon hearing and for cause shown, to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part. Such injunction shall be issued without bond. (Ga. L. 1960, p. 214, § 20.)

**JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**10-4-121. Procedure for adopting or changing rules and regulations; administrative review of objections.**

(a) Prior to adoption or change of any rules and regulations, the Commissioner of Agriculture shall promulgate the proposed rule or

regulation or change and afford interested persons an opportunity to be heard and submit data and views orally or in writing.

(b) Any person with a real and substantial interest who is affected by a rule or regulation of the Commissioner and who believes that the Commissioner, in the promulgation or enforcement of such rule or regulation, has exceeded the authority vested in him by the General Assembly under the Constitution of Georgia or the United States shall have the right to petition the Commissioner for the repeal or rejection of such rule or regulation by pointing out in what respect and for what reasons he contends the rule to be unlawful or unconstitutional. The Commissioner is required to consider every such petition and afford the petitioner an opportunity to be heard within 30 days; and, after argument, the Commissioner shall determine the merits of the petition. If the Commissioner decides in whole or in part in favor of the petitioner, the Commissioner shall take corrective measures within 30 days after the hearing to give the petitioner relief in every respect from any unlawful or unconstitutional rule or regulation. The foregoing is expressly made an administrative remedy; and every person affected by any rule or regulation or any act of the Commissioner is required to exhaust this remedy before taking any other steps, except as otherwise provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(c) All hearings before the Commissioner shall be stenographically reported and shall be available to any interested party upon payment of the stenographic cost. (Ga. L. 1960, p. 214, § 21.)

### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

#### **10-4-122. Judicial review of administrative decision.**

Any person aggrieved by a final decision or determination in any matter in which a hearing is required or authorized by this part or by the state or federal Constitution is entitled to judicial review thereof in accordance with the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," for the judicial review of contested cases. (Ga. L. 1960, p. 214, § 22.)

### JUDICIAL DECISIONS

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**10-4-123. General penalty for violation of part.**

Any person who shall violate any provision of this part for which no specific punishment is provided in this part shall be guilty of a misdemeanor. (Ga. L. 1960, p. 214, § 27.)

**JUDICIAL DECISIONS**

**Cited** in *Hussey v. Campbell*, 189 F. Supp. 54 (S.D. Ga. 1960).

**PART 2****CARRY-OVER LEAF TOBACCO STORAGE AND SALE****10-4-140. Legislative intent and findings.**

It is the intent and purpose of this part to enable producers of flue-cured leaf tobacco to avail themselves of an adequate and safe method of storing flue-cured leaf tobacco unsold in the year of production until the subsequent selling season for purposes of marketing at that time. It is found by the General Assembly that the provisions specified in this part are necessary to the proper marketing of carry-over flue-cured leaf tobacco. (Ga. L. 1975, p. 1263, § 1.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 8.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 2.

**10-4-141. Definitions.**

As used in this part, the term:

(1) “Carry-over tobacco” means any tobacco unsold in the year of its production and held, for whatever reason, in storage until the subsequent selling season for sale in that season.

(2) “Operator” means any person, firm, partnership, or corporation engaged in the receipt for storage or storage, or both, of tobacco unsold in the year of production until the subsequent selling season for sale in that season.

(3) “Producer” means any flue-cured leaf tobacco grower who has tobacco in excess of his current marketing quota which will be eligible for sale during the subsequent selling season. (Ga. L. 1975, p. 1263, § 15.)



10-4-142. Licenses for carry-over tobacco services.

No person, real or corporate, shall operate a service for receiving within this state flue-cured leaf tobacco for the purpose of weighing, redrying, and storing said tobacco from the year of production until the subsequent selling season for sale at that time without first having obtained a license from the Commissioner of Agriculture. Each license so issued shall automatically expire at the termination of the storage period and be subject to renewal annually under such rules and regulations as the Commissioner shall prescribe. The license fee shall be \$10.00 for each year. Licensed operators of flue-cured leaf tobacco auction warehouses may be licensed without cost under this part upon application to the Commissioner. This part shall not require licensing of any federal agency, its agents, or contractors who receive carry-over tobacco. (Ga. L. 1975, p. 1263, § 2.)

RESEARCH REFERENCES

<b>Am. Jur. 2d.</b> — 78 Am. Jur. 2d, Warehouses, § 13.	<b>ALR.</b> — Right to enjoin business competitor from unlicensed or otherwise illegal acts or practices, 90 ALR2d 7.
<b>C.J.S.</b> — 93 C.J.S., Warehousemen and Safe Depositaries, § 4.	

10-4-143. Fire and extended coverage insurance on stored tobacco.

As a prerequisite to the issuance of a license under this part, each applicant shall furnish evidence to the Commissioner of Agriculture that there is in force an insurance policy against loss or damage by fire and such other perils as are commonly insured against under extended coverage provisions, for its full value, upon the best terms obtainable by individual or reporting form blanket policies on the carry-over tobacco to be received for storage or stored, or both, by him in the year for which the license is sought, either provided by the applicant or the actual storer of the tobacco. The insurance policy shall be written by an insurance company, of the applicant's choice, authorized to transact business in this state or in the state where the tobacco is stored. Such insurance policy shall be effective for the entire storage period and shall be approved in form by the Commissioner of Insurance. A copy of the insurance policy shall be filed with the Commissioner of Agriculture. (Ga. L. 1975, p. 1263, § 3; Ga. L. 1989, p. 14, § 10.)

RESEARCH REFERENCES

<b>Am. Jur. 2d.</b> — 78 Am. Jur. 2d, Warehouses, § 112 et seq.	<b>C.J.S.</b> — 93 C.J.S., Warehousemen and Safe Depositaries, § 50 et seq.
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**10-4-144. Each licensee to be bonded.**

As a prerequisite to the issuance of a license under this part, each applicant shall also furnish evidence to the Commissioner of Agriculture that he has in force for the year for which the license is sought a bond issued by a corporate entity authorized to do business in this state in the penal sum of \$10,000.00. The bond shall be conditioned upon the licensee performing all the duties imposed upon him by law and the accounting for the proceeds of all carry-over flue-cured leaf tobacco received by him for storage and for sale. (Ga. L. 1975, p. 1263, § 4.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 79 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, §§ 3, 16 et seq.

**10-4-145. Maximum charges and expenses.**

The maximum charges and expenses to be maintained by operators under this part receiving tobacco unsold in the year of production to be stored until sold in the subsequent selling season shall not exceed 5¢ per pound for services rendered, if sold on a green-weight basis. If sold on a dry-weight basis, the charges may also include the actual cost of redrying as leaves or strips and shipping charges. (Ga. L. 1975, p. 1263, § 5.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 65 et seq.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 99 et seq.

**10-4-146. Licensees to render statements upon receipt of tobacco.**

Each licensee shall render to each producer submitting carry-over tobacco for storage until the next selling season at the time of receipt of the tobacco a statement of the amount of tobacco tendered and the amount to be charged for servicing that tobacco other than actual cost of redrying as leaves or strips and shipping charges. (Ga. L. 1975, p. 1263, § 6.)

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 27, 31.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-147. Division of money received above contract sales price plus charges and expenses.**

The contract between the operator and producer shall state the percentage division of money received above the contract sales price plus a service

charge and processing cost. The producer shall in no event receive less than 50 percent of this sum. (Ga. L. 1975, p. 1263, § 7.)

#### **10-4-148. Licensees' records and reports.**

Each licensee shall keep a record of the number of pounds of carry-over tobacco received by him for storage until the next selling season, identifying the amount received from each producer. The records shall also show the final disposition of the tobacco, whether redeemed by the producer or sold by operator for the producer at the subsequent selling season. It shall be the duty of each licensee to cause to be kept records that shall be open to inspection by the Commissioner of Agriculture in such manner as to show accurately the origin and disposition of the carry-over tobacco. Each licensee shall transmit this information to the Commissioner in such reports as prescribed by him. The licensee shall submit to the Commissioner a copy of all reports he is required by law or regulation to submit to the United States Department of Agriculture — Agricultural Soil Conservation Service. (Ga. L. 1975, p. 1263, § 7.)

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 4.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### **10-4-149. Commissioner of Agriculture to keep storage and sale records; publication.**

The Commissioner of Agriculture shall cause to be kept and compiled the information submitted to him as to the storage and sale of carry-over tobacco and is authorized to cause the information to be published in a manner that he deems most beneficial. (Ga. L. 1975, p. 1263, § 8.)

#### **RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, §§ 75, 76, 123.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

#### **10-4-150. Tender for storage not deemed sale; sale not consummated before next season.**

The tendering of carry-over tobacco by producers to operators to be stored until the next selling season shall not be deemed a sale as of the time of the tender. The sale of carry-over tobacco may not be consummated until after the beginning of the subsequent selling season. (Ga. L. 1975, p. 1263, § 9.)



**10-4-151. Certified public weighers to be provided by licensees.**

It shall be the duty of each licensee to provide a certified public weigher for the weighing of carry-over tobacco at the time and place of receipt of the tobacco by operators for storage until the subsequent selling season, and it shall be unlawful for any person who is not a certified public weigher to weigh such tobacco. (Ga. L. 1975, p. 1263, § 10.)

**Cross references.** — Certified public weighers generally, Art. 2, Ch. 2, T. 10.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 78 Am. Jur. 2d, Warehouses, § 14.

**C.J.S.** — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.

**10-4-152. Regulations and physical standards for premises; inspection of premises.**

The Commissioner of Agriculture shall be authorized to promulgate regulations to implement this part, to accomplish its purposes, and to prescribe physical standards for buildings and premises used for the receipt or storage, or both, of carry-over tobacco. Such standards shall be reasonably designed to ensure the protection of producers and others from loss or damage to carry-over tobacco when received or held for storage, or both, until the subsequent selling season. It shall be a prerequisite to the issuance of a license under this part that the applicant has complied with all standards promulgated pursuant to this Code section. The Commissioner, or his agent, is authorized to inspect the premises of each licensee as often as he shall deem necessary. (Ga. L. 1975, p. 1263, § 11; Ga. L. 2000, p. 136, § 10.)

**10-4-153. Enforcement of part; revocation or suspension of licenses.**

It shall be the duty of the Commissioner of Agriculture to enforce this part and to utilize any employee of the Department of Agriculture in the performance of his duties under this part. The Commissioner is authorized to revoke or suspend, for violation of this part, any license issued under this part after notice and hearing before the Commissioner, in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.” (Ga. L. 1975, p. 1263, § 12.)

**Cross references.** — Authority of Commissioner of Agriculture to impose penalty in lieu of other action, § 2-2-10.

**10-4-154. Enjoining violations.**

In addition to the remedies provided in this part and notwithstanding the existence of any other remedy at law and notwithstanding the pendency of any criminal prosecution, the Commissioner of Agriculture is authorized to apply to the superior court and the court shall have jurisdiction upon hearing and for cause shown to grant a temporary or permanent injunction or an ex parte restraining order restraining or enjoining any person from violating or continuing to violate this part or for the failure or refusal to comply with this part or any rule or regulation promulgated under this part. Such injunction shall be issued without bond. (Ga. L. 1975, p. 1263, § 13.)

**10-4-155. Penalty for violating part or rules or regulations.**

Any person who violates any provision of this part or the rules and regulations issued under this part shall be guilty of a misdemeanor. (Ga. L. 1975, p. 1263, § 14.)

**RESEARCH REFERENCES**

<b>Am. Jur. 2d.</b> — 78 Am. Jur. 2d, Warehouses, § 4.	<b>C.J.S.</b> — 93 C.J.S., Warehousemen and Safe Depositaries, § 3.
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**PART 3**

**TOBACCO WAREHOUSEMEN'S ASSOCIATIONS**

**Cross references.** — Creation and regulation of cooperative associations for marketing of agricultural products, § 2-10-80 et seq.

**RESEARCH REFERENCES**

<b>ALR.</b> — Right of manufacturer, producer, or wholesaler to control resale price, 32 ALR 1087; 103 ALR 1331; 125 ALR 1335.	Delegation of legislative power to nongovernmental agencies as regards prices, wages, and hours, 3 ALR2d 188.
Board of trade or similar organization as affected with public interest subjecting it to state regulation, 54 ALR 304.	

**10-4-170. Local boards of trade and state-wide organization of warehousemen authorized.**

(a) Tobacco warehousemen licensed and bonded under the laws of this state to operate warehouses for the sale of leaf tobacco at auction are authorized to organize, either as nonstock corporations or as voluntary associations, tobacco boards of trade in the several municipalities of this state in which leaf tobacco is sold on warehouse floors at auction.

(b) Said tobacco warehousemen may also, by majority vote, authorize any nonstock corporation or voluntary association of tobacco warehousemen, in which a majority of such warehousemen in this state are members, to exercise on a state-wide basis the powers and duties provided in this part. In the event there shall be more than one such nonstock corporation or voluntary association in which a majority of such warehousemen are members, that organization possessing the largest number of such members shall be the organization which may be vested with such authority. (Ga. L. 1962, p. 102, § 1; Ga. L. 1972, p. 918, § 1.)

#### **10-4-171. Arbitrating organization of board of trade.**

In the event there are two such warehousemen in a municipality and in the event the two cannot agree as to the organization of any such board, or cannot agree as to any matter authorized under this part, it shall be the duty of each, upon notice or request by the other, to appoint one disinterested person; and the two persons so appointed shall appoint a third disinterested person; and the three persons so appointed, with the two warehousemen, shall determine the questions involved in the controversy, on failure to agree, by a majority vote. (Ga. L. 1962, p. 102, § 2.)

#### **10-4-172. Rules and regulations of boards of trade and state-wide organization.**

(a) Each such tobacco board of trade is authorized to make reasonable rules and regulations not in conflict with the laws of this state and the rules and regulations promulgated under the laws of this state for the economical and efficient handling and sale of leaf tobacco at auction on the warehouse floors in the municipality in which the tobacco board of trade is organized under this part.

(b) A state-wide corporation or association, as provided in this part, is authorized to make such reasonable rules and regulations as provided in this part for the economical and efficient handling and sale of leaf tobacco at auction in the several tobacco markets in this state. (Ga. L. 1962, p. 102, § 3; Ga. L. 1972, p. 918, § 2.)

#### **10-4-173. Local and state-wide membership fees.**

(a) The tobacco boards of trade in the several municipalities in Georgia are authorized to require as a condition to membership therein the payment of a reasonable fee which shall not exceed:

(1) \$50.00 in those municipalities in which less than 3 million pounds of tobacco was sold at auction during the year 1960;

(2) \$100.00 in those municipalities in which not less than 3 million pounds but less than 10 million pounds of tobacco was sold at auction during the year 1960;



(3) \$150.00 in those municipalities in which not less than 10 million pounds but less than 25 million pounds of tobacco was sold at auction during the year 1960;

(4) \$300.00 in those municipalities in which 25 million pounds or more of tobacco was sold at auction during the year 1960.

(b) A state-wide corporation or association, as provided in this part, may require as a condition to membership therein the payment of a reasonable fee which shall not exceed \$100.00 per 1 million pounds of producers' tobacco sold at auction during the year preceding the year in which the fee is assessed. (Ga. L. 1962, p. 102, § 4; Ga. L. 1972, p. 918, § 3.)

**10-4-174. Membership in board of trade and state-wide organization as conditions for operating warehouse.**

In addition to complying with the laws of this state relative to the operation of tobacco warehouses, local boards of trade may require membership in good standing in the local board of trade as a condition to participate in the business of operating a tobacco warehouse in such municipality; and, in addition thereto, a state-wide corporation or association, as provided in this part, may require membership in such state-wide organization as a condition to participate in the business of operating a tobacco warehouse in this state; and such requirements shall be deemed reasonable requirements by the board of trade or state-wide organization. (Ga. L. 1962, p. 102, § 5; Ga. L. 1972, p. 918, § 4.)

**10-4-175. Categories of membership; participation in allocating sale time; liability for board's acts.**

Membership in the several boards of trade may be divided into categories as the board may provide in its bylaws and may include, in addition to warehousemen, members other than warehousemen. The holder of a membership other than a warehouseman shall not participate in the allocation of sale time among the warehousemen. The board of trade may provide for the participation of membership other than warehousemen in matters other than the allocation of sales time. Members in any of the several boards of trade authorized by this part shall not be responsible or liable for any of the acts, omissions, or commissions of the several tobacco boards of trade except as to the extent of their participation therein. Membership in a state-wide corporation or association, as provided in this part, shall be limited to warehousemen. The holder of a membership in such state-wide organization who is not the operator of a warehouse in this state shall not participate in the allocation of sales time among the tobacco markets in this state. (Ga. L. 1962, p. 102, § 6; Ga. L. 1972, p. 918, § 5.)

**10-4-176. Appealing suspension or expulsion from board of trade or state-wide organization.**

Any person suspended or expelled from a tobacco board of trade may appeal from such suspension or expulsion to the superior court of the county in which the board of trade is located. Any person suspended or expelled from the state-wide organization provided for in this part may appeal from such suspension or expulsion to the superior court of the county in which the person's warehouse is located. The appeal shall be a de novo investigation by the court, and the court in considering the appeal may make such findings in relation thereto as the circumstances may warrant. (Ga. L. 1962, p. 102, § 7; Ga. L. 1972, p. 918, § 6.)

**10-4-177. Price fixing or restraint of trade not authorized; regulation of leaf tobacco selling unaffected.**

Nothing in this part shall authorize the organization of any association or corporation having for its purpose the control of prices or the making of rules and regulations in restraint of trade or in conflict with the laws of this state or rules and regulations promulgated under such laws. Nothing contained in this part shall supersede, alter, amend, or repeal the authority of the Commissioner of Agriculture to regulate the sale of leaf tobacco as provided by law. (Ga. L. 1962, p. 102, § 8.)

**ARTICLE 4****CONVENIENCE WAREHOUSING****10-4-190. Short title.**

This article shall be known and may be cited as the "Convenience Warehouse Act of 1975." (Ga. L. 1975, p. 1156, § 1.)

**10-4-191. Definitions; exemption of state licensed or bonded warehouses.**

(a) As used in this article, the term:

(1) "Convenience warehouse" means a series of storage spaces contained in one building or in a series of buildings which are designed and used for the purpose of renting or leasing individual storage spaces to persons in order that any person renting or leasing one or more of such individual storage spaces shall have access for the purpose of storing property therein.

(2) "Person" means an individual, corporation, association, partnership, or other organization.

(b) Nothing in this article shall be construed to apply to a public warehouse licensed pursuant to Article 1 of this chapter, as now or hereafter

amended, nor to any person engaged in business as a bonded public warehouseman pursuant to law providing for such bonded public warehouseman. (Ga. L. 1975, p. 1156, § 2.)

**10-4-192. Convenience warehouseman to obtain and retain certain information; property ownership statement.**

(a) Any person engaged in the business of operating a convenience warehouse shall obtain from each person renting or leasing a storage space the following information:

- (1) His name, age, home address, and home telephone number, if any;
- (2) His social security number, if any;
- (3) His driver's license number, if any; and
- (4) The name and address of his employer.

(b) In addition to the requirements of subsection (a) of this Code section, any person renting or leasing a storage space from a convenience warehouse shall sign a written document, under oath, that he is the owner of or has legal possession of any property which he intends to store in the storage space rented or leased by him. A copy of the signed document shall be given to the person executing it, and the original thereof shall be retained in the records of the person engaged in the business of operating the convenience warehouse.

(c) The information required by subsections (a) and (b) of this Code section shall be retained by the person engaged in the business of operating the convenience warehouse for a period of at least one year following the last date on which the storage space was rented or leased to the person covered by such information. (Ga. L. 1975, p. 1156, § 3.)

**10-4-193. Penalties.**

(a) Any person engaged in the business of operating a convenience warehouse who fails to obtain the information required by subsection (a) of Code Section 10-4-192 or who rents or leases a storage space without first obtaining the written document required by subsection (b) of Code Section 10-4-192 or who knowingly and willfully fails to comply with subsection (c) of Code Section 10-4-192 shall be guilty of a misdemeanor.

(b) Any person who intentionally provides any false information pursuant to subsection (a) of Code Section 10-4-192 shall be guilty of a misdemeanor.

(c) Any person who knowingly provides false information in executing the document required by subsection (b) of Code Section 10-4-192 commits



the offense of false swearing within the meaning of Code Section 16-10-71. (Ga. L. 1975, p. 1156, § 4.)

## ARTICLE 5

### SELF-SERVICE STORAGE FACILITIES

#### 10-4-210. Short title.

This article shall be known and may be cited as the “Georgia Self-service Storage Facility Act.” (Ga. L. 1982, p. 2286, § 1; Code 1981, § 10-4-210, enacted by Ga. L. 1982, p. 2286, § 7.)

#### 10-4-211. Definitions.

For purposes of this article, the term:

(1) “Last known address” means that address provided by the occupant in the latest rental agreement or the address provided by the occupant in a subsequent written notice of a change of address.

(2) “Occupant” means a person, his sublessee, successor, or assign entitled to the use of the storage space at a self-service storage facility under a rental agreement, to the exclusion of others.

(3) “Owner” means the owner, operator, lessor, or sublessor of a self-service storage facility, his agent, or any other person authorized by him to manage the facility or to receive rent from an occupant under a rental agreement.

(4) “Personal property” means movable property not affixed to land and includes, but is not limited to, goods, wares, merchandise, motor vehicles, watercraft, and household items and furnishings.

(5) “Rental agreement” means any agreement or lease, written or oral, that establishes or modifies the terms, conditions, rules, or any other provisions concerning the use and occupancy of a self-service storage facility.

(6) “Self-service storage facility” means any real property designed and used for the purpose of renting or leasing individual storage space to occupants who are to have access to such for the purpose of storing and removing personal property. No occupant shall use a self-service storage facility for residential purposes. A self-service storage facility is not a warehouse within the meaning of Article 1 of this chapter known as the “Georgia State Warehouse Act,” and the provisions of law relative to bonded public warehousemen shall not apply to the owner of a self-service storage facility. A self-service storage facility is not a safe-deposit box or vault maintained by banks, trust companies, or other

financial entities. (Ga. L. 1982, p. 2286, § 2; Code 1981, § 10-4-211, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 2004, p. 976, § 1.)

**10-4-212. Lien of owner of self-service storage facility upon property located at facility; priority; attachment.**

The owner of a self-service storage facility and his heirs, executors, administrators, successors, and assigns have a lien upon all personal property located at a self-service storage facility for rent, labor, or other charges, present or future, in relation to the personal property and for expenses necessary for its preservation or expenses reasonably incurred in its sale or other disposition pursuant to this article. The lien provided for in this Code section is superior to any other lien or security interest except those which are perfected and recorded prior to the date of the rental agreement in Georgia in the name of the occupant, either in the county of the occupant's last known address or in the county where the self-service storage facility is located, except any tax lien as otherwise provided by law and except any lienholder with an interest in the property of whom the owner has knowledge either through the disclosure provision of the rental agreement or through other written notice. The lien attaches as of the date the personal property is brought to the self-service storage facility. (Ga. L. 1982, p. 2286, § 3; Code 1981, § 10-4-212, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 2000, p. 136, § 10.)

**10-4-213. Enforcement of lien without judicial intervention.**

Provided that it complies with the requirements of this Code section, an owner may enforce the lien without judicial intervention. Owner shall obtain from occupant a written rental agreement which includes the following language:

This agreement, made and entered into this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, by \_\_\_\_\_ and \_\_\_\_\_ between \_\_\_\_\_, hereinafter called Owner, and \_\_\_\_\_, hereinafter called Occupant, whose last known address is \_\_\_\_\_. For the consideration hereinafter stated, the Owner agrees to let the Occupant use and occupy a space in the self-service storage facility, known as \_\_\_\_\_, situated in the City of \_\_\_\_\_, County of \_\_\_\_\_, State of Georgia, and more particularly described as follows: Building #\_\_\_\_\_, Space #\_\_\_\_\_, Size \_\_\_\_\_. Said space is to be occupied and used for the purposes specified herein and subject to the conditions set forth for a period of \_\_\_\_\_, beginning on the \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_, and continuing month to month until terminated.

“Space,” as used in this agreement, will be that part of the self-service storage facility as described above. The Occupant agrees to pay the Owner, as payment for the use of the space and improvements thereon, the monthly sum of \$\_\_\_\_\_. Monthly installments are payable in advance on or before the first of each month, in the amount of \$\_\_\_\_\_, and a like amount for each month thereafter, until the termination of this agreement.

If any monthly installment is not paid by the tenth of the month due, or if any check given in payment is dishonored, Occupant shall be deemed to be in default.

Occupant further agrees to pay the sum of one month’s fees, which shall be used as a clean-up and maintenance fund, and is to be used, if required, for the repair of any damage done to the space and to clean up the space at the termination of the agreement. In the event that the space is left in a good state of repair, and in a broom-swept condition, then this amount shall be refunded to the Occupant. However, it is agreed to between the parties that the Owner may set off any claims it may have against the Occupant from this fund.

The space named herein is to be used by the Occupant solely for the purpose of storing any personal property belonging to the Occupant. The Occupant agrees not to store any explosives or any highly inflammable goods or any other goods in the space which would cause danger to the space. The Occupant agrees that the property will not be used for any unlawful purposes and the Occupant agrees not to commit waste, nor alter, nor affix signs on the space, and to keep the space in good condition during the term of this agreement.

OWNER HAS A LIEN ON ALL PERSONAL PROPERTY STORED IN OCCUPANT’S SPACE FOR RENT, LABOR, OR OTHER CHARGES, PRESENT OR FUTURE, IN RELATION TO THE PERSONAL PROPERTY, AND FOR ITS PRESERVATION OR EXPENSES REASONABLY INCURRED IN ITS SALE OR OTHER DISPOSITION PURSUANT TO THIS AGREEMENT. PERSONAL PROPERTY STORED IN OCCUPANT’S SPACE WILL BE SOLD OR OTHERWISE DISPOSED OF IF NO PAYMENT HAS BEEN RECEIVED FOR A CONTINUOUS THIRTY-DAY PERIOD AFTER DEFAULT. IN ADDITION, UPON OCCUPANT’S DEFAULT, OWNER MAY WITHOUT NOTICE DENY OCCUPANT ACCESS TO THE PERSONAL PROPERTY STORED IN OCCUPANT’S SPACE UNTIL SUCH TIME AS PAYMENT IS RECEIVED. IF ANY MONTHLY INSTALLMENT IS NOT MADE BY THE TENTH OF THE MONTH DUE, OR IF ANY CHECK GIVEN IN PAYMENT IS DISHONORED, THE OCCUPANT IS IN DEFAULT FROM DATE PAYMENT WAS DUE.

For purposes of Owner’s lien: “personal property” means movable property, not affixed to land, and includes, but is not limited to, goods,



wares, merchandise, motor vehicles, watercraft, household items, and furnishings; "last known address" means that address provided by the Occupant in the latest rental agreement or the address provided by the Occupant in a subsequent written notice of a change of address.

The Owner's lien is superior to any other lien or security interest, except those which are evidenced by a certificate of title or perfected and recorded prior to the date of this rental agreement in Georgia, in the name of the Occupant, either in the county of the Occupant's "last known address" or in the county where the self-service storage facility is located, except any tax lien as provided by law and except those liens or security interests of whom the Owner has knowledge through the Occupant's disclosure in this rental agreement or through other written notice. Occupant attests that the personal property in his space(s) is free and clear of all liens and secured interests except for \_\_\_\_\_. The Owner's lien attaches as of the date the personal property is brought to the self-service storage facility.

Except as otherwise specifically provided in this rental agreement, the exclusive care, custody, and control of any and all personal property stored in the leased space shall remain vested in the Occupant. The Owner does not become a bailee of the Occupant's personal property by the enforcement of the Owner's lien.

If Occupant has been in default continuously for thirty (30) days, Owner may enforce its lien, provided Owner shall comply with the following procedure:

The Occupant shall be notified in writing by delivery in person or by certified mail or statutory overnight delivery to the last known address of Occupant. The Owner also shall notify other parties with superior liens or security interests as defined in this rental agreement. Such notice shall be presumed delivered as of the date indicated on the proof of delivery or, if there is no proof of delivery, on the fourteenth day after sending as shown by the United States Postal Service or the statutory overnight delivery service.

Owner's notice to Occupant shall include an itemized statement of the Owner's claim showing the sum due, at the time of the notice, and the date when the sum became due. It shall briefly and generally describe the personal property subject to the lien. The description shall be reasonably adequate to permit the person(s) notified to identify it, except that any container included, but not limited to, a trunk, valise, or box that is locked, fastened, sealed, or tied in a manner which deters immediate access to its contents may be described as such without describing its contents. Owner's notice shall notify Occupant of denial of access to the personal property and provide the name, street address, and telephone number of the Owner or its designated agent,

whom the Occupant may contact to respond to this notice. Owner's notice shall demand payment within a specified time, not less than fourteen (14) days after delivery of the notice. It shall state that, unless the claim is paid, within the time stated in the notice, the personal property will be advertised for public sale to the highest bidder, and will be sold at a public sale to the highest bidder, at a specified time and place.

After the expiration of the time given in Owner's notice, Owner shall publish an advertisement of the public sale to the highest bidder, once a week, for two consecutive weeks, in a newspaper of general circulation where the self-service storage facility is located. The advertisement shall include: a brief and general description of the personal property, reasonably adequate to permit its identification; the address of the self-service storage facility, and the number, if any, of the space where the personal property is located, and the name of the Occupant; and the time, place, and manner of the public sale. The public sale to the highest bidder shall take place not sooner than fifteen (15) days after the first publication. If there is no newspaper of general circulation where the self-service storage facility is located, the advertisement shall be posted at least ten (10) days before the date of the public sale and in not less than six (6) conspicuous places in the neighborhood where the self-service storage facility is located.

If no one purchases the property at the public sale and if the Owner has complied with the foregoing procedures, the Owner may otherwise dispose of the property and shall notify the Occupant of the action taken. Any sale or disposition of the personal property shall be held at the self-service storage facility or at the nearest suitable place to where the personal property is held or stored.

Before any sale or other disposition of personal property pursuant to this agreement, the Occupant may pay the amount necessary to satisfy the lien and the reasonable expenses incurred and thereby redeem the personal property and thereafter the Owner shall have no liability to any person with respect to such personal property.

A Purchaser in good faith of the personal property sold to satisfy Owner's lien takes the property free of any rights of persons against whom the lien was valid, despite noncompliance by the Owner with the requirements of this agreement.

In the event of a sale, the Owner may satisfy his lien from the proceeds of the sale. The Owner shall hold the balance of the proceeds, if any, for the Occupant or any notified secured interest holder. If not claimed within two years of the date of sale, the balance of the proceeds shall be disposed of in accordance with Article 5 of Chapter 12 of Title 44, the "Disposition of Unclaimed Property Act." In no event shall the Owner's liability exceed the

proceeds of the sale. (Ga. L. 1982, p. 2286, § 4; Code 1981, § 10-4-213, enacted by Ga. L. 1982, p. 2286, § 7; Ga. L. 1983, p. 3, § 8; Ga. L. 1984, p. 22, § 10; Ga. L. 1992, p. 6, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 2000, p. 425, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2004, p. 976, § 2; Ga. L. 2005, p. 60, § 10/HB 95.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, commas were inserted preceding and following the phrase “hereinafter called Owner” in first paragraph of the rental agreement.

Pursuant to Code Section 28-9-5, in 1992, a comma was deleted following “DISPOSED OF” in the sixth paragraph of the rental agreement form, “last” was substituted for “Last” in the seventh paragraph, “the” was inserted preceding “date” in the eighth paragraph, a comma was deleted following “incurred” in the twelfth paragraph, and a

comma was deleted following “notified” in the last paragraph.

**Editor’s notes.** — Ga. L. 2000, p. 425, § 3, not codified by the General Assembly, provides that the amendment to this Code section is applicable to rental agreements entered into on and after July 1, 2000.

Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **10-4-214. Right of parties to create additional rights, duties, and obligations not impaired; rights under article additional.**

Nothing in this article shall be construed as in any manner impairing or affecting the right of the parties to create additional rights, duties, and obligations in and by virtue of the rental agreement. The rights provided by this article shall be in addition to all other rights allowed by law to a creditor against his debtor. (Ga. L. 1982, p. 2286, § 5; Code 1981, § 10-4-214, enacted by Ga. L. 1982, p. 2286, § 7.)

### **JUDICIAL DECISIONS**

**Storage facility’s sale of property pursuant to rental contract** was valid and enforceable and did not require compliance with sale provisions under the Georgia Self-Service

Storage Facility Act, O.C.G.A. § 10-4-210 et seq. *Tompkins v. Mayers*, 209 Ga. App. 809, 434 S.E.2d 798 (1993).

#### **10-4-215. Rental agreements entered into before July 1, 1982, not affected.**

All rental agreements entered into before July 1, 1982, and not extended or renewed after that date, and the rights and duties and interests flowing from them shall remain valid and may be enforced or terminated in accordance with their terms or as permitted by any other statute or law of this state. (Ga. L. 1982, p. 2286, § 6; Code 1981, § 10-4-215, enacted by Ga. L. 1982, p. 2286, § 7.)



## CHAPTER 5

## GEORGIA UNIFORM SECURITIES

## Article 1

## General Provisions

- Sec.  
 10-5-1. Short title.  
 10-5-2. Definitions.  
 10-5-3. Citations to United States Code.  
 10-5-4. Reference to agency or department of United States.  
 10-5-5. Electronic records and signatures.

## Article 2

## Exemptions

- 10-5-10. Exemptions from registration of securities.  
 10-5-11. Exempt transactions.  
 10-5-12. Exemption of securities, transactions, or offers by adoption of rule or issuance of order.  
 10-5-13. Denial, suspension, or revocation of exemption.

## Article 3

## Registration of Securities

- 10-5-20. Restrictions on sales of securities.  
 10-5-21. Filing of records.  
 10-5-22. Registration by coordination; additional records; effective date of federal registration statement.  
 10-5-23. Registration by qualification; additional information and records required; effective date.  
 10-5-24. Who may file registration statement; conditions of registration; amendment.  
 10-5-25. Denying, suspending, or revoking the effectiveness of registration statement; publication of standards providing notice of conduct constituting violations; notice and hearing.  
 10-5-26. Waiver or modification of requirements by Commissioner.

## Article 4

## Registration of Broker-dealers, Agents, and Investment Advisors

- 10-5-30. Registration requirements for broker-dealers; exemptions.

## Sec.

- 10-5-31. Registration requirements for agents; exemptions.  
 10-5-32. Registration requirements for investment advisors; exemptions.  
 10-5-33. Registration requirement for investment adviser representatives; exemptions.  
 10-5-34. Registration requirements for federal covered investment advisers.  
 10-5-35. Application; consent to service of process.  
 10-5-36. Change of name; change of control.  
 10-5-37. Notice of termination.  
 10-5-38. Withdrawal of registration.  
 10-5-39. Fees.  
 10-5-40. Financial requirements.  
 10-5-41. Denial of or placement of conditions or limitations on registration.

## Article 5

## Violations, Penalties, and Civil Liability

- 10-5-50. Unlawful practices with offer, sale, or purchase of security.  
 10-5-51. Fraud or deceit unlawful; adoption of rule.  
 10-5-52. Civil and criminal proceedings.  
 10-5-53. Order or rule may require filing of prospectus and additional information.  
 10-5-54. Unlawful to make false or misleading statements.  
 10-5-55. Filing under this chapter does not constitute a finding by Commissioner that records are accurate or upon the merits or qualifications of any person.  
 10-5-56. Liability for defamation related to information contained in record.  
 10-5-57. Penalties for violations.  
 10-5-58. Enforcement of civil liability; damages.  
 10-5-59. Exemptions to liability.

## Article 6

## Administration

- 10-5-70. Administration of chapter; Com-

Sec.	
	missioner of Securities; authority.
10-5-71.	Powers of Commissioner.
10-5-72.	Violations; remedies and penalties.
10-5-73.	Cease and desist orders; denying, revoking, or conditioning exemptions for broker-dealers.
10-5-74.	Issuance of forms and orders; adoption and amendment of rules.
10-5-75.	Register of applications for registration of securities; registration statements; notice filings; notices of claims; furnishing of rules, forms, orders, and records to the public.
10-5-76.	Public records; exceptions.

Sec.	
10-5-77.	Intergovernmental cooperation, coordination, and consultation; sharing of records and information.
10-5-78.	Rules and orders issued under this chapter subject to judicial review.
10-5-79.	Applicability of chapter to certain offers to purchase or sell.
10-5-80.	Consent to service of process.

### Article 7

#### Applicability of Predecessor Provisions

10-5-90.	Predecessor Act governs actions pending and registrations, orders, and rules in effect on July 1, 2009.
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**Editor's notes.** — Ga. L. 2008, p. 381, § 1, effective July 1, 2009, repealed the Code sections formerly codified at this chapter and enacted the current chapter. The former chapter consisted of §§ 10-5-1 through 10-5-23.1, and 10-5-24, and was based on Code 1933, §§ 97-101—97-113, 97-114, 97-115—97-121, 97-9901, enacted by Ga. L. 1973, p. 1202, §§ 1-22; Code 1933, § 97-114.1, enacted by Ga. L. 1974, p. 284, § 17; Ga. L. 1974, p. 284, §§ 1-16, 18, 19; Ga. L. 1975, p. 928, §§ 1-27; Ga. L. 1979, p. 1296, §§ 1-10; Ga. L. 1981, p. 840, § 1; Ga. L. 1981, p. 1583, § 1; Ga. L. 1982, p. 3, § 10; Ga. L. 1982, p. 1178, § 1; Ga. L. 1983, p. 781, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1984, p. 529, §§ 2-5; Ga. L. 1985, p. 149, § 10; Ga. L. 1986, p. 1559, §§ 1-8; Ga. L. 1987, p. 3, § 10; Ga. L. 1987, p. 191, § 9; Ga. L. 1987, p. 439, § 1; Code 1981, § 10-5-23, enacted by Ga. L. 1987, p. 984, § 1; Ga. L. 1988, p. 1290, §§ 1-10; Code 1981, § 10-5-23.1, enacted by Ga. L. 1988, p. 1290, § 11; Ga. L. 1989, p. 14, § 10; Ga. L. 1990, p. 1332, §§ 1-5; Ga. L. 1990, p. 1534, §§ 1-16; Ga. L. 1992, p. 6, § 10; Ga. L. 1994, p. 860, §§ 1, 2; Ga. L. 1997, p. 143, § 10; Ga. L. 1998, p. 1617, §§ 1-9; Ga. L. 1999, p. 329, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2002, p. 792, §§ 1-4.

**Cross references.** — Applicability to chapter of laws pertaining to sales of business opportunities, § 10-1-417. Provisions regard-

ing status of investment securities as negotiable instruments, § 11-8-101 et seq. Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, § 13-9-1 et seq. Creation, classification, and issuance of shares of corporations, § 14-2-601 et seq. Uniform transfer on death security registration, § 53-5-60 et seq.

**Administrative rules and regulations.** — Rules of General Applicability, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-4-1.

Dealers, Limited Dealers, Salespersons and Limited Salespersons of Securities, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-4-2.

Registered Securities, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-4-3.

Prohibited Acts, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-4-4.

Securities Exemptions, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State,

Cemeteries, Commissioner of Securities, Chapter 590-45.

Administrative Hearings, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-46.

Advertising and Internet Marketing, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-47.

Investment Advisers, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Commissioner of Securities, Chapter 590-48.

**Law reviews.** — For article discussing the Georgia Securities Act of 1957, see 9 Mercer L. Rev. 332 (1958). For article advocating uniformity in securities regulation within the states and adoption of the Uniform Act in Georgia, see 22 Ga. B.J. 437 (1960). For article advocating revision of former Georgia Securities Act, see 4 Ga. L. Rev. 341 (1970). For article, "The Regulation of Franchising Under the Securities Laws," see 6 Ga. St. B.J. 357 (1970). For article, "A Survey of the Georgia Securities Act of 1973," see 10 Ga. St. B.J. 219 (1973). For article surveying the Georgia Securities Act of 1973 and the 1974 amendments thereto, see 25 Mercer L. Rev. 601 (1974). For article, "The Georgia Securities Act of 1974: A Survey of the 1974 Amendments," see 10 Ga. St. B.J. 547 (1974). For article, "Real Estate Syndications As Securities in Georgia — A Review and Comments on the Recent Opinion of the Attorney General," see 11 Ga. St. B.J. 80 (1974). For article discussing 1975 amendments to this chapter, see 27 Mercer L. Rev. 299 (1975). For article, "A Response: Real Estate Syndications as Securities in Georgia," see 11 Ga. St. B.J. 153 (1975). For article discussing provisions pertaining to the regulation of time-shared interests in property ownership, see 12 Ga. St. B.J. 75 (1975). For article discussing regulation in this state of oil and gas offerings exempt under Regulation B of the Federal Securities and Exchange Commission, and offering proposals for regulations to meet problems posed thereby, see 12 Ga. St. B.J. 149 (1976). For article discussing developments in Georgia securities law in 1977, see 29 Mercer L.

Rev. 31 (1977). For article surveying Georgia cases in the area of business associations from June 1977 through May 1978, see 30 Mercer L. Rev. 1 (1978). For article discussing recent judicial and legislative developments in Georgia Corporations Law, see 31 Mercer L. Rev. 43 (1979). For article surveying Georgia cases in the area of business associations from June 1979 through May 1980, see 32 Mercer L. Rev. 1 (1980). For article, "Securities Investigations Under the Georgia Securities Act," see 17 Ga. St. B.J. 14 (1980). For article, "Securities," see 32 Mercer L. Rev. 1125 (1981). For article discussing utility of the central securities broker-dealer registration system (CRD), see 18 Ga. St. B.J. 47 (1981). For survey article on business associations, see 34 Mercer L. Rev. 13 (1982). For survey of 1986 Eleventh Circuit cases on securities regulation, see 38 Mercer L. Rev. 1341 (1987). For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987). For annual survey of securities regulation law, see 41 Mercer L. Rev. 343 (1989). For survey article on business associations, see 42 Mercer L. Rev. 71 (1990). For annual eleventh circuit survey of securities regulation, see 42 Mercer L. Rev. 1519 (1991). For annual survey of law of business associations, see 43 Mercer L. Rev. 85 (1991). For article, "Re-reading Section 16(b) of the Securities Exchange Act," see 27 Ga. L. Rev. 183 (1992). For annual survey article on business associations, see 45 Mercer L. Rev. 53 (1993). For annual survey article on business associations, see 50 Mercer L. Rev. 171 (1998). For survey article discussing developments in law of business associations for the period from June 1, 1999 through May 31, 2000, see 52 Mercer L. Rev. 95 (2000). For annual survey article discussing developments in commercial law, see 52 Mercer L. Rev. 143 (2000). For survey article on cases in the areas of corporate, securities, partnership, and banking law for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 55 (2003).

For note discussing preincorporation and postincorporation securities transactions exempt from regulation, see 26 Ga. B.J. 461 (1964). For note discussing the need for revision of director and officer liability under Blue Sky Laws, see 5 Ga. L. Rev. 128 (1971).



For comment, "Insider Trading, the Contemporaneous Trader, and the Corporate

Acquirer: Entitlement to Profits Disgorged by the SEC," see 40 Emory L.J. 537 (1991).

### JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1920, p. 250, Ga. L. 1957, p. 134, and Ga. L. 1973, p. 1202, as amended, which were subsequently repealed but were succeeded by provisions in this chapter, are included in the annotations for this chapter.

**Constitutionality.** — Criminal provisions of the former chapter were not vague, ambiguous, or contradictory, and an indictment thereunder was not void. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**Criminal provisions not exclusive.** — Criminal provisions were not intended by the legislature to be exclusive, as the provisions would ordinarily be, but only cumulative. *Cohen v. State*, 101 Ga. App. 23, 112 S.E.2d 672 (1960) (decided under former Ga. L. 1957, p. 134, as amended).

**Purpose and intent was** to prohibit organizers and promoters, whether foreign or domestic, who organize and promote the sale of what is commonly known as "blue sky stock," from doing business without complying with the statutory provisions, and to guard and protect an unsuspecting and trusting public from what are commonly known as "wild cat" organizers and promoters and their agents. *Ratliffe v. Hartsfield Co.*, 181 Ga. 663, 184 S.E. 324 (1935) (decided under former Ga. L. 1920, p. 250, as amended).

**Liberal construction.** — Since the former provisions were remedial in nature, it was to be construed broadly to effectuate its aim — protection of investors. *Fortier v. Ramsey*, 136 Ga. App. 203, 220 S.E.2d 753 (1975) (construing former Ga. L. 1957, p. 134, as

amended); *Jaciewicki v. Gordarl Assocs.*, 132 Ga. App. 888, 209 S.E.2d 693 (1974); *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977); *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981) (decided under Ga. L. 1973, p. 1202).

**Exemptions are strictly construed.** — Exemptions from the securities laws are to be strictly construed, and one who claims the exemption bears the burden of proving the exemption's availability. *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under Ga. L. 1973, p. 1202).

Law was intended for protection of investors and was designed to disclose relevant and material facts to the investor, any exception to a disclosure requirement was to be narrowly construed. *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981) (decided under Ga. L. 1973, p. 1202).

**Investor in stock index futures.** — Due to the preclusive and preemptive operation of the federal commodities laws, investor in stock index futures had no claim against broker and account executive under the federal or state securities laws. *Mallen v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 605 F. Supp. 1105 (N.D. Ga. 1985) (decided under former O.C.G.A. Ch. 5, T. 10).

**Cited in** *Boddy v. Theiling*, 129 Ga. App. 273, 199 S.E.2d 379 (1973); *Vohs v. Dickson*, 495 F.2d 607 (5th Cir. 1974); *Lane v. Pardue*, 147 Ga. App. 877, 250 S.E.2d 574 (1978); *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979); *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979); *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys.*, 506 F. Supp. 944 (N.D. Ga. 1980).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134 and Ga. L. 1973, p. 1202, as amended, which were subsequently repealed but were succeeded by provisions in this chapter, are included in the annotations for this chapter.

**Law was concerned with substance, rather than with form.** 1970 Op. Att'y Gen. No. U70-25 (decided under former Ga. L. 1957, p. 134, as amended).

In determining the applicability of the former chapter, it was the substance and not the form of the offering which was determi-

native. 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134).

**Former law continues to govern securities registered under it.** — Bonds which are filed in connection with registrations under Georgia Securities Act of 1957, Ga. L. 1957, p. 134, continue to be governed by the 1957 Act, and bonds filed in connection with a registration or renewal after the effective date of Ga. L. 1973, p. 1202, April 1, 1974, must comply with and will be governed by the latter statute. 1973 Op. Att'y Gen. No. 73-159 (decided under Ga. L. 1973, p. 1202).

**Chapter does not apply if no sale occurs in Georgia.** — Georgia courts would probably hold that the securities registration provisions do not apply to transactions involving a Georgia issuer where no sale or offer to sell occurs within Georgia. 1970 Op. Att'y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

**Activities in Georgia may bring transaction under chapter.** — If certain activities, as to registration of dealers and salesmen, are carried on in Georgia, this could bring transactions involving a Georgia issuer under the law of this state. 1970 Op. Att'y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

**Any security offered must be registered unless exempted.** — Unless exempted or involved in an exempt transaction, securities offered for sale must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under Ga. L. 1957, p. 134, as amended).

It does not necessarily follow that a scheme which constitutes a "security" must always be registered with the commissioner of securities; if a scheme falls within any of the exemptions provided by law or if the sale of such a scheme fits any of the exempt transactions, the registration requirements would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

**Any person offering securities must be registered.** — A person who engages in the business of selling mortgage securities to the public is required to register as a dealer, and the individuals who work for such a dealer are required to register as salesmen unless the individuals qualify for one of the exemptions enumerated in Ga. L. 1973, p. 1202,

§ 3 (see O.C.G.A. § 10-5-3). 1974 Op. Att'y Gen. No. 74-153 (decided under Ga. L. 1973, p. 1202).

The sale of scotch whiskey investments in Georgia would be a transaction subject to this chapter, and both the investment and the sellers must be registered pursuant to this chapter unless they qualify for some exemption from registration. 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134, as amended).

The sale of time-sharing units in a condominium, when coupled with a rental pool or other profit-sharing arrangement, constitutes a "security" within the definition of former Code 1933, § 97-102 (see former O.C.G.A. § 10-5-2(a)(16)) and, unless exempt, must be registered pursuant to Ga. L. 1973, p. 1202 (see former O.C.G.A. Ch. 5, T. 10); any person offering for sale or selling such securities that are subject to registration must register as a dealer, limited dealer, salesman, or limited salesman under Ga. L. 1973, p. 1202 (see former O.C.G.A. Ch. 5, T. 10) unless such a person is a real estate broker or salesman licensed to sell real estate in Georgia. 1976 Op. Att'y Gen. No. 76-75 (decided under former Ga. L. 1973, p. 1202).

**Foreign corporation needs certificate of authority.** — Registration as a dealer does not exempt a foreign corporation from needing a certificate of authority. 1975 Op. Att'y Gen. No. 75-38 (decided under former Ga. L. 1973, p. 1202).

**All material facts must be disclosed.** — Any person who sells mortgage securities is required to fully and truthfully disclose all material facts concerning the value and risks of the investment. 1974 Op. Att'y Gen. No. 74-153 (decided under former Ga. L. 1973, p. 1202).

**Secretary of State may not retain fees.** — The fees collected by the Secretary of State as the commissioner of securities must be paid to the Fiscal Division of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), and such fees may not be retained by the Office of Secretary of State as reimbursements for the expenses of that office. 1969 Op. Att'y Gen. No. 69-13 (decided under former Ga. L. 1957, p. 134, as amended).

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Fraudulent Representations Inducing the Purchase of a Small Business, 30 POF3d 1.

**Am. Jur. Trials.** — Broker-Dealer Fraud: Churning, 36 Am. Jur. Trials 1.

**ALR.** — Right of broker to repledge customer's securities, 24 ALR 452.

Rights inter se of customers whose securities have been repledged by broker, 24 ALR 479; 48 ALR 803; 76 ALR 794.

Section 20a of Interstate Commerce Act (in relation to issuance of securities by carriers) as limitation on powers of state, 57 ALR 671.

Measure of damages for broker's breach of contract with customer as to sales and purchases of stocks on the exchange, 63 ALR 305.

Blue Sky Laws, 87 ALR 42.

Legal aspects of transactions in securities "when issued" or "when, as and if" issued, 88 ALR 311.

What constitutes stock, securities, or investment contracts within contemplation of

state and federal statutes regulating sale of securities, 163 ALR 1050.

Awarding damages for delay, in addition to specific performance, of contract for sale of corporate stock, 28 ALR3d 1401.

What amounts to participation by corporate officer or agent in illegal issuance of security, in order to impose liability upon him under state securities regulations, 44 ALR3d 588.

Commodities broker's state-law duties to customers, 55 ALR4th 394.

Lockup option defense to hostile corporate takeover, 66 ALR4th 180.

Construction and application of preemption exemption, under Employee Retirement Income Security Act (29 USCS §§ 1001, et seq.), for state laws regulating insurance, banking, or securities (29 USCS § 1144(b)(2)), 87 ALR Fed. 797.

Attorney's liability for nondisclosure or misrepresentation to third-party nonclients in private civil actions under Federal Securities Laws, 112 ALR Fed. 141.

## ARTICLE 1

## GENERAL PROVISIONS

## 10-5-1. Short title.

This chapter shall be known as and may be cited as the "Georgia Uniform Securities Act of 2008." (Code 1981, § 10-5-1, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Law reviews.** — For survey article on business associations, see 60 Mercer L. Rev. 35 (2008).

## RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 22 Am. Jur. Pleading and Practice Forms, Securities Regulation, § 2. 22A Am. Jur. Pleading and Practice Forms, Securities Regulation, § 99.

**ALR.** — What gives rise to right of recession under state blue-sky laws, 52 ALR 5th 491.

Investigative authority of administrative agencies in state regulation of securities, 58 ALR5th 293.

Effect of asset freeze obtained by Securities and Exchange Commission on attorney's fees paid or owed by company subject to freeze, 161 ALR Fed. 233.



**10-5-2. Definitions.**

As used in this chapter, the term:

(1) “Agent” means an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities or who represents an issuer in effecting or attempting to effect purchases or sales of the issuer’s securities. A partner, officer, or director of a broker-dealer or issuer or an individual having a similar status or performing similar functions may be an agent if the individual performs the duties of an agent. This term does not include an individual excluded by rule adopted or order issued under this chapter.

(2) “Bank” means:

(A) A banking institution organized under the laws of the United States;

(B) A member bank of the Federal Reserve System;

(C) Any other banking institution, whether incorporated or not, doing business under the laws of a state or of the United States, a substantial portion of the business of which consists of receiving deposits or exercising fiduciary powers similar to those permitted to be exercised by national banks under the authority of the Comptroller of the Currency pursuant to Section 1 of P. L. 87-722, 12 U.S.C. Section 92a, and which is supervised and examined by a state or federal agency having supervision over banks and which is not operated for the purpose of evading this chapter; or

(D) A receiver, conservator, or other liquidating agent of any institution or firm included in subparagraph (A), (B), or (C) of this paragraph.

(3) “Broker-dealer” means a person engaged in the business of effecting transactions in securities for the account of others or for the person’s own account. The term does not include:

(A) An agent;

(B) An issuer;

(C) A bank, trust company, credit union, or savings institution if its activities as a broker-dealer are limited to those specified in subsections 3(a)(4)(B)(i) through (vi) and (viii) through (x) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4); subsection 3(a)(4)(B)(xi) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4) if limited to unsolicited transactions; or subsections 3(a)(5)(B) and 3(a)(5)(C) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(5), or a bank that satisfies the conditions

described in subsection 3(a)(4)(E) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78c(a)(4);

(D) An international banking institution; or

(E) A person excluded by rule adopted or order issued under this chapter.

(4) “Central Registration Depository” means a computerized data base that contains information about most brokers, their representatives, and the firms they work for. It can be used to find out if brokers are properly licensed and if they have had previous disputes with regulators or received serious complaints from investors.

(5) “Credit union” means any credit union incorporated under the laws of this state, the United States, or any state or territory of the United States or the District of Columbia.

(6) “Commissioner” means the Secretary of State of Georgia.

(7)(A) “Depository institution” means:

(i) A bank; or

(ii) A savings institution, trust company, credit union, or similar institution that is organized or chartered under the laws of a state or of the United States, authorized to receive deposits, and supervised and examined by an official or agency of a state or the United States if its deposits or share accounts are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund or a successor authorized by federal law.

(B) The term does not include:

(i) An insurance company or other organization primarily engaged in the business of insurance;

(ii) A Morris Plan bank; or

(iii) An industrial loan company that is not an “insured depository institution” as defined in subsection 3(c)(2) of the Federal Deposit Insurance Act, 12 U.S.C. Section 1813(c)(2), or any successor federal statute.

(8) “Federal covered investment adviser” means a person registered under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq.

(9) “Federal covered security” means a security that is, or upon completion of a transaction will be, a covered security under Section 18(b) of the Securities Act of 1933, 15 U.S.C. Section 77r(b), or rules or regulations adopted pursuant to that provision.

(10) “Filing” means the receipt under this chapter of a record by the Commissioner or a designee of the Commissioner.

(11) “Fraud,” “deceit,” or “defraud” is not limited to common law deceit.

(12) “Guaranteed” means guaranteed as to payment of all principal and all interest.

(13) “Institutional investor” means any of the following, whether acting for itself or for others in a fiduciary capacity:

(A) A depository institution or international banking institution;

(B) An insurance company;

(C) A separate account of an insurance company;

(D) An investment company as defined in the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq.;

(E) A broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.;

(F) An employee pension, profit-sharing, or benefit plan if the plan has total assets in excess of \$10 million or its investment decisions are made by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., that is a broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., an investment adviser registered under this chapter, a depository institution, or an insurance company;

(G) A plan established and maintained by a state, a political subdivision of a state, or an agency or instrumentality of a state or a political subdivision of a state for the benefit of its employees if the plan has total assets in excess of \$10 million or its investment decisions are made by a duly designated public official or by a named fiduciary, as defined in the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq., that is a broker-dealer registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., an investment adviser registered or exempt from registration under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., an investment adviser registered under this chapter, a depository institution, or an insurance company;

(H) A trust if it has total assets in excess of \$10 million, its trustee is a depository institution, and its participants are exclusively plans of the types identified in subparagraph (F) or (G) of this paragraph, regardless of the size of their assets, except a trust that includes as participants



self-directed individual retirement accounts or similar self-directed plans;

(I) An organization that is not formed for the specific purpose of acquiring the securities offered, with total assets in excess of \$10 million, including an organization described in subsection 501(c)(3) of the Internal Revenue Code, 26 U.S.C. Section 501(c)(3), a corporation, a Massachusetts trust or similar business trust, a limited liability company, or a partnership;

(J) A small business investment company licensed by the Small Business Administration under Section 301(c) of the Small Business Investment Act of 1958, 15 U.S.C. Section 681(c), with total assets in excess of \$10 million;

(K) A private business development company as defined in Section 202(a)(22) of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-2(a)(22), with total assets in excess of \$10 million;

(L) A federal covered investment adviser acting for its own account;

(M) A qualified institutional buyer as defined in Rule 144A(a)(1), other than Rule 144A(a)(1)(H), 17 C.F.R. 230.144A, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.;

(N) A major United States institutional investor as defined in Rule 15a-6(b)(4)(I), 17 C.F.R. 240.15a-6, adopted under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.;

(O) Any other person, other than an individual, of institutional character with total assets in excess of \$10 million not organized for the specific purpose of evading this chapter; or

(P) Any other person specified by rule adopted or order issued under this chapter.

(14) "Insurance company" means a company organized as an insurance company whose primary business is writing insurance or reinsuring risks underwritten by insurance companies and which is subject to supervision by the insurance commissioner or a similar official or agency of a state.

(15) "Insured" means insured as to payment of all principal and all interest.

(16) "International banking institution" means an international financial institution of which the United States is a member and whose securities are exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.

(17) "Investment adviser" means a person that, for compensation, engages in the business of advising others, either directly or through

publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as a part of a regular business, issues or promulgates analysis or reports concerning securities. The term includes a financial planner or other person that, as an integral component of other financially related services, provides investment advice to others for compensation as part of a business or that holds itself out as providing investment advice to others for compensation. The term does not include:

(A) An investment adviser representative;

(B) A lawyer, accountant, engineer, or teacher whose performance of investment advice is solely incidental to the practice of the person's profession;

(C) A broker-dealer or its agents whose performance of investment advice is solely incidental to the conduct of business as a broker-dealer and that does not receive special compensation for the investment advice;

(D) A publisher of a bona fide newspaper, news magazine, or business or financial publication of general and regular circulation;

(E) A federal covered investment adviser;

(F) A bank or savings institution;

(G) A credit union;

(H) Any other person that is excluded by the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., from the definition of investment adviser; or

(I) Any other person excluded by rule adopted or order issued under this chapter.

(18) "Investment Adviser Registration Depository" means an electronic filing system that facilitates investment adviser registration, regulatory review, and the public disclosure information of investment adviser firms.

(19) "Investment adviser representative" means an individual employed by or associated with an investment adviser or federal covered investment adviser who makes any recommendations or otherwise gives investment advice regarding securities, manages accounts or portfolios of clients, determines which recommendation or advice regarding securities should be given, provides investment advice or holds herself or himself out as providing investment advice, receives compensation to solicit, offer, or negotiate for the sale of or for selling investment advice, or supervises employees who perform any of the foregoing. The term does not include an individual who:

(A) Performs only clerical or ministerial acts;

(B) Is an agent whose performance of investment advice is solely incidental to the individual acting as an agent and who does not receive special compensation for investment advisory services;

(C) Is employed by or associated with a federal covered investment adviser, unless the individual has a place of business in this state as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-3a, and is:

(i) An investment adviser representative as that term is defined by rule adopted under Section 203A of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-3a; or

(ii) Not a supervised person as that term is defined in Section 202(a)(25) of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-2(a)(25); or

(D) Is excluded by rule adopted or order issued under this chapter.

(20) “Issuer” means a person that issues or proposes to issue a security, subject to the following:

(A) The issuer of a voting trust certificate, collateral trust certificate, certificate of deposit for a security, or share in an investment company without a board of directors or individuals performing similar functions is the person performing the acts and assuming the duties of depositor or manager pursuant to the trust or other agreement or instrument under which the security is issued;

(B) The issuer of an equipment trust certificate or similar security serving the same purpose is the person by which the property is or will be used or to which the property or equipment is or will be leased or conditionally sold or that is otherwise contractually responsible for assuring payment of the certificate; or

(C) The issuer of a fractional undivided interest in an oil, gas, or other mineral lease or in payments out of production under a lease, right, or royalty is the owner of an interest in the lease or in payments out of production under a lease, right, or royalty, whether whole or fractional, that creates fractional interests for the purpose of sale.

(21) “Nonissuer transaction” or “nonissuer distribution” means a transaction or distribution not directly or indirectly for the benefit of the issuer.

(22) “Offer to purchase” includes an attempt or offer to obtain or solicitation of an offer to sell a security or interest in a security for value. The term does not include a tender offer that is subject to Section 14(d) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78n(d).



(23) “Person” means an individual; corporation; business trust; estate; trust; partnership; limited liability company; association; joint venture; government; governmental subdivision, agency, or instrumentality; public corporation; or any other legal or commercial entity.

(24) “Place of business” of a broker-dealer, an investment adviser, or a federal covered investment adviser means:

(A) An office at which the broker-dealer, investment adviser, or federal covered investment adviser regularly provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients; or

(B) Any other location that is held out to the general public as a location at which the broker-dealer, investment adviser, or federal covered investment adviser provides brokerage or investment advice or solicits, meets with, or otherwise communicates with customers or clients.

(25) “Predecessor Act” means Chapter 5 of this title, the “Georgia Securities Act of 1973”, as it existed immediately prior to July 1, 2009.

(26) “Price amendment” means the amendment to a registration statement filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., or, if an amendment is not filed, the prospectus or prospectus supplement filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., that includes a statement of the offering price, underwriting and selling discounts or commissions, amount of proceeds, conversion rates, call prices, and other matters dependent upon the offering price.

(27) “Principal place of business” of a broker-dealer or an investment adviser means the executive office of the broker-dealer or investment adviser from which the officers, partners, or managers of the broker-dealer or investment adviser direct, control, and coordinate the activities of the broker-dealer or investment adviser.

(28) “Record,” except in the phrases “of record,” “official record,” and “public record,” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(29) “Sale” includes every contract of sale, contract to sell, or disposition of a security or interest in a security for value. Offer to sell includes every attempt or offer to dispose of or solicitation of an offer to purchase a security or interest in a security for value. Both terms include:

(A) A security given or delivered with or as a bonus on account of a purchase of securities or any other thing constituting part of the subject of the purchase and having been offered and sold for value;

(B) A gift of assessable stock involving an offer and sale; and

(C) A sale or offer of a warrant or right to purchase or subscribe to another security of the same or another issuer and a sale or offer of a security that gives the holder a present or future right or privilege to convert the security into another security of the same or another issuer, including an offer of the other security.

(30) “Securities and Exchange Commission” means the United States Securities and Exchange Commission.

(31) “Security” means a note; stock; treasury stock; security future; bond; debenture; evidence of indebtedness; certificate of interest or participation in a profit-sharing agreement; collateral trust certificate; preorganization certificate or subscription; transferable share; investment contract; voting trust certificate; certificate of deposit for a security; fractional undivided interest in oil, gas, or other mineral rights; put, call, straddle, option, or privilege on a security, certificate of deposit, or group or index of securities, including an interest therein or based on the value thereof; put, call, straddle, option, or privilege entered into on a national securities exchange relating to foreign currency; or, in general, an interest or instrument commonly known as a “security”; or a certificate of interest or participation in, temporary or interim certificate for, receipt for, guarantee of, or warrant or right to subscribe to or purchase any of the foregoing. The term:

(A) Includes both a certificated and an uncertificated security;

(B) Does not include an insurance or endowment policy or annuity contract under which an insurance company promises to pay a fixed or variable sum of money either in a lump sum or periodically for life or other specified period;

(C) Does not include an interest in a contributory or noncontributory pension or welfare plan subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, et seq.;

(D) Includes as an investment contract an investment in a common enterprise with the expectation of profits to be derived primarily from the efforts of a person other than the investor where common enterprise means an enterprise in which the fortunes of the investor are interwoven with those of either the person offering the investment, a third party, or other investors; and

(E) Includes as an investment contract, among other contracts, an interest in a limited partnership or a limited liability company and an investment in a viatical settlement or similar agreement.

(32) “Self-regulatory organization” means a national securities exchange registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., a national securities association of broker-dealers

registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., a clearing agency registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or the Municipal Securities Rulemaking Board established under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq.

(33) “Sign” means, with present intent to authenticate or adopt a record:

(A) To execute or adopt a tangible symbol; or

(B) To attach or logically associate with the record an electronic symbol, sound, or process.

(34) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. (Code 1981, § 10-5-2, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Cross references.** — Designation of Secretary of State as commissioner of securities, § 10-5-10.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, “July 1, 2009” was substituted for “the effective date of this chapter” in paragraph (25).

**Law reviews.** — For article on the definition of a security in light of the “Georgia Securities Act of 1973” and the need for maximizing investor protection, see 30 Emory L.J. 73 (1981). For article, uniformity under the securities laws: regulation D and the new Georgia uniform limited offering exemption, see 19 Ga. St. B.J. 74 (1982). For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004). For survey of 11th Circuit securities regulation cases, see 56 Mercer L. Rev. 1341 (2005).

For note, “Regulation of the Franchise as a Security,” see 19 J. of Pub. L. 105 (1970). For note discussing the classification of pyramid marketing scheme contracts as securities prior to enactment of Georgia Securities Act of 1973, see 21 J. of Pub. L. 445 (1972). For note discussing standards used by Georgia courts to define securities, and their application, see 31 Mercer L. Rev. 333 (1979). For note, “The Economic Realities of Condominium Registration Under the Securities Act of 1933,” see 19 Ga. L. Rev. 747 (1984).

For comment, the purchase of all the shares of stock of a business is not the purchase of a “security” within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

“SALE” OR “SELL”

“SALESMAN”

“SECURITY”

#### General Consideration

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1920, p. 250, Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-102, former O.C.G.A. § 10-5-2, and un-

der 15 U.S.C. § 77(b), which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this section.

**Commodity futures dealer not a “dealer”.**

— One who deals in commodity futures is



not a “dealer” in securities. *Monarch Co. v. Weis*, 86 Ga. App. 7, 70 S.E.2d 600 (1952) (decided under former Ga. L. 1920, p. 250, as amended).

**“Issuers”.** — Persons who procure contracts of subscription to the stock of a proposed corporation not in esse but which may be organized in the future are not “issuers” of such stock within the intent and meaning of that term as defined in the securities law. *Felton v. Highlands Hotel Co.*, 165 Ga. 598, 141 S.E. 793, 57 ALR 987 (1928) (decided under former Ga. L. 1920, p. 250).

**Cited in** *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979); *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980); *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981); *Jorges v. Griffin*, 161 Ga. App. 439, 288 S.E.2d 356 (1982); *Nicholson v. Harris*, 179 Ga. App. 35, 345 S.E.2d 63 (1986); *Turem v. Sinowski & Jones*, 195 Ga. App. 829, 395 S.E.2d 60 (1990); *Haupt v. State*, 290 Ga. App. 616, 660 S.E.2d 383 (2008).

### “Sale” or “Sell”

**Term “sale” or “sell” is not limited to** technical common-law sales or transactions ordinarily governed by the commercial law of sales. *Peoples Bank v. North Carolina Nat’l Bank*, 139 Ga. App. 405, 228 S.E.2d 334 (1976) (construing similar federal provision, 15 U.S.C. § 77b(3)).

**Payment may be made in any medium** which the payor and the payee regard as equivalent to money, such as goods, chattels, securities, lands, services, credits, or bank notes. *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

**Cancelling or assuming debt as payment.** — Payment may be made by cancelling an existing debt owed one by the creditor of another, whether by request or compulsion, or by rendering an account which makes the person rendering it liable for another’s debt. *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

**Determining whether “sale” occurred in Georgia.** — Former Code 1933, § 102-108 did not limit the application of the statutory security provisions; thus, whether a “sale”

within the meaning of the statutory security provisions occurred in Georgia must be decided on basic principles. *Allen v. Smith & Medford, Inc.*, 129 Ga. App. 538, 199 S.E.2d 876 (1973) (decided under former Ga. L. 1957, p. 134, as amended).

Where, although one defendant testified that plaintiff agreed to lend \$50,000.00 in Florida, the agreement which concerned the debenture or security sets forth that the agreement was entered into in Atlanta, Georgia, and that the plaintiff, who resided in Georgia, executed the contract in Georgia and received the stock in Georgia; thus, there was a “sale” in Georgia. *Allen v. Smith & Medford, Inc.*, 129 Ga. App. 538, 199 S.E.2d 876 (1973) (decided under former Ga. L. 1957, p. 134, as amended).

After Texas residents sent a Georgia resident letters, brochures and other materials regarding a cattle feeding and sales investment program and, during a telephone conversation, solicited a cash downpayment from the Georgia resident, who then transferred the payment from the Georgia resident’s bank account, these contacts were sufficient to establish a “sale” within the state. *Seale v. Miller*, 698 F. Supp. 883 (N.D. Ga. 1988) (decided under former O.C.G.A. § 10-5-2).

### “Salesman”

**Sufficiency of evidence.** — Whether defendant was a “dealer” under former O.C.G.A. § 10-5-3 was immaterial since the evidence at trial was sufficient for a jury to find that the defendant was a “salesman” pursuant to paragraph (a)(25) of former O.C.G.A. § 10-5-2. *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577, cert. denied, 199 Ga. App. 906, 404 S.E.2d 557 (1991) (decided under former O.C.G.A. § 10-5-2).

### “Security”

**Treatment similar to federal Acts.** — The treatment extended to notes and securities, while not precisely the same under Georgia law and the federal Acts, is virtually identical. *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under former Code 1933, § 97-102).

The test for determining whether an investment is a security is the same under both the former Georgia Securities Act and the

**"Security"** (Cont'd)

federal securities laws. *Eberhardt v. Waters*, 901 F.2d 1578 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

**"Any note" and "evidence of indebtedness".** — The ordinary terms of "any note" or "evidence of indebtedness" in paragraph (a)(19) of this section are self-defining and require no further definition. *Peoples Bank v. North Carolina Nat'l Bank*, 139 Ga. App. 405, 228 S.E.2d 334 (1976) (holding note a "security") (construing similar provisions of 15 U.S.C. § 77b(1)); *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under former Code 1933, § 97-102).

**To determine whether stock constitutes a "security"** under either the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq., or the federal securities acts, it is necessary to apply the test in *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S. Ct. 2297, 85 L.Ed. 692 (1985), which is whether the stock "bears such characteristics usually associated with common stock that a purchaser justifiably may assume that appropriate securit[ies] laws apply." *Cohen v. William Goldberg & Co.*, 202 Ga. App. 172, 413 S.E.2d 759 (1991), cert. denied, 202 Ga. App. 905, 413 S.E.2d 759, modified on other grounds, 262 Ga. 606, 423 S.E.2d 231 (1992), vacated on other grounds, 207 Ga. App. 174, 428 S.E.2d 117 (1993) (decided under former O.C.G.A. § 10-5-2).

The appropriate test to be employed in resolving issues of whether particular stock is a security is whether the stock bears such characteristics usually associated with common stock that a purchaser justifiably may assume that appropriate security laws apply. *Cohen v. William Goldberg & Co.*, 262 Ga. 606, 423 S.E.2d 231 (1992) (decided under former O.C.G.A. § 10-5-2).

In determining whether stock is a security, if, and only if, the stock does not meet the statutory definition under either the Georgia or federal securities acts, the next inquiry should be whether the stock meets the *Howey* economic reality test as tailored by *Tech Resources* to resolve issues concerning "investment contracts" and any "instrument commonly known as a 'security.'" *Cohen v. William Goldberg & Co.*, 262 Ga. 606, 423 S.E.2d 231 (1992) (decided under former O.C.G.A. § 10-5-2).

**Four tests are applicable in determining whether a transaction falls within the definition of "security":** the "*Howey*" test (*Securities & Exch. Comm'n v. W.J. Howey Co.*, 328 U.S. 293, 66 S. Ct. 1100, 90 L. Ed. 1244 (1946)); the "*Joiner*" test (*Securities & Exch. Comm'n v. C.M. Joiner Leasing Corp.*, 320 U.S. 344, 64 S. Ct. 120, 88 L. Ed. 88 (1943)); the "*Risk Capital*" test (*Silver Hills Country Club v. Sobieski*, 55 Cal. 2d 811, 13 Cal. Rptr. 186, 361 P.2d 906 (1961)); and the "*Managerial Efforts*" test (*Securities & Exch. Comm'n v. Glenn W. Turner Enters., Inc.*, 474 F.2d 476 (9th Cir. 1973)). *Jaciewicki v. Gordarl Assocs.*, 132 Ga. App. 888, 209 S.E.2d 693 (1974) (decided under former Ga. L. 1957, p. 134, as amended); *D.K. Properties, Inc. v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293 (1977) (decided under former Code 1933, § 97-102).

A factual situation which falls within the framework of either the "*Howey*," "*Joiner*," "*Risk Capital*," or "*Managerial Efforts*" test, or any combination thereof, will afford sufficient basis for a finding that a "security" is involved. *Jaciewicki v. Gordarl Assocs.*, 132 Ga. App. 888, 209 S.E.2d 693 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

**Applying the stock characterization test,** shares of stock were securities where stockholders were entitled to receive dividends, the stock was negotiable, the shares could be pledged or hypothecated, the by-laws provided that stockholders were entitled to one vote per share, and the stock apparently had the capacity to increase in value. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-2).

Neither restrictions on the negotiability of stock in a closely held corporation nor its unregistered status negated the stock's character as a security. *Cox v. Edelson*, 243 Ga. App. 5, 530 S.E.2d 250 (2000) (decided under former O.C.G.A. § 10-5-2).

**Policy to protect investor when success depends on promoter's efforts.** — The basic policy behind all the tests for a "security" is to protect the investor with the shield of the securities laws when the promoter or syndicator puts forth the essential managerial efforts which affect the failure or success of the enterprise. *D.K. Properties, Inc. v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293



(1977) (decided under former Code 1933, § 97-102).

**Form should be disregarded for substance and emphasis should be on economic reality** when making a determination as to whether or not an instrument is a security. *Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 272 S.E.2d 314 (1980); *Cocklereece v. Moran*, 532 F. Supp. 519 (N.D. Ga. 1982) (decided under former Code 1933, § 97-102).

**Label used on instrument not determinative.** — The label placed on the instrument by the parties or by the courts does not determine whether the instrument is a “security.” Instead, the characteristics of the instrument and the underlying economic reality are the significant factors for a court to consider in classifying an instrument as a “security.” *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979); *Redmond v. Blau*, 153 Ga. App. 395, 265 S.E.2d 329 (1980) (decided under former Code 1933, § 97-102).

As there was no dispute that agreements and notes defendant provided the defendant’s victims in exchange for money were investments and that the victims relied on defendant to manage the investments and to provide a return on the investments, the instruments were “securities” within the meaning of Georgia’s blue sky law; that the amount of expected return was fixed was immaterial. *Rasch v. State*, 260 Ga. App. 379, 579 S.E.2d 817 (2003) (decided under former O.C.G.A. § 10-5-2).

**Expectation of profits from efforts of others.** — The touchstone of a “security” is the presence of an investment in a common venture premised on a reasonable expectation of profits to be derived from the entrepreneurial or managerial efforts of others. *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) (decided under former Code 1933, § 97-102).

In order for a transaction to constitute a securities transaction under the law, there must be an investment, a reasonable expectation of profits, and a reliance on the management of another party to bring about the profits. *Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 272 S.E.2d 314 (1980) (decided under former Code 1933, § 97-102).

In determining whether a transaction constitutes a “security,” the courts focus primarily upon one issue: do persons other than the investors provide the essential managerial efforts from which the investors expect profits? If the answer to that question is in the affirmative, then, for the protection of the investor, who is thereby seen to lack control over the investor’s investment, the courts have found the transaction to be a “security.” *D.K. Properties, Inc. v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293 (1977) (decided under former Code 1933, § 97-102).

**Stock of closely-held corporation.** — Since restrictions on negotiability of stock were usual and customary for closely-held corporations, the restrictions did not negate the stock’s character as a security. *Cohen v. William Goldberg & Co.*, 262 Ga. 606, 423 S.E.2d 231 (1992) (decided under former O.C.G.A. § 10-5-2).

**Unregistered stock.** — Unregistered status of stock in a closely-held corporation did not negate the stock’s character as a security since the Georgia and federal securities acts contemplate that stock may be a “security” and yet be unregistered. *Cohen v. William Goldberg & Co.*, 262 Ga. 606, 423 S.E.2d 231 (1992) (decided under former O.C.G.A. § 10-5-2).

**Limited partnership interests are explicitly included** in the definitions of “security.” *Kleiner v. Silver*, 137 Ga. App. 560, 224 S.E.2d 508 (1976) (decided under former Code 1933, § 97-102).

**“Unusual instruments”.** — A stock not meeting the definition of a security under the test in *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 105 S. Ct. 2297, 85 L. Ed. 2d 692 (1985), may otherwise come within the Georgia or federal securities acts if the stock qualifies as one of the “unusual instruments” not easily characterized as “securities.” *Cohen v. William Goldberg & Co.*, 202 Ga. App. 172, 413 S.E.2d 759 (1991), cert. denied, 202 Ga. App. 905, 413 S.E.2d 759, modified on other grounds, 262 Ga. 606, 423 S.E.2d 231 (1992), vacated on other grounds, 207 Ga. App. 174, 428 S.E.2d 117 (1993) (decided under former O.C.G.A. § 10-5-2).

**If investors control decision essential for profit, no sale of securities.** — Where the investors have control over the essential de-



**“Security” (Cont’d)**

cision from which the investors expect profits to flow, the scheme does not involve the sale of securities. *D.K. Properties, Inc. v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293 (1977) (decided under former Code 1933, § 97-102).

**Restrictive covenants and pledge of shares did not vest control in another.** — Where buyer proposed to purchase business of coal mining companies and to operate and control it as its own and to assume certain financial obligations of the companies, existence of restrictive financial covenants in the agreement and pledge of shares as security for performance of covenants did not vest significant managerial control in anyone other than the purchaser and the sale was not a security transaction. *Tech Resources, Inc. v. Estate of Hubbard*, 246 Ga. 583, 272 S.E.2d 314 (1980) (decided under former Code 1933, § 97-102).

**Test applies to “investment contract”.** — The test of whether there is an “investment contract” is whether the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others. *Georgia Mkt. Ctrs., Inc. v. Fortson*, 225 Ga. 854, 171 S.E.2d 620 (1969), commented on in 21 Mercer L. Rev. 715 (1970) (decided under former Ga. L. 1957, p. 134, as amended).

An “investment contract” is a security if the scheme involves an investment of money in a common enterprise in which profits are to come solely from the efforts of others. *Goldsmith v. American Food Servs., Inc.*, 123 Ga. App. 353, 181 S.E.2d 95 (1971) (decided under former Ga. L. 1957, p. 134, as amended); *Brown v. Computer Credit Sys.*, 128 Ga. App. 429, 197 S.E.2d 165 (1973) (decided under former Ga. L. 1957, p. 134, as amended).

**The elements of an “investment contract” are:** (a) the investment of money (b) in a common enterprise (c) with profits to come solely from the efforts of others. The Georgia courts accept this test for an investment contract for purposes of the security law. *Plunkett v. Francisco*, 430 F. Supp. 235 (N.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

The three elements of an investment contract are: (1) an investment of money; (2) in

a common enterprise; and (3) an expectation of profit solely from the efforts of others. *Eberhardt v. Waters*, 901 F.2d 1578 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

Sale and lease-back contracts for payphones were found to be investment contracts within the definition of securities pursuant to O.C.G.A. § 10-5-2(a)(26), as the buyer invested money for the purchase, the concept was packaged as an investment venture by the seller, and the purchaser expected to receive a fixed monthly income as a return on each payphone, which represented a fixed return on the purchaser’s investment. *Garvin v. Sec’y of State*, 266 Ga. App. 66, 596 S.E.2d 166 (2004) (decided under former O.C.G.A. § 10-5-2).

**Investment met Howey “economic reality” test.** — Plaintiff’s payment for a 10% interest in a closely held corporation was an “investment contract” under the Howey “economic reality” test. *Huggins v. Chapin*, 227 Ga. App. 340, 489 S.E.2d 109 (1997) (decided under former O.C.G.A. § 10-5-2).

**Investment arrangement involving the sale of cattle embryos**, based on the process of artificially inseminating superovulated “donor cows” for reproduction, constituted the sale of a security under Georgia law. *Eberhardt v. Waters*, 901 F.2d 1578 (11th Cir. 1990) (decided under former O.C.G.A. § 10-5-2).

**“Security” may include transaction purporting to be real estate sale.** — A transaction which purports only to be a sale of real estate can, when the economic realities of the transaction are examined, be determined to be a security. The rule which has developed is that any investment will be deemed an “investment contract” and a “security” if the investor’s return is essentially dependent upon the efforts of the syndicator or an affiliate. *Fortier v. Ramsey*, 136 Ga. App. 203, 220 S.E.2d 753 (1975) (decided under former Ga. L. 1957, p. 134, as amended).

**Franchise agreement is not a “security”** within the meaning of the securities law if the investor is entitled to no return under the agreement except through the investor’s own efforts. *Brown v. Computer Credit Sys.*, 128 Ga. App. 429, 197 S.E.2d 165 (1973) (decided under former Ga. L. 1957, p. 134, before it was amended by Ga. L. 1970, p. 450).

**Redeemable membership certificate** is a certificate of indebtedness, but the certificate of indebtedness does not represent an "investment" within the meaning of the securities law when the certificate creates no expectation of profit because the certificate

bears no interest, cannot appreciate, and cannot be pledged or assigned. *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) (decided under former Code 1933, § 97-102).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

GENERAL CONSIDERATION  
"DEALER" AND "SALESMAN"  
"SALE" OR "SELL"  
"SECURITY"

#### General Consideration

**Editor's notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-102, and former O.C.G.A. § 10-5-2, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this section.

**New York license to sell securities is not valid in Georgia.** 1969 Op. Att'y Gen. No. 69-102 (decided under former Ga. L. 1957, p. 134, as amended).

#### "Dealer" and "Salesman"

**"Commission" construed broadly.** — The term "commission," particularly when further expanded to include any remuneration paid related to the sale of securities, should be given an expansive reading. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

**"Dealer" or "salesman" not limited to one receiving explicit commission.** — A general partner or executive officer of a real estate syndication should not be excluded from the definition of "salesman" or "dealer" merely because the partner or officer receives compensation or profit in the form of a profit on sales to the syndication, a real estate brokerage commission, a management fee, or some other form which is not an explicit commission for the sale of securities. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

#### "Sale" or "Sell"

**Guarantee of corporate indebtedness.** — Transaction under which a person under-

takes to guarantee corporate indebtedness in consideration for the right to receive future corporate profits is a "sale" of a security governed by the statutory provisions on securities. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

#### "Security"

**Exact classification of instrument not necessary.** — It is not necessary that an instrument be susceptible to exact classification coextensive with one or more of the incremental clauses of paragraph (a)(19) of this section and, in addition, since securities regulation is a function of substance, one should hesitate to hand down any conclusive, all-purpose formulae. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

**"Investment contract" involves efforts of another.** — If the success of the investment is essentially dependent upon the efforts of the seller or some third person, the security being sold is an "investment contract." 1974 Op. Att'y Gen. No. 75-153 (decided under former Code 1933, § 97-102).

**"Investment contract" may involve management of land.** — "Investment contract" includes many situations where investors are offered land in such a way that its value is dependent on management by others. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

**Agreement to buy land as tenants in common.** — An agreement to purchase specifically identified parcels of land which purchasers are to hold as tenants in common with the hope of increase in price is not per-



**“Security” (Cont’d)**

se a “security.” 1971 Op. Att’y Gen. No. U71-118 (decided under former Ga. L. 1957, p. 134, as amended).

**If the purchasers of land are passive in the operation,** and depend primarily upon the efforts of promoters of the enterprise for their profits, the transaction may well constitute the sale of a “security.” 1971 Op. Att’y Gen. No. U71-118 (decided under former Ga. L. 1957, p. 134, as amended).

**Real estate syndication anticipating profits from syndicator’s efforts.** — Any real estate syndication that is structured or marketed in such a way that the investor anticipates that the investor will realize returns based on the efforts or expertise of the syndicator or some affiliate is a “security.” 1974 Op. Att’y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

**Limited partnership interest.** — The offering for sale of limited partnerships constitutes the offering for sale of a “security.” 1969 Op. Att’y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

A limited partnership interest is explicitly defined to be a “security” by the securities law. 1974 Op. Att’y Gen. No. 74-75 (decided under former Code 1933, § 97-102).

**Investment club interest.** — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security. 1969 Op. Att’y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

**Travelers checks and money orders deemed “securities.”** — “Travelers check,” “money order,” or “draft,” or any similar instrument by whatever name called, sold or offered for sale to the public through retail outlets for a consideration or fee over and above its face value, which instrument may be later endorsed and cashed by the purchaser at another retail outlet or endorsed by the purchaser to another person for the payment of bills or other purposes are “securities” within the meaning of the securities law and are subject to regulation and control by the commissioner of securities. 1957 Op. Att’y Gen. p. 233 (decided under former Ga. L. 1957, p. 134).

**Franchise agreements.** — In every instance where the franchisor is thinly capital-

ized or so under-capitalized as to require franchisee fees in order to be able to fulfill its obligations to its franchisees, the franchise agreements constitute “securities” within the purview of the securities law. 1969 Op. Att’y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

Securities coverage is not avoided by simply providing franchisor with adequate capital. 1969 Op. Att’y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

When, because of its newness, a franchising system is necessarily preorganizational as a matter of fact, then its franchising agreements constitute preorganization certificates and are “securities” within the meaning of the securities law. 1969 Op. Att’y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

All franchise systems however capitalized are susceptible to securities regulation until such time as the franchise is so well established as a system that the success or failure of an individual franchise is not disproportionately keyed to the success or failure of other franchisees; either the franchisor will have to provide a sufficient number of franchisor-owned and operated outlets to establish the system as a going enterprise without dependence upon the individual activities of the franchisee’s cofranchisors or the franchisor will have to comply with the registration requirements of the securities law. 1969 Op. Att’y Gen. No. 69-471 (decided under former Ga. L. 1957, p. 134, as amended).

**Club memberships deemed securities where promoter seeks profit.** — Where club property will be the chief capital asset of a recreational program conducted by the developer for profit, and the members are asked to allow a business to use their capital without allowing the members a return on the business, and they are required to supply operating capital, because they are obligated to pay dues assessments, the proposed memberships are securities; they are not exempt as securities of a nonprofit corporation because a substantial purpose of the enterprise is profit for the promoter. 1973 Op. Att’y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

**Use of proceeds to develop common property.** — If the transaction otherwise



constitutes a security, it does not matter that proceeds were not used to develop the common facility. 1973 Op. Att'y Gen. No. 73-25 (decided under former Ga. L. 1957, p. 134, as amended).

**Condominium with rental pool feature.** — Condominium, when combined with rental pool feature, constitutes "security" as defined by this section. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

The sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security", unless exempt, must be registered pursuant to the statutory provisions on securities; any person offering for sale or selling such securities that are subject to registration must register as a dealer, limited dealer, salesman, or limited salesman unless such a person is a real estate broker or salesman licensed to sell real estate in Georgia. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-102).

**Guaranteeing corporate indebtedness.** — A transaction under which a person undertakes to guarantee corporate indebtedness in consideration for the right to receive future corporate profits may be a sale of "security" governed by the statutory provisions on securities. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

A transaction under which a corporation would obtain the guarantees of strangers on the corporation's loans in exchange for a percentage of profits in a development for which they guarantee the loan would constitute a sale of a "security". 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

The guaranty of a corporate loan by a

stockholder if the guarantor expected no direct return from the guaranty, but only the indirect benefit of the increase in value of the corporation should the project be successful and the loan repaid would not constitute the sale of a security. 1973 Op. Att'y Gen. No. 73-177 (decided under former Ga. L. 1957, p. 134, as amended).

**Typical scotch whiskey investment is "security."** 1973 Op. Att'y Gen. No. 73-187 (decided under former Ga. L. 1957, p. 134, as amended).

**Notes given in commercial transaction.** — Notes given in an essentially commercial transaction between a payor and a payee are not subject to the securities law. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

**Sales of notes or mortgages** will be subject to the securities law if the transaction, as a matter of economic reality, is an investment. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

**Variable annuity contract** is subject to regulation as "security." 1962 Op. Att'y Gen. p. 448 (decided under former Ga. L. 1957, p. 134, prior to its amendment by Ga. L. 1969, p. 722).

"Security" does not include variable annuity contracts provided for and regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under former Ga. L. 1957, p. 134, as amended).

Group variable annuity contracts are subject to the control and direction of the Insurance Commissioner; the words "regulated under" do not necessarily require the formal adoption of regulations under Ga. L. 1964, p. 338, § 1 et seq. so long as the contracts are in fact being regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under former Ga. L. 1957, p. 134, as amended).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 69 Am. Jur. 2d, Securities Regulation — State, §§ 16, 26 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 3.

**ALR.** — Sale of memberships in club or similar organization as sale of securities within provisions of securities Acts, 87 ALR2d 1140.

Who is "dealer" under state securities

Acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 ALR3d 1425.

What passes under term "securities" in will, 27 ALR3d 1386.

What constitutes an "investment contract" within the meaning of state Blue Sky Laws, 47 ALR3d 1375.

Validity of pyramid distribution plan, 54 ALR3d 217.

“Common enterprise” element of Howey test to determine existence of investment contract regulable as “security” within meaning of federal Securities Act of 1933 (15 USCS § 77a et seq.) and Securities Exchange Act of 1934 (15 USCS § 78a et seq.), 90 ALR Fed. 825.

What is “investment contract” within meaning of § 2(1) of Securities Act of 1933 (15 USCS § 77b(1)) and § 3(a)(10) of Securities Exchange Act of 1934 (15 USCS § 78c(a)(10)), both defining term “security” as including investment contract, 134 ALR Fed 289.

### 10-5-3. Citations to United States Code.

Any citation in this chapter to a section of the United States Code includes those statutes and the rules and regulations adopted under those statutes as in effect on July 1, 2009, or as later amended. (Code 1981, § 10-5-3, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, “July 1, 2009” was substituted for “the date of enactment of this chapter”.

### 10-5-4. Reference to agency or department of United States.

A reference in this chapter to an agency or department of the United States is also a reference to a successor agency or department. (Code 1981, § 10-5-4, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

### 10-5-5. Electronic records and signatures.

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act, 15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). This chapter authorizes the filing of records and signatures, when specified by provisions of this chapter or by a rule adopted or order issued under this chapter, in a manner consistent with Section 104(a) of that act, 15 U.S.C. Section 7004(a). (Code 1981, § 10-5-5, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

## ARTICLE 2

### EXEMPTIONS

### 10-5-10. Exemptions from registration of securities.

The following securities are exempt from the requirements of Article 3 of this chapter and Code Section 10-5-53:

- (1) A security, including a revenue obligation or a separate security as defined in Rule 131, 17 C.F.R. 230.131, adopted under the Securities Act

of 1933, 15 U.S.C. Section 77a, et seq., issued, insured, or guaranteed by the United States; by a state; by a political subdivision of a state; by a public authority, agency, or instrumentality of one or more states; by a political subdivision of one or more states; or by a person controlled or supervised by and acting as an instrumentality of the United States under authority granted by the Congress or a certificate of deposit for any of the foregoing;

(2) A security issued, insured, or guaranteed by a foreign government with which the United States maintains diplomatic relations, or any of its political subdivisions, if the security is recognized as a valid obligation by the issuer, insurer, or guarantor;

(3) A security issued by and representing or that will represent an interest in or a direct obligation of or be guaranteed by:

(A) An international banking institution;

(B) A banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation or the National Credit Union Share Insurance Fund or a successor authorized by federal law or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of Currency pursuant to Section 1 of P. L. 87-722, 12 U.S.C. Section 92a; or

(C) Any other depository institution, unless by rule or order the Commissioner proceeds under Code Section 10-5-13;

(4) A security issued by and representing an interest in, or a debt of, or insured or guaranteed by, an insurance company authorized to do business in this state;

(5) A security issued or guaranteed by a railroad, other common carrier, public utility, or public utility holding company that is:

(A) Regulated in respect to its rates and charges by the United States or a state;

(B) Regulated in respect to the issuance or guarantee of the security by the United States, a state, Canada, or a Canadian province or territory; or

(C) A public utility holding company registered under the Public Utility Holding Company Act of 1935 or a subsidiary of such a registered holding company within the meaning of that act;

(6) A federal covered security specified in Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1), or by rule adopted



under that provision or a security listed or approved for listing on another securities market specified by rule under this chapter; a put or a call option contract; a warrant; a subscription right on or with respect to such securities; or an option or similar derivative security on a security or an index of securities or foreign currencies issued by a clearing agency registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 77a, et seq., and listed or designated for trading on a national securities exchange, a facility of a national securities exchange, or a facility of a national securities association registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 77a, et seq., or an offer or sale of the underlying security in connection with the offer, sale, or exercise of an option or other security that was exempt when the option or other security was written or issued; or an option or a derivative security designated by the Securities and Exchange Commission under Section 9(b) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78i(b);

(7) A security issued by a person organized and operated exclusively for religious, educational, benevolent, fraternal, charitable, social, athletic, or reformatory purposes or as a chamber of commerce and not for pecuniary profit, no part of the net earnings of which inures to the benefit of a private stockholder or other person; or a security of a company that is excluded from the definition of an investment company under Section 3(c)(10)(B) of the Investment Company Act of 1940, 15 U.S.C. Section 80b-3(c)(10)(B); except that with respect to the offer or sale of a note, bond, debenture, or other evidence of indebtedness issued by such a person, a rule may be adopted under this chapter limiting the availability of this exemption by classifying securities, persons, and transactions, imposing different requirements for different classes, specifying with respect to Section 3(c)(10)(B) of the Investment Company Act of 1940, 15 U.S.C. Section 80b-3(c)(10)(B), the scope of the exemption and the grounds for denial or suspension, and requiring an issuer:

(A) To file a notice specifying the material terms of the proposed offer or sale and copies of any proposed sales and advertising literature to be used and provide that the exemption becomes effective if the Commissioner does not disallow the exemption within the period established by the rule;

(B) To file a request for exemption authorization for which a rule under this chapter may specify the scope of the exemption, the requirement of an offering statement, the filing of sales and advertising literature, the filing of consent to service of process complying with Code Section 10-5-80, and grounds for denial or suspension of the exemption; or

(C) To register under Code Section 10-5-23;

(8) A member's or owner's interest in, retention certificate, or like security given in lieu of a cash patronage dividend issued by, a cooperative

organized and operated as a nonprofit membership cooperative under the cooperative laws of a state, but not a member's or owner's interest, retention certificate, or like security sold to persons other than bona fide members of the cooperative; and

(9) An equipment trust certificate with respect to equipment leased or conditionally sold to a person if any security issued by the person would be exempt under this Code section or would be a federal covered security under Section 18(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1). (Code 1981, § 10-5-10, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Cross references.** — Securities laws exemption for opening and transferring of deposits in building and loan associations and savings and loan associations, § 7-1-787.

**Law reviews.** — For article on the definition of a security in light of the "Georgia Securities Act of 1973" and the need for maximizing investor protection, see 30 Emory L.J. 73 (1981).

For comment, the purchase of all the shares of stock of a business is not the purchase of a "Security" within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, former Code 1933, § 97-108, and former O.C.G.A. § 10-5-8, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

**Exemptions viewed narrowly.** — The exempted transactions specifying "promissory notes" only, must be narrowly viewed, since the law was remedial legislation entitled to a broad construction. *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under former Code 1933, § 97-108).

**Exemptions from registration** are to be strictly construed in favor of investors and one claiming an exemption has the burden of proving the exemption's application. *Womack v. State*, 270 Ga. 56, 507 S.E.2d 425 (1998) (decided under former O.C.G.A. § 10-5-8).

**Unregistered stock as security.** — Unregistered status of stock in a closely-held corporation did not negate the stock's character as a security since the Georgia and federal securities acts contemplate that stock may be a "security" and yet be unregistered. *Cohen*

*v. William Goldberg & Co.*, 262 Ga. 606, 423 S.E.2d 231 (1992) (decided under former O.C.G.A. § 10-5-8).

**Promissory note exemption applies to high quality commercial paper.** — The exemption for promissory notes maturing in not more than nine months in paragraph (9) of this section was explicit as to the type of security and was indicative that it was applicable to high quality commercial paper. *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under former Code 1933, § 97-108).

**Notes issued by a corporation.** — The exemption from registration for promissory notes under former paragraph (9) of O.C.G.A. § 10-5-8 did not apply to notes issued by a corporation, although the corporate notes did not mature more than nine months from the date of issuance as required by the exemption, since the notes had all the characteristics of a security and were offered to the public as investments. *Womack v. State*, 270 Ga. 56, 507 S.E.2d 425 (1998) (decided under former O.C.G.A. § 10-5-8).

**Cited in** *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-108, and former O.C.G.A. § 10-5-8, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

**Registration not necessary if exemption applies.** — It did not necessarily follow that a scheme which constituted a "security" under former Code 1933, § 97-102 must always be registered with the commissioner of securities; if a scheme fell within any of the exemptions provided in former Code 1933, § 97-108 or if the sale of such a scheme fits any of the exempt transactions set forth in former Code 1933, § 97-109, the registration requirements of the law would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under former Ga. L. 1957, p. 134, as amended).

**Investment clubs.** — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a "security," since the offering for sale of limited partnerships constitutes the offering for sale of a "security" as the security was defined by former Code 1933, § 97-102; unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

**Sales of mortgages.** — Sales of mortgages described in paragraph (10) of former Code 1933, § 97-108 were exempt from the registration requirement of former Code 1933, § 97-105, but mortgage offerings which were structured or promoted in such a way that they become investment contracts must be registered pursuant to former Code 1933, § 97-105 unless the mortgages qualify for some exemption from registration other than paragraph (10) of former Code 1933, § 97-108. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-108).

**Sale of time-sharing condominium units.** — The sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security" within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered pursuant to the law. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-108).

**Variable annuity contract** is subject to regulation as a security. 1962 Op. Att'y Gen. p. 448 (decided under former Ga. L. 1957, p. 134, as amended).

"Security" does not include variable annuity contracts provided for and regulated under the insurance law. 1970 Op. Att'y Gen. No. 70-22 (decided under Ga. L. 1957, p. 134, as amended).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, § 64 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 379 et seq.

**ALR.** — Sales as "isolated" or "succe-

sive" or the like, under state securities Acts, 1 ALR3d 614.

What securities are exempt from registration under § 402(a) of the Uniform Securities Act, 84 ALR3d 575.

## 10-5-11. Exempt transactions.

The following transactions are exempt from the requirements of Article 3 of this chapter and Code Section 10-5-53:

- (1) An isolated nonissuer transaction, whether effected by or through a broker-dealer or not;



(2) A nonissuer transaction by or through a broker-dealer registered, or exempt from registration under this chapter, and a resale transaction by a sponsor of a unit investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq., in a security of a class that has been outstanding in the hands of the public for at least 90 days, if, at the date of the transaction:

(A) The issuer of the security is engaged in business, the issuer is not in the organizational stage or in bankruptcy or receivership, and the issuer is not a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with, or an acquisition of, an unidentified person;

(B) The security is sold at a price reasonably related to its current market price;

(C) The security does not constitute the whole or part of an unsold allotment to or a subscription or participation by the broker-dealer as an underwriter of the security or a redistribution;

(D) A nationally recognized securities manual or its electronic equivalent designated by rule adopted or order issued under this chapter or a record filed with the Securities and Exchange Commission that is publicly available contains:

(i) A description of the business and operations of the issuer;

(ii) The names of the issuer's executive officers and the names of the issuer's directors, if any;

(iii) An audited balance sheet of the issuer as of a date within 18 months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization; and

(iv) An audited income statement for each of the issuer's two immediately previous fiscal years or for the period of existence of the issuer, whichever is shorter, or, in the case of a reorganization or merger when each party to the reorganization or merger had an audited income statement, a pro forma income statement; and

(E) The issuer of the security has a class of equity securities listed on a national securities exchange registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or designated for trading on the National Association of Securities Dealers Automated Quotation System, unless the issuer of the security is a unit investment trust registered under the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq.; or the issuer of the security, including its

predecessors, has been engaged in continuous business for at least three years; or the issuer of the security has total assets of at least \$2 million based on an audited balance sheet as of a date within 18 months before the date of the transaction or, in the case of a reorganization or merger when the parties to the reorganization or merger each had an audited balance sheet, a pro forma balance sheet for the combined organization;

(3) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security of a foreign issuer that is a margin security defined in regulations or rules adopted by the Board of Governors of the Federal Reserve System;

(4) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in an outstanding security if the guarantor of the security files reports with the Securities and Exchange Commission under the reporting requirements of Section 13 or 15(d) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78m or 78o(d);

(5) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter in a security that:

(A) Is rated at the time of the transaction by a nationally recognized statistical rating organization in one of its four highest rating categories; or

(B) Has a fixed maturity or a fixed interest or dividend if:

(i) A default has not occurred during the current fiscal year or within the three previous fiscal years or during the existence of the issuer and any predecessor, if less than three fiscal years, in the payment of principal, interest, or dividends on the security; and

(ii) The issuer is engaged in business, is not in the organizational stage or in bankruptcy or receivership, and is not and has not been within the previous 12 months a blank check, blind pool, or shell company that has no specific business plan or purpose or has indicated that its primary business plan is to engage in a merger or combination of the business with or an acquisition of an unidentified person;

(6) A nonissuer transaction by or through a broker-dealer registered or exempt from registration under this chapter effecting an unsolicited order or offer to purchase;

(7) A nonissuer transaction executed by a bona fide pledgee without the purpose of evading this chapter;

(8) A nonissuer transaction by a federal covered investment adviser with investments under management in excess of \$100 million acting in

the exercise of discretionary authority in a signed record for the account of others;

(9) A transaction in a security, whether or not the security or transaction is otherwise exempt, in exchange for one or more bona fide outstanding securities, claims, or property interests, or partly in such exchange and partly for cash, if the terms and conditions of the issuance and exchange or the delivery and exchange and the fairness of the terms and conditions have been approved by the Commissioner after a hearing;

(10) A transaction between the issuer or other person on whose behalf the offering is made and an underwriter or among underwriters;

(11) A transaction in a note, bond, debenture, or other evidence of indebtedness secured by a mortgage or other security agreement if:

(A) The note, bond, debenture, or other evidence of indebtedness is offered and sold with the mortgage or other security agreement as a unit;

(B) A general solicitation or general advertisement of the transaction is not made; and

(C) A commission or other remuneration is not paid or given, directly or indirectly, to a person not registered under this chapter as a broker-dealer or as an agent;

(12) A transaction by an executor, commissioner of an estate, sheriff, marshal, receiver, trustee in bankruptcy, guardian, or conservator;

(13) A sale or offer to sell to:

(A) An institutional investor;

(B) A federal covered investment adviser; or

(C) Any other person exempted by rule adopted or order issued under this chapter;

(14) A sale or an offer to sell securities of an issuer if part of a single issue in which:

(A) Not more than 15 purchasers are present in this state during any 12 consecutive months, other than those designated in paragraph (13) of this Code section;

(B) A general solicitation or general advertising is not made in connection with the offer to sell or sale of the securities;

(C) A commission or other remuneration is not paid or given, directly or indirectly, to any person for soliciting a prospective purchaser in this state; and



(D) The issuer reasonably believes that all the purchasers in this state, other than those designated in paragraph (13) of this Code section, are purchasing for investment;

(15) A transaction under an offer to existing security holders of the issuer, including persons that at the date of the transaction are holders of convertible securities, options, or warrants if a commission or other remuneration, other than a standby commission, is not paid or given, directly or indirectly, for soliciting a security holder in this state;

(16) An offer to sell, but not a sale, of a security not exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., if:

(A) A registration or offering statement or similar record as required under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., has been filed but is not effective, or the offer is made in compliance with Rule 165, 17 C.F.R. 230.165, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(B) A stop order of which the offeror is aware has not been issued against the offeror by the Commissioner or the Securities and Exchange Commission, and an audit, inspection, or proceeding that is public and that may culminate in a stop order is not known by the offeror to be pending;

(17) An offer to sell, but not a sale, of a security exempt from registration under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., if:

(A) A registration statement has been filed under this chapter but is not effective;

(B) A solicitation of interest is provided in a record to offerees in compliance with a rule adopted by the Commissioner under this chapter; and

(C) A stop order of which the offeror is aware has not been issued by the Commissioner under this chapter, and an audit, inspection, or proceeding that may culminate in a stop order is not known by the offeror to be pending;

(18) A transaction involving the distribution of the securities of an issuer to the security holders of another person in connection with a merger, consolidation, exchange of securities, sale of assets, or other reorganization to which the issuer, or its parent or subsidiary, and the other person, or its parent or subsidiary, are parties;

(19) A rescission offer, sale, or purchase under Code Section 10-5-59;

(20) An offer or sale of a security to a person not a resident of this state and not present in this state if the offer or sale does not constitute a

violation of the laws of the state or foreign jurisdiction in which the offeree or purchaser is present and is not part of an unlawful plan or scheme to evade this chapter;

(21) Employees' stock purchase, savings, option, profit-sharing, pension, or similar employees' benefit plan, including any securities, plan interests, and guarantees issued under a compensatory benefit plan or compensation contract, contained in a record, and established by the issuer, its parents, its majority-owned subsidiaries, or the majority-owned subsidiaries of the issuer's parent for the participation of their employees including offers or sales of such securities to:

(A) Directors; general partners; trustees, if the issuer is a business trust; officers; consultants; and advisers;

(B) Family members who acquire such securities from those persons through gifts or domestic relations orders;

(C) Former employees, directors, general partners, trustees, officers, consultants, and advisers if those individuals were employed by or providing services to the issuer when the securities were offered; and

(D) Insurance agents who are exclusive insurance agents of the issuer or the issuer's subsidiaries or parents or who derive more than 50 percent of their annual income from those organizations;

(22) A transaction involving:

(A) A stock dividend or equivalent equity distribution, whether the corporation or other business organization distributing the dividend or equivalent equity distribution is the issuer or not, if nothing of value is given by stockholders or other equity holders for the dividend or equivalent equity distribution other than the surrender of a right to a cash or property dividend if each stockholder or other equity holder may elect to take the dividend or equivalent equity distribution in cash, property, or stock;

(B) An act incident to a judicially approved reorganization in which a security is issued in exchange for one or more outstanding securities, claims, or property interests or partly in such exchange and partly for cash; or

(C) The solicitation of tenders of securities by an offeror in a tender offer in compliance with Rule 162, 17 C.F.R. 230.162, adopted under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(23) A nonissuer transaction in an outstanding security by or through a broker-dealer registered or exempt from registration under this chapter if the issuer is a reporting issuer in a foreign jurisdiction designated by this paragraph or by rule adopted or order issued under this chapter; has been subject to continuous reporting requirements in the foreign

jurisdiction for not less than 180 days before the transaction; and the security is listed on the foreign jurisdiction's securities exchange that has been designated by this paragraph or by rule adopted or order issued under this chapter or is a security of the same issuer that is of senior or substantially equal rank to the listed security or is a warrant or right to purchase or subscribe to any of the foregoing. For purposes of this paragraph, Canada, together with its provinces and territories, is a designated foreign jurisdiction and The Toronto Stock Exchange, Inc., is a designated securities exchange. After an administrative hearing in compliance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act," the Commissioner, by rule adopted or order issued under this chapter, may revoke the designation of a securities exchange under this paragraph, if the Commissioner finds that revocation is necessary or appropriate in the public interest and for the protection of investors. (Code 1981, § 10-5-11, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Law reviews.** — For article on the definition of a security in light of the "Georgia Securities Act of 1973" and the need for maximizing investor protection, see 30 Emory L.J. 73 (1981). For survey article on business associations, see 34 Mercer L. Rev. 13 (1982). For article, uniformity under the securities laws: regulation D and the new Georgia uniform limited offering exemption, see 19 Ga. St. B.J. 74 (1982). For article, "Regulatory Evolution of Limited Offerings

in Georgia," see 20 Ga. St. B.J. 202 (1984). For article, "The Uniform Limited Offering Exemption: How 'Uniform' is 'Uniform'? — An Evaluation and Critique of the ULOE," see 36 Emory L.J. 357 (1987).

For comment, the purchase of all the shares of stock of a business is not the purchase of a "Security" within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

## JUDICIAL DECISIONS

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-9, which was subsequently repealed but was succeeded by provisions in this Code section, are included in the annotations for this Code section.

**Section strictly construed.** — Former O.C.G.A. § 10-5-9 required notice of exempt transaction marked for period of one year on any certificate or certificates and because former O.C.G.A. § 10-5-9 created an exemption from registration requirement, it would be strictly construed against anyone claiming application. *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981) (decided under former O.C.G.A. § 10-5-9).

**Burden of proving exemption from registration requirements** was on seller of unregistered securities, the party seeking its protection from liability. *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65

(1981) (decided under former O.C.G.A. § 10-5-9).

**Section requires notice** to be on any certificate or certificates. *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981) (decided under former O.C.G.A. § 10-5-9).

**Owner of stock included in the Georgia Securities Act.** — See *Jorges v. Griffin*, 161 Ga. App. 439, 288 S.E.2d 356 (1982) (decided under former O.C.G.A. § 10-5-9).

**Stock not exempt from registration.** — Exemption under paragraph (12) of O.C.G.A. § 10-5-9 did not apply where stock was sold to an individual, not a corporation, and the fact that the buyer later transferred some of the stock to new investors was of no import because the relevant period for determining whether the stock had to be registered was at the time it was offered for sale. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d



287 (1999) (decided under former O.C.G.A. § 10-5-9).

**Cited in** *Hirsch v. Equilateral Assocs.*, 245

Ga. 373, 264 S.E.2d 885 (1980); *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663 (N.D. Ga. 1990).

### OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-109, and former O.C.G.A. § 10-5-9, as amended, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this section.

**Term "other financial institution,"** found in paragraph (7) of this section, refers to any institution primarily engaged in banking, extending credit, making investments, or circulating money. 1978 Op. Att'y Gen. No. 78-71 (decided under former Code 1933, § 97-109).

**Banks are considered to fall within term "corporation"** as used in paragraph (12) of former O.C.G.A. § 10-5-9, since bank shareholders, in merger transactions, were adequately protected by other statutory provisions which effectuate investor protection purpose of the law. In addition, banks should be considered "corporations" because banks are given similar corporate powers as nonbank corporations, thereby evidencing intent on part of legislature to treat banks as corporations for purposes of general corporate law. 1981 Op. Att'y Gen. No. 81-103 (decided under former O.C.G.A. § 10-5-9).

**Registration not necessary if exempt.** — It did not necessarily follow that a scheme which constitutes a "security" under former Code 1933, § 97-102 must always be registered with the Commissioner of Securities; if a scheme fell within any of the exemptions provided in former Code 1933, § 97-108 or if the sale of such a scheme fit any of the exempt transactions set forth in former Code 1933, § 97-109, the registration requirements of the law would not apply. 1973 Op. Att'y Gen. No. 73-100 (decided under Ga. L. 1957, p. 134, as amended).

**Investment clubs.** — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security, since the offering for sale of limited partnerships constitutes the offering for sale of a "security" as

security was defined; unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att'y Gen. No. 69-328 (decided under Ga. L. 1957, p. 134, as amended).

The sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a "security" within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered. 1976 Op. Att'y Gen. No. 76-75 (decided under former Code 1933, § 97-109).

**Small issue registration provisions.** — It would be consistent with the intent of the General Assembly as manifested in the Act as a whole for a syndicator to sell interests to 40 persons concurrently if the investor was afforded the disclosures and rescission right of subsection (e) of former Code 1933, § 97-105, the prohibitions against public advertising of paragraph (13) of former Code 1933, § 97-109 were observed, and the legend and investment letter provisions of the two sections were complied with. 1974 Op. Att'y Gen. No. 74-75 (decided prior to 1975 amendment to paragraph (13) of this section).

A syndicator may sell interests to 40 investors in any 12-month period utilizing the small issue registration procedure of subsection (e) of former Code 1933, § 97-105 and the registration exemption of paragraph (13) of former Code 1933, § 97-109; if this was done in such a way that purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 were not clearly identifiable, all investors must be accorded the rights and disclosures provided for in subsection (e) of former Code 1933, § 97-105. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

In determining whether the maximum number of purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 or subsection (e) of former Code 1933, § 97-105 had been exceeded, the syndicator and the syndicator's affiliates must be counted as purchasers if the syndicators obtain or

retain an interest. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

Integration would be virtually demanded if the syndicator commingles funds and other assets belonging to purportedly separate syndications; such commingling reduces the separate syndications to the level of mere window dressing and would preclude treatment of the syndications as separate entities in determining the number of purchasers to which sales have been made. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-109).

**Fee for application for exemption nonrefundable.** — Law vests the commissioner of securities with no authority to refund the

\$250.00 filing fee tendered under former subparagraph (C) of paragraph (5) of this section when the party paying the fee subsequently withdraws the federal registration statement on which the exemption provided by that paragraph depends. 1974 Op. Att'y Gen. No. 74-150 (decided under former Code 1933, § 97-109).

The \$250.00 filing fee required by former Code 1933, § 97-109 for applications seeking a transactional exemption from the requirements of former Code 1933, § 97-105 was nonrefundable, since the legislature, had the legislature intended that a refund be implied, would have explicitly provided for one. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-109).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, § 72 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 395.

**ALR.** — Applicability of Blue Sky Laws to preincorporation subscriptions, 50 ALR2d 1103.

Sales as “isolated” or “successive” or the like, under state securities Acts, 1 ALR3d 614.

What constitutes “public” or “private” offering within meaning of state securities regulation, 84 ALR3d 1009.

#### **10-5-12. Exemption of securities, transactions, or offers by adoption of rule or issuance of order.**

A rule adopted or order issued under this chapter may exempt a security, transaction, or offer; a rule adopted under this chapter may exempt a class of securities, transactions, or offers from any or all of the requirements of Article 3 of this chapter and Code Section 10-5-53; and an order issued under this chapter may waive, in whole or in part, any or all of the conditions for an exemption or offer under Code Sections 10-5-10 and 10-5-11. (Code 1981, § 10-5-12, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-13. Denial, suspension, or revocation of exemption.**

(a) Except with respect to a federal covered security or a transaction involving a federal covered security, an order issued under this chapter may deny, suspend application of, condition, limit, or revoke an exemption created under subparagraph (C) of paragraph (3) or paragraph (7) or (8) of Code Section 10-5-10 or under Code Section 10-5-11 or an exemption or waiver created under Code Section 10-5-12 with respect to a specific security, transaction, or offer. An order issued under this Code section may be issued only pursuant to the procedures in subsection (d) of Code Section 10-5-25 or 10-5-73 and only prospectively.

(b) A person does not violate Code Section 10-5-20, 10-5-22 through 10-5-25, 10-5-53, or 10-5-59 by an offer to sell, offer to purchase, sale, or purchase effected after the entry of an order issued under this Code section if the person did not know, and in the exercise of reasonable care could not have known, of the order. (Code 1981, § 10-5-13, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

### ARTICLE 3

## REGISTRATION OF SECURITIES

**Law reviews.** — For article, “Uniformity Under the Securities Laws: Regulation D and the New Georgia Uniform Limited Offering Exemption,” see 19 Ga. St. B.J. 74 (1982). For article, “Regulatory Evolution of Limited Offerings in Georgia,” see 20 Ga. St. B.J. 202 (1984).

For comment, “The Purchase of All the Shares of Stock of a Business Is Not the Purchase of a ‘Security’ within the Meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973,” see 30 Emory L.J. 1212 (1981).

### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-105, and former O.C.G.A. § 10-5-5, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

**Nonprofit corporations.** — Prior to April 24, 1975, nonprofit corporations were not subject to registration or regulation under the securities law, but by Ga. L. 1975, p. 928, § 11, the statute became applicable to non-profit corporations. *Blau v. Redmond*, 143 Ga. App. 897, 240 S.E.2d 273 (1977) (decided under former Code 1933, § 97-105).

**Chapter inapplicable if neither promoter nor investor seeks profit.** — If the promoter is not engaged in a profit-making enterprise and the investor cannot secure any financial advantage, the security provisions did not apply. *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) (decided under former Code 1933, § 97-105).

**Chapter may apply if either promoter or investor anticipates financial return.** — If the promoter is engaged in a profit-making enterprise but the investor will receive no financial return or if the promoter is a nonprofit corporation but the investor antic-

ipates a financial return (e.g., sale of interest-bearing bonds), the securities provisions may apply. *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) (decided under former Code 1933, § 97-105).

**Securities of nonprofit corporation promising profit to investor.** — Former Code 1933, § 97-105 covered instruments issued by nonprofit corporations since the incentive to purchase was the promise of profit to the investor. An example of this type of security would be the sale of interest-bearing bonds by a nonprofit corporation. *Dunwoody Country Club of Atlanta, Inc. v. Fortson*, 243 Ga. 236, 253 S.E.2d 700 (1979) (decided under former Code 1933, § 97-105).

**Individual desiring to sell stock owned by an individual, not otherwise registered,** would have to register as a limited dealer under former O.C.G.A. § 10-5-5. *Jorges v. Griffin*, 161 Ga. App. 439, 288 S.E.2d 356 (1982) (decided under former O.C.G.A. § 10-5-5).

**Stock not exempt from registration.** — The exemption under former Code 1933, § 97-109 did not apply since the stock was sold to an individual, not a corporation and the fact that the buyer later transferred some of the stock to new investors was of no import because the relevant period for de-



termining whether the stock had to be registered was at the time it was offered for sale. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-5).

**Right of rescission.** — Although security provisions did not define “purchaser” to whom the election of voiding an illegal sale was given, it was apparent that this referred to the one to whom the sale or disposition was made, especially when the certificate was issued directly to a party, designating him or her by name. The word “purchaser” may be used in a broad sense to include those who acquire title for a monetary consideration; however, as commonly employed and as ordinarily used a “purchaser” was understood to be one who obtains through negotiation or the like, for a consideration. *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962) (decided under former Ga. L. 1957, p. 134, as amended).

**Transaction held not taking place in Georgia.** — If a plaintiff, a Georgia resident, and

a defendant, a Tennessee resident, discussed by telephone an arrangement whereby the defendant’s company would serve as plaintiff’s investment advisor in trading of commodity futures and the defendant mailed to the plaintiff two letter agreements, setting out the contract terms and the plaintiff signed the agreements and returned the agreements for signature of the other party, under Georgia law the transaction did not take place in Georgia. *Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeyer, Inc.*, 608 F.2d 175 (5th Cir. 1979) (decided under former Code 1933, § 97-105).

**Cited in** *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980); *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980); *Martin v. T.V. Tempo, Inc.*, 628 F.2d 887 (5th Cir. 1980); *Novatex Sales, Inc. v. Prince*, 159 Ga. App. 559, 284 S.E.2d 65 (1981); *Putnam v. Williams*, 652 F.2d 497 (5th Cir. 1981); *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981); *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577 (1991).

#### OPINIONS OF THE ATTORNEY GENERAL

**Editor’s notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, as amended, former Code 1933, § 97-105, and former O.C.G.A. § 10-5-5, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

**Limited partnership interest.** — The offering for sale of limited partnerships constitutes the offering for sale of a “security”. Unless exempted or involved in an exempt transaction, such securities must be registered. 1969 Op. Att’y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

A limited partnership is explicitly defined to be a “security” by former Code 1933, § 97-102. 1974 Op. Att’y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

**Investment club interest.** — If the formation of an investment club were essentially the same as that for a limited partnership, such an interest would be a security. 1969 Op. Att’y Gen. No. 69-328 (decided under former Ga. L. 1957, p. 134, as amended).

**Time-sharing units in condominium with profit-sharing arrangement.** — The sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constituted a “security” within the definition of former Code 1933, § 97-102 and, unless exempt, must be registered pursuant to the statutory provisions on securities. 1976 Op. Att’y Gen. No. 76-75 (decided under former Code 1933, § 97-105).

**Mortgages structured or promoted as investment contracts.** — Sales of mortgages described in paragraph (10) of former Code 1933, § 97-108 were exempt from the registration requirement of former Code 1933, § 97-105 but mortgage offerings which are structured or promoted in such a way that the mortgages become investment contracts must be registered pursuant to § 97-105 unless the mortgages qualify for some exemption from registration other than paragraph (10) of § 97-108. 1974 Op. Att’y Gen. No. 74-153 (decided under former Code 1933, § 97-102).

**Registration not required unless activity occurs in Georgia.** — Georgia courts would

probably hold that the securities registration provisions of this chapter do not apply to transactions involving a Georgia issuer where no sale or offer to sell occurs within Georgia; but if certain activities were carried on in Georgia, this could bring the transactions under the law of this state. 1970 Op. Att'y Gen. No. U70-88 (decided under Ga. L. 1957, p. 134, as amended).

**Small issue registration and exemption provisions.** — It would be consistent with the intent of the General Assembly as manifested in the security law as a whole for a syndicator to sell interests to 40 persons concurrently if the investor was afforded the disclosures and rescission right of subsection (e) of former Code 1933, § 97-105, the prohibitions against public advertising of paragraph (13) of former Code 1933, § 97-109 are observed, and the legend and investment letter provisions of the two sections are complied with. 1974 Op. Att'y Gen. No. 74-75 (decided prior to 1975 amendment to paragraph (13) of former Code 1933, § 97-109; decided under former Code 1933, § 97-105).

A syndicator may sell interests to 40 investors in any 12-month period utilizing the small issue registration procedure of subsection (e) of former Code 1933, § 97-105 and the registration exemption of paragraph (13) of former Code 1933, § 97-109; if this is done in such a way that purchasers pursuant to paragraph (13) of § 97-109 are not clearly identifiable, all investors must be accorded the rights and disclosures provided for in subsection (e) of § 97-105. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

In determining whether the maximum number of purchasers pursuant to paragraph (13) of former Code 1933, § 97-109 or subsection (e) of former Code 1933, § 97-105 had been exceeded, the syndicator and the syndicator's affiliates must be counted as purchasers if the syndicators ob-

tain or retain an interest. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

Integration would be virtually demanded if the syndicator commingles funds and other assets belonging to purportedly separate syndications; such commingling reduces the separate syndications to the level of mere window dressing and would preclude treatment of the syndications as separate entities in determining the number of purchasers to which sales have been made. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-105).

**National banks.** — A national bank should be viewed as a corporation within the purview of subparagraph (f)(3)(B) of former O.C.G.A. § 10-5-5. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

National banks whose principal offices are located within Georgia must as a matter of federal law be deemed qualified to do business in Georgia. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

In the absence of a superseding provision of federal law, a national bank whose principal office is located in a state other than Georgia may qualify to do business in Georgia under subparagraph (f)(3)(B) of former O.C.G.A. § 10-5-5 by compliance with either former Art. 14, Ch. 2, T. 44 or former Ch. 16, T. 53. 1982 Op. Att'y Gen. No. 82-47 (decided under former O.C.G.A. § 10-5-5).

**Fee for application for exemption not refundable.** — The \$250.00 filing fee required by paragraph (5) of former Code 1933, § 97-109 for applications seeking a transactional exemption from the requirements of former Code 1933, § 97-105 is nonrefundable, since the legislature, had it intended that a refund be implied, would have explicitly provided for one. 1975 Op. Att'y Gen. No. 75-79 (decided under former Code 1933, § 97-105).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, §§ 17 et seq., 25 et seq., 31, 54.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 372 et seq.

**ALR.** — Applicability of Blue Sky Laws to preincorporation subscriptions, 50 ALR2d 1103.

Sale of memberships in club or similar organization as sale of securities within provisions of securities Acts, 87 ALR2d 1140.

Sales as “isolated” or “successive” or the like, under state securities Acts, 1 ALR3d 614.

Attorney’s preparation of legal document incident to sale of securities as rendering him liable under state securities regulation statutes, 62 ALR3d 252.

What securities are exempt from registration under § 402 (a) of the Uniform Securities Act, 84 ALR3d 575.

Persons entitled to relief under civil liability provisions of § 12 of Securities Act of 1933 (15 USC § 77l), 113 ALR Fed. 575.

### 10-5-20. Restrictions on sales of securities.

It is unlawful for a person to offer or sell a security in this state unless:

- (1) The security is a federal covered security;
- (2) The security, transaction, or offer is exempted from registration under Code Sections 10-5-10 through 10-5-12; or
- (3) The security is registered under this chapter. (Code 1981, § 10-5-20, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

### 10-5-21. Filing of records.

(a) With respect to a federal covered security, as defined in Section 18(b)(2) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(2), that is not otherwise exempt under Code Sections 10-5-10 through 10-5-12, a rule adopted or order issued under this chapter may require the filing of any or all of the following records:

(1) Before the initial offer of a federal covered security in this state, all records that are part of a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., and a consent to service of process complying with Code Section 10-5-80 signed by the issuer and the payment of a fee of \$250.00;

(2) After the initial offer of the federal covered security in this state, all records that are part of an amendment to a federal registration statement filed with the Securities and Exchange Commission under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.; and

(3) To the extent necessary or appropriate to compute fees, a report of the value of the federal covered securities sold or offered to persons present in this state, if the sales data are not included in records filed with the Securities and Exchange Commission and payment of a fee of \$250.00.

(b) A notice filing under subsection (a) of this Code section is effective for one year commencing on the later of the notice filing or the effectiveness of the offering filed with the Securities and Exchange Commission. On or before expiration, the issuer may renew a notice filing by filing a copy of those records filed by the issuer with the Securities and Exchange Commis-



sion that are required by rule adopted or order issued under this chapter to be filed and by paying a renewal fee of \$100.00. A previously filed consent to service of process complying with Code Section 10-5-80 may be incorporated by reference in a renewal. A renewed notice filing becomes effective upon the expiration of the filing being renewed.

(c) With respect to a security that is a federal covered security under Section 18(b)(4)(D) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(4)(D), a rule adopted under this chapter may require a notice filing by or on behalf of an issuer to include a copy of Form D, including the Appendix, as promulgated by the Securities and Exchange Commission, and a consent to service of process complying with Code Section 10-5-80 signed by the issuer not later than 15 days after the first sale of the federal covered security in this state and the payment of a fee of \$250.00.

(d) Except with respect to a federal security under Section 181(b)(1) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(1), if the Commissioner finds that there is a failure to comply with a notice or fee requirement of this Code section, the Commissioner may issue a stop order suspending the offer and sale of a federal covered security in this state. If the deficiency is corrected, the stop order is void as of the time of its issuance and no penalty may be imposed by the Commissioner. (Code 1981, § 10-5-21, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-22. Registration by coordination; additional records; effective date of federal registration statement.**

(a) A security for which a registration statement has been filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., in connection with the same offering may be registered by coordination under this Code section.

(b) A registration statement and accompanying records under this Code section must contain or be accompanied by the following records in addition to the information specified in Code Section 10-5-24 and a consent to service of process complying with Code Section 10-5-80:

(1) A copy of the latest form of prospectus filed under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq.;

(2) A copy of the articles of incorporation and bylaws or their substantial equivalents currently in effect; a copy of any agreement with or among underwriters; a copy of any indenture or other instrument governing the issuance of the security to be registered; and a specimen, copy, or description of the security that is required by rule adopted or order issued under this chapter;

(3) Copies of any other information or any other records filed by the issuer under the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., requested by the Commissioner; and

(4) An undertaking to forward each amendment to the federal prospectus, other than an amendment that delays the effective date of the registration statement, promptly after it is filed with the Securities and Exchange Commission.

(c) A registration statement under this Code section becomes effective simultaneously with or subsequent to the federal registration statement when all the following conditions are satisfied:

(1) A stop order issued under subsection (d) of this Code section or Code Section 10-5-25 or issued by the Securities and Exchange Commission is not in effect and a proceeding is not pending against the issuer under Code Section 10-5-41; and

(2) The registration statement has been on file for at least 20 days or a shorter period provided by rule adopted or order issued under this chapter.

(d) The registrant shall promptly notify the Commissioner in a record of the date when the federal registration statement becomes effective and the content of any price amendment and shall promptly file a record containing the price amendment. If the notice is not timely received, the Commissioner may issue a stop order, without prior notice or hearing, retroactively denying effectiveness to the registration statement or suspending its effectiveness until compliance with this Code section. The Commissioner shall promptly notify the registrant of an order by telephone or electronic means and promptly confirm this notice by a record. If the registrant subsequently complies with the notice requirements of this Code section, the stop order is void as of the date of its issuance.

(e) If the federal registration statement becomes effective before each of the conditions in this Code section is satisfied or is waived by the Commissioner, the registration statement is automatically effective under this chapter when all the conditions are satisfied or waived. If the registrant notifies the Commissioner of the date when the federal registration statement is expected to become effective, the Commissioner shall promptly notify the registrant by telephone or electronic means and promptly confirm this notice by a record, indicating whether all the conditions are satisfied or waived and whether the Commissioner intends the institution of a proceeding under Code Section 10-5-25. The notice by the Commissioner does not preclude the institution of such a proceeding. (Code 1981, § 10-5-22, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-23. Registration by qualification; additional information and records required; effective date.**

(a) A security may be registered by qualification under this Code section.

(b) A registration statement under this Code section must contain the information or records specified in Code Section 10-5-24, a consent to

service of process complying with Code Section 10-5-80, and, if required by rule adopted under this chapter, the following information or records:

(1) With respect to the issuer and any significant subsidiary, its name, address, and form of organization; the state or foreign jurisdiction and date of its organization; the general character and location of its business; a description of its physical properties and equipment; and a statement of the general competitive conditions in the industry or business in which it is or will be engaged;

(2) With respect to each director and officer of the issuer and other person having a similar status or performing similar functions, the person's name, address, and principal occupation for the previous five years; the amount of securities of the issuer held by the person as of the thirtieth day before the filing of the registration statement; the amount of the securities covered by the registration statement to which the person has indicated an intention to subscribe; and a description of any material interest of the person in any material transaction with the issuer or a significant subsidiary effected within the previous three years or proposed to be effected;

(3) With respect to persons covered by paragraph (2) of this subsection, the aggregate sum of the remuneration paid to those persons during the previous 12 months and estimated to be paid during the next 12 months, directly or indirectly, by the issuer and all predecessors, parents, subsidiaries, and affiliates of the issuer;

(4) With respect to a person owning of record or owning beneficially, if known, 10 percent or more of the outstanding shares of any class of equity security of the issuer, the information specified in paragraph (2) of this subsection other than the person's occupation;

(5) With respect to a promoter, if the issuer was organized within the previous three years, the information or records specified in paragraph (2) of this subsection, any amount paid to the promoter within that period or intended to be paid to the promoter and the consideration for the payment;

(6) With respect to a person on whose behalf any part of the offering is to be made in a nonissuer distribution, the person's name and address; the amount of securities of the issuer held by the person as of the date of the filing of the registration statement; a description of any material interest of the person in any material transaction with the issuer or any significant subsidiary effected within the previous three years or proposed to be effected; and a statement of the reasons for making the offering;

(7) The capitalization and long term debt, on both a current and pro forma basis, of the issuer and any significant subsidiary, including a



description of each security outstanding or being registered or otherwise offered, and a statement of the amount and kind of consideration, whether in the form of cash, physical assets, services, patents, good will, or anything else of value, for which the issuer or any subsidiary has issued its securities within the previous two years or is obligated to issue its securities;

(8) The kind and amount of securities to be offered; the proposed offering price or the method by which it is to be computed; any variation at which a proportion of the offering is to be made to a person or class of persons other than the underwriters, with a specification of the person or class; the basis on which the offering is to be made if otherwise than for cash; the estimated aggregate underwriting and selling discounts or commissions and finders' fees, including separately cash, securities, contracts, or anything else of value to accrue to the underwriters or finders in connection with the offering or, if the selling discounts or commissions are variable, the basis of determining them and their maximum and minimum amounts; the estimated amounts of other selling expenses, including legal, engineering, and accounting charges; the name and address of each underwriter and each recipient of a finder's fee; a copy of any underwriting or selling group agreement under which the distribution is to be made or the proposed form of any such agreement whose terms have not yet been determined; and a description of the plan of distribution of any securities that are to be offered otherwise than through an underwriter;

(9) The estimated monetary proceeds to be received by the issuer from the offering; the purposes for which the proceeds are to be used by the issuer; the estimated amount to be used for each purpose; the order or priority in which the proceeds will be used for the purposes stated; the amounts of any funds to be raised from other sources to achieve the purposes stated; the sources of the funds; and, if a part of the proceeds is to be used to acquire property, including good will, otherwise than in the ordinary course of business, the names and addresses of the vendors, the purchase price, the names of any persons that have received commissions in connection with the acquisition, and the amounts of the commissions and other expenses in connection with the acquisition, including the cost of borrowing money to finance the acquisition;

(10) A description of any stock options or other security options outstanding or to be created in connection with the offering and the amount of those options held or to be held by each person required to be named in paragraph (2), (4), (5), (6), or (8) of this subsection and by any person that holds or will hold 10 percent or more in the aggregate of those options;

(11) The dates of, parties to, and general effect concisely stated of each managerial or other material contract made or to be made

otherwise than in the ordinary course of business to be performed in whole or in part at or after the filing of the registration statement or that was made within the previous two years and a copy of the contract;

(12) A description of any pending litigation, action, or proceeding to which the issuer is a party and that materially affects its business or assets and any litigation, action, or proceeding known to be contemplated by governmental authorities;

(13) A copy of any prospectus, pamphlet, circular, form letter, advertisement, or other sales literature intended as of the effective date to be used in connection with the offering and any solicitation of interest used in compliance with subparagraph (B) of paragraph (17) of Code Section 10-5-11;

(14) A specimen or copy of the security being registered, unless the security is uncertificated; a copy of the issuer's articles of incorporation and bylaws or their substantial equivalents, in effect; and a copy of any indenture or other instrument covering the security to be registered;

(15) A signed or conformed copy of an opinion of counsel concerning the legality of the security being registered, with an English translation if it is in a language other than English, which states whether the security when sold will be validly issued, fully paid, and nonassessable and, if a debt security, a binding obligation of the issuer;

(16) A signed or conformed copy of a consent of any accountant, engineer, appraiser, or other person whose profession gives authority for a statement made by the person if the person is named as having prepared or certified a public report or valuation, other than an official record, which is used in connection with the registration statement;

(17) A balance sheet of the issuer as of a date within four months before the filing of the registration statement; a statement of income and changes in financial position for each of the three fiscal years preceding the date of the balance sheet and for any period between the close of the immediately previous fiscal year and the date of the balance sheet or for the period of the issuer's and any predecessor's existence if less than three years; and, if any part of the proceeds of the offering is to be applied to the purchase of a business, the financial statements that would be required if that business were the registrant; and

(18) Any additional information or records required by rule adopted or order issued under this chapter.

(c) A registration statement under this Code section becomes effective 30 days after the date the registration statement or the last amendment other than a price amendment is filed, unless any shorter period is provided by a rule adopted or order issued under this chapter, if:

(1) A stop order is not in effect and a proceeding is not pending under Code Section 10-5-25;

(2) The Commissioner has not issued an order under Code Section 10-5-25 delaying effectiveness; and

(3) The applicant or registrant has not requested that effectiveness be delayed.

(d) The Commissioner may delay effectiveness once for not more than 90 days if the Commissioner determines the registration statement is not complete in all material respects and promptly notifies the applicant or registrant of that determination. The Commissioner may also delay effectiveness for a further period of not more than 30 days if the Commissioner determines that the delay is necessary or appropriate.

(e) A rule adopted or order issued under this chapter may require as a condition of registration under this Code section that a prospectus containing a specified part of the information or record specified in subsection (b) of this Code section be sent or given to each person to which an offer is made before or concurrently with the earliest of:

(1) The first offer made in a record to the person, otherwise than by means of a public advertisement, by or for the account of the issuer or another person on whose behalf the offering is being made or by an underwriter or broker-dealer that is offering part of an unsold allotment or subscription taken by the person as a participant in the distribution;

(2) The confirmation of a sale made by or for the account of the person;

(3) Payment pursuant to such a sale; or

(4) Delivery of the security pursuant to such a sale. (Code 1981, § 10-5-23, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-24. Who may file registration statement; conditions of registration; amendment.**

(a) A registration statement may be filed by the issuer, a person on whose behalf the offering is to be made, or a broker-dealer registered under this chapter.

(b) If a registration statement is withdrawn before the effective date or a pre-effective stop order is issued under Code Section 10-5-25, the Commissioner shall retain the fee.

(c) A registration statement filed under Code Section 10-5-22 or 10-5-23 must specify:

(1) The amount of securities to be offered in this state;



(2) The states in which a registration statement or similar record in connection with the offering has been or is to be filed; and

(3) Any adverse order, judgment, or decree issued in connection with the offering by a state securities administrator, the Securities and Exchange Commission, or a court.

(d) A record filed under this chapter or the predecessor Act within five years preceding the filing of a registration statement may be incorporated by reference in the registration statement to the extent that the record is currently accurate.

(e) In the case of a nonissuer distribution, information or a record shall not be required under subsection (i) of this Code section or under Code Section 10-5-23, unless it is known to the person filing the registration statement or to the person on whose behalf the distribution is to be made or unless it can be furnished by those persons without unreasonable effort or expense.

(f) A rule adopted or order issued under this chapter may require as a condition of registration that a security issued within the previous five years or to be issued to a promoter for a consideration substantially less than the public offering price or to a person for a consideration other than cash be deposited in escrow; and that the proceeds from the sale of the registered security in this state be impounded until the issuer receives a specified amount from the sale of the security either in this state or elsewhere. The conditions of any escrow or impoundment required under this subsection may be established by rule adopted or order issued under this chapter, but the Commissioner may not reject a depository institution solely because of its location in another state.

(g) A rule adopted or order issued under this chapter may require as a condition of registration that a security registered under this chapter be sold only on a specified form of subscription or sale contract and that a signed or conformed copy of each contract be filed under this chapter or preserved for a period specified by the rule or order, which may not be longer than five years.

(h) Except while a stop order is in effect under Code Section 10-5-25, a registration statement is effective for one year after its effective date or for any longer period designated in an order under this chapter during which the security is being offered or distributed in a nonexempted transaction by or for the account of the issuer or other person on whose behalf the offering is being made or by an underwriter or broker-dealer that is still offering part of an unsold allotment or subscription taken as a participant in the distribution. For the purposes of a nonissuer transaction, all outstanding securities of the same class identified in the registration statement as a security registered under this chapter are considered to be registered while the registration statement is effective. If any securities of

the same class are outstanding, a registration statement may not be withdrawn until one year after its effective date. A registration statement may be withdrawn only with the approval of the Commissioner.

(i) While a registration statement is effective, a rule adopted or order issued under this chapter may require the person that filed the registration statement to file reports, not more often than quarterly, to keep the information or other record in the registration statement reasonably current, and to disclose the progress of the offering.

(j) A registration statement may be amended after its effective date. The post-effective amendment becomes effective when the Commissioner so orders. A post-effective amendment relates back to the date of the offering of the additional securities being registered if, within one year after the date of the sale, the amendment is filed and the additional registration fee is paid. (Code 1981, § 10-5-24, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-25. Denying, suspending, or revoking the effectiveness of registration statement; publication of standards providing notice of conduct constituting violations; notice and hearing.**

(a) The Commissioner may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, a registration statement if the Commissioner finds that the order is in the public interest and that:

(1) The registration statement as of its effective date or before the effective date in the case of an order denying effectiveness, an amendment under subsection (j) of Code Section 10-5-24 as of its effective date, or a report under subsection (i) of Code Section 10-5-24 is incomplete in a material respect or contains a statement that, in the light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) This chapter or a rule adopted or order issued under this chapter or a condition imposed under this chapter has been willfully violated, in connection with the offering, by the person filing the registration statement; by the issuer, a partner, officer, or director of the issuer or a person having a similar status or performing a similar function; by a promoter of the issuer; or by a person directly or indirectly controlling or controlled by the issuer but only if the person filing the registration statement is directly or indirectly controlled by or acting for the issuer; or by an underwriter;

(3) The security registered or sought to be registered is the subject of a permanent or temporary injunction of a court of competent jurisdiction or an administrative stop order or similar order issued under any federal, foreign, or state law other than this chapter applicable to the offering, but the Commissioner may not institute a proceeding against an

effective registration statement under this paragraph more than one year after the date of the order or injunction on which it is based, and the Commissioner may not issue an order under this paragraph on the basis of an order or injunction issued under the securities act of another state unless the order or injunction was based on conduct that would constitute, as of the date of the order, a ground for a stop order under this Code section;

(4) The issuer's enterprise or method of business includes or would include activities that are unlawful where performed;

(5) With respect to a security sought to be registered under Code Section 10-5-22, there has been a failure to comply with the undertaking required by paragraph (4) of subsection (b) of said Code section;

(6) The applicant or registrant has not paid the filing fee, but the Commissioner shall void the order if the deficiency is corrected; or

(7) The offering:

(A) Will work or tend to work a fraud upon purchasers or would so operate; or

(B) Has been or would be made with unreasonable amounts of underwriters' and sellers' discounts, commissions, or other compensation or promoters' profits or participations or unreasonable amounts or kinds of options; or

(C) Is being made on terms that are unfair, unjust, or inequitable.

(b) To the extent practicable, the Commissioner by rule adopted or order issued under this chapter shall publish standards that provide notice of conduct that violates paragraph (7) of subsection (a) of this Code section.

(c) The Commissioner may not institute a stop order proceeding against an effective registration statement on the basis of conduct or a transaction known to the Commissioner when the registration statement became effective unless the proceeding is instituted within 30 days after the registration statement became effective.

(d) The Commissioner may summarily revoke, deny, postpone, or suspend the effectiveness of a registration statement pending final determination of an administrative proceeding. Upon the issuance of the order, the Commissioner shall promptly notify each person specified in subsection (e) of this Code section that the order has been issued, the reasons for the revocation, denial, postponement, or suspension, and that within 30 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final. If a hearing is requested or ordered, the



Commissioner, after notice of and opportunity for hearing for each person subject to the order, may modify or vacate the order or extend the order until final determination.

(e) A stop order may not be issued under this Code section without:

(1) Appropriate notice to the applicant or registrant, the issuer, and the person on whose behalf the securities are to be or have been offered;

(2) An opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

(f) The Commissioner may modify or vacate a stop order issued under this Code section if the Commissioner finds that the conditions that caused its issuance have changed or that it is necessary or appropriate in the public interest or for the protection of investors. (Code 1981, § 10-5-25, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Law reviews.** — For article, “Start Making Trading Regulation,” see 26 Ga. L. Rev. 179 (1992). Sense: An Analysis and Proposal for Insider

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities and Commodity Futures Trading Regulation — State, § 55 et seq. Regulation, § 412 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation

#### 10-5-26. Waiver or modification of requirements by Commissioner.

The Commissioner may waive or modify, in whole or in part, any or all of the requirements of Code Sections 10-5-21, 10-5-22, and subsection (b) of Code Section 10-5-23 or the requirement of any information or record in a registration statement or in a periodic report filed pursuant to subsection (i) of Code Section 10-5-24. (Code 1981, § 10-5-26, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

### ARTICLE 4

#### REGISTRATION OF BROKER-DEALERS, AGENTS, AND INVESTMENT ADVISORS

#### JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former Code 1933, § 97-103 and former O.C.G.A. § 10-5-3, which were subsequently repealed but were succeeded by provisions

in this article, are included in the annotations for this article.

**Sale of shares of stock.** — Shares of stock were “securities” which it was unlawful to sell in violation of former Code 1933,

§ 97-103 and subsection (a) of former Code 1933, § 97-112. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-103).

Demand promissory note and option to purchase shares of corporation given in exchange for checks for \$12,500.00 was a transaction to which requirements of former Code 1933, §§ 97-103 and 97-112 applied. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-103).

**Subsection (a) only violated by listed persons.** — Where the defendants did not come within any of the categories of persons, as defined in former Code 1933, § 97-102, which were required by subsection (a) of former Code 1933, § 97-103 to be registered, it follows that the sale of limited partnership interests by them was not violative of subsection (a) of § 97-103. *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980) (decided under former Code 1933, § 97-103).

**Owner of stock included in security provisions.** — See *Jorges v. Griffin*, 161 Ga. App. 439, 288 S.E.2d 356 (1982) (decided under former O.C.G.A. § 10-5-3).

**Burden on controlling officer seeking to avoid liability.** — Former Code 1933, § 97-114 imposed liability upon the controlling officer of a corporation for a transaction executed by corporate treasurer administering affairs in the officer's absence, which transaction violated former Code 1933, §§ 97-103 and 97-112, if the officer directly or indirectly controlled the treasurer, unless the officer sustained burden of proof that the officer did not know, and in exercise of reasonable care could not have known, existence of facts by reason of which liability was alleged to exist. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former O.C.G.A. § 10-5-3).

**Dealers.** — Whether defendant was a "dealer" was immaterial since the evidence at trial was sufficient for a jury to find that the defendant was a "salesman" pursuant to former O.C.G.A. § 10-5-2(a)(25). *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577, cert. denied, 199 Ga. App. 906, 404 S.E.2d 557 (1991) (decided under former O.C.G.A. § 10-5-3).

**Cited in** *Martin v. T.V. Tempo, Inc.*, 628 F.2d 887 (5th Cir. 1980); *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981).

## OPINIONS OF THE ATTORNEY GENERAL

**Editor's notes.** — In light of the similarity of the statutory provisions, opinions under former Ga. L. 1957, p. 134, former Code 1933, § 97-103, and former O.C.G.A. § 10-5-3, as amended, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

**New York license to sell securities was not valid in Georgia.** 1969 Op. Att'y Gen. No. 69-102 (decided under former Ga. L. 1957, p. 134, as amended).

**Citizenship is not prerequisite to registration** as a dealer, limited dealer, salesman, or limited salesman. 1970 Op. Att'y Gen. No. 70-113 (decided under former Ga. L. 1957, p. 134, as amended).

**Foreign corporation also needs certificate of authority.** — Registration as a dealer does not exempt a foreign corporation from needing a certificate of authority. 1975 Op. Att'y Gen. No. 75-38 (decided under former Code 1933, § 97-103).

**Partner or officer in real estate syndicate may be "dealer" or "salesman".** — A general partner or executive officer of a real estate syndication should not be excluded from the definition of "salesman" or "dealer" merely because the person receives compensation or profit in the form of a profit on sales to the syndication, a real estate brokerage commission, a management fee, or some other form which is not an explicit commission for the sale of securities. 1974 Op. Att'y Gen. No. 74-75 (decided under former Code 1933, § 97-103).

**Sellers of mortgage securities.** — A person who engages in the business of selling mortgage securities to the public is required to register as a dealer, and the individuals who work for such a dealer are required to register as salesmen unless the individuals qualify for one of the exemptions enumerated in this section. 1974 Op. Att'y Gen. No. 74-153 (decided under former Code 1933, § 97-103).

**Sellers of time-sharing units in condominiums with profit-sharing arrangements.** — The sale of time-sharing units in a condominium when coupled with a rental pool or other profit-sharing arrangement constitutes a “security” within the definition of former Code 1933, § 97-103, and any person offering for sale or selling such securities must register as a dealer, limited dealer, salesman, or limited salesman unless such a person was a real estate broker or salesman licensed to sell real estate in Georgia. 1976 Op. Att’y Gen. No. 76-75 (decided under former Code 1933, § 97-103).

**Activities described in section bring transaction under chapter.** — Georgia courts would probably hold that the securities registration provisions did not apply to transactions involving a Georgia issuer if no sale or offer to sell occurred within Georgia; but if activities described in Ga. L. 1957, p. 134 are carried on in Georgia, this could bring the

transactions under the law of this state. 1970 Op. Att’y Gen. No. U70-88 (decided under former Ga. L. 1957, p. 134, as amended).

**Fees part of application.** — General Assembly intended registration fees to be part of the application process without which the application for registration could not be considered complete and hence could not be acted upon. 1975 Op. Att’y Gen. No. 75-79 (decided under former Code 1933, § 97-103).

**Refund of fees if application withdrawn not authorized.** — Statutory security provisions did not vest the commissioner of securities with authority to refund the registration fees required by this section as part of the application for registration as a dealer, limited dealer, salesman, or limited salesman should an applicant withdraw an application. 1975 Op. Att’y Gen. No. 75-79 (decided under former Code 1933, § 97-103).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, §§ 15, 17 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 372 et seq.

**ALR.** — Liability of seller to purchaser of invalid nonnegotiable public warrants, bonds, certificates, or other documents, 139 ALR 1426.

Applicability of Blue Sky Laws to preincorporation subscriptions, 50 ALR2d 1103.

Who is “dealer” under state securities Acts exempting sales by owners other than issuers not made in course of successive transactions, and the like, 6 ALR3d 1425.

#### 10-5-30. Registration requirements for broker-dealers; exemptions.

(a) It is unlawful for a person to transact business in this state as a broker-dealer unless the person is registered under this chapter as a broker-dealer or is exempt from registration as a broker-dealer under subsection (b) or (d) of this Code section.

(b) The following persons are exempt from the registration requirement of subsection (a) of this Code section:

(1) A broker-dealer without a place of business in this state if its only transactions effected in this state are with:

(A) The issuer of the securities involved in the transactions;

(B) A person registered as a broker-dealer under this chapter or not required to be registered as a broker-dealer under this chapter;

(C) An institutional investor;



(D) A nonaffiliated federal covered investment adviser with investments under management in excess of \$100 million acting for the account of others pursuant to discretionary authority in a signed record;

(E) A bona fide preexisting customer whose principal place of residence is not in this state and the person is registered as a broker-dealer under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities act of the state in which the customer maintains a principal place of residence;

(F) A bona fide preexisting customer whose principal place of residence is in this state but was not present in this state when the customer relationship was established, if:

(i) The broker-dealer is registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities laws of the state in which the customer relationship was established and where the customer had maintained a principal place of residence; and

(ii) Within 45 days after the customer's first transaction in this state, the person files an application for registration as a broker-dealer in this state and a further transaction is not effected more than 75 days after the date on which the application is filed, or, if earlier, the date on which the Commissioner notifies the person that the Commissioner has denied the application for registration or has stayed the pendency of the application for good cause;

(G) Not more than three customers in this state during the previous 12 months, in addition to those customers specified in subparagraphs (A) through (F) and subparagraph (H) of this paragraph, if the broker-dealer is registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., or not required to be registered under the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and is registered under the securities act of the state in which the broker-dealer has its principal place of business; and

(H) Any other person exempted by rule adopted or order issued under this chapter; and

(2) A person that deals solely in United States government securities and is supervised as a dealer in government securities by the Board of Governors of the Federal Reserve System, the Comptroller of the Currency, the Federal Deposit Insurance Corporation, or the Office of Thrift Supervision.

(c) It is unlawful for a broker-dealer or for an issuer engaged in offering, offering to purchase, purchasing, or selling securities in this state, directly or indirectly, to employ or associate with an individual to engage in an activity related to securities transactions in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with a broker-dealer, an issuer, an investment adviser, or a federal covered investment adviser by an order of the Commissioner under this chapter, the Securities and Exchange Commission, or a self-regulatory organization. A broker-dealer or issuer does not violate this subsection if the broker-dealer or issuer did not know and in the exercise of reasonable care could not have known of the suspension, revocation, or bar. Upon request from a broker-dealer or issuer and for good cause, an order under this chapter may modify or waive, in whole or in part, the application of the prohibitions of this subsection to the broker-dealer.

(d) A rule adopted or order issued under this chapter may permit:

(1) A broker-dealer that is registered in Canada or other foreign jurisdiction and that does not have a place of business in this state to effect transactions in securities with or for or attempt to effect the purchase or sale of any securities by:

(A) An individual from Canada or other foreign jurisdiction who is temporarily present in this state and with whom the broker-dealer had a bona fide customer relationship before the individual entered the United States;

(B) An individual from Canada or other foreign jurisdiction who is present in this state and whose transactions are in a self-directed tax advantaged retirement plan of which the individual is the holder or contributor in that foreign jurisdiction; or

(C) An individual who is present in this state, with whom the broker-dealer customer relationship arose while the individual was temporarily or permanently resident in Canada or the other foreign jurisdiction; and

(2) An agent who represents a broker-dealer that is exempt under this subsection to effect transactions in securities or attempt to effect the purchase or sale of securities in this state as permitted for a broker-dealer described in paragraph (1) of this subsection. (Code 1981, § 10-5-30, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-31. Registration requirements for agents; exemptions.**

(a) It is unlawful for an individual to transact business in this state as an agent unless the individual is registered under this chapter as an agent or is

exempt from registration as an agent under subsection (b) of this Code section.

(b) The following individuals are exempt from the registration requirement of subsection (a) of this Code section:

(1) An individual who represents a broker-dealer in effecting transactions in this state limited to those described in Section 15(h)(2) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78(h)(2);

(2) An individual who represents a broker-dealer that is exempt under subsection (b) or (d) of Code Section 10-5-30;

(3) An individual who represents an issuer with respect to an offer or sale of the issuer's own securities or those of the issuer's parent or any of the issuer's subsidiaries and who is not compensated in connection with the individual's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(4) An individual who represents an issuer and who effects transactions in the issuer's securities exempted by Code Section 10-5-11, with the exception of paragraphs (11) and (14) of that Code section;

(5) An individual who represents an issuer that effects transactions solely in federal covered securities of the issuer, but an individual who effects transactions in a federal covered security under Section 18(b)(3) or 18(b)(4)(D) of the Securities Act of 1933, 15 U.S.C. Section 77r(b)(3) or 77r(b)(4)(D), is not exempt if the individual is compensated in connection with the agent's participation by the payment of commissions or other remuneration based, directly or indirectly, on transactions in those securities;

(6) An individual who represents a broker-dealer registered in this state under subsection (a) of Code Section 10-5-30 or exempt from registration under subsection (b) of Code Section 10-5-30 in the offer and sale of securities for an account of a nonaffiliated federal covered investment adviser with investments under management in excess of \$100 million acting for the account of others pursuant to discretionary authority in a signed record;

(7) An individual who represents an issuer in connection with the purchase of the issuer's own securities;

(8) An individual who represents an issuer and who restricts participation to performing clerical or ministerial acts; or

(9) Any other individual exempted by rule adopted or order issued under this chapter.

(c) The registration of an agent is effective only while the agent is employed by or associated with a broker-dealer registered under this



chapter or an issuer that is offering, selling, or purchasing its securities in this state.

(d) It is unlawful for a broker-dealer or an issuer engaged in offering, selling, or purchasing securities in this state to employ or associate with an agent who transacts business in this state on behalf of broker-dealers or issuers unless the agent is registered under subsection (a) of this Code section or exempt from registration under subsection (b) of this Code section.

(e) An individual may not act as an agent for more than one broker-dealer or one issuer at a time, unless the broker-dealers and the issuers for which the agent acts are affiliated by direct or indirect common control or are authorized by rule adopted or order issued under this chapter. (Code 1981, § 10-5-31, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-32. Registration requirements for investment advisors; exemptions.**

(a) It is unlawful for a person to transact business in this state as an investment adviser unless the person is registered under this chapter as an investment adviser or is exempt from registration as an investment adviser under subsection (b) of this Code section.

(b) The following persons are exempt from the registration requirement of subsection (a) of this Code section:

(1) A person without a place of business in this state that is registered under the securities act of the state in which the person has its principal place of business if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, or broker-dealers registered under this chapter;

(B) Institutional investors;

(C) Bona fide preexisting clients whose principal places of residence are not in this state if the investment adviser is registered under the securities act of the state in which the clients maintain principal places of residence; or

(D) Any other client exempted by rule adopted or order issued under this chapter;

(2) A person without a place of business in this state if the person has had, during the preceding 12 months, not more than five clients that are resident in this state in addition to those specified under paragraph (1) of this subsection; or

(3) Any other person exempted by rule adopted or order issued under this chapter.

(c) It is unlawful for an investment adviser, directly or indirectly, to employ or associate with an individual to engage in an activity related to investment advice in this state if the registration of the individual is suspended or revoked or the individual is barred from employment or association with an investment adviser, federal covered investment adviser, or broker-dealer by an order issued under this chapter, the Securities and Exchange Commission, or a self-regulatory organization unless the investment adviser did not know, and in the exercise of reasonable care could not have known, of the suspension, revocation, or bar. Upon request from the investment adviser and for good cause, the Commissioner, by order, may waive, in whole or in part, the application of the prohibitions of this subsection to the investment adviser.

(d) It is unlawful for an investment adviser to employ or associate with an individual required to be registered under this chapter as an investment adviser representative who transacts business in this state on behalf of the investment adviser unless the individual is registered under subsection (a) of Code Section 10-5-33 or is exempt from registration under subsection (b) of Code Section 10-5-33. (Code 1981, § 10-5-32, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-33. Registration requirement for investment adviser representatives; exemptions.**

(a) It is unlawful for an individual to transact business in this state as an investment adviser representative unless the individual is registered under this chapter as an investment adviser representative or is exempt from registration as an investment adviser under subsection (b) of this Code section.

(b) The following individuals are exempt from the registration requirement of subsection (a) of this Code section:

(1) An individual who is employed by or associated with an investment adviser that is exempt from registration under subsection (b) of Code Section 10-5-32 or a federal covered investment adviser that is excluded from the notice filing requirements of Code Section 10-5-34; and

(2) Any other individual exempted by rule adopted or order issued under this chapter.

(c) The registration of an investment adviser representative is not effective while the investment adviser representative is not employed by or associated with an investment adviser registered under this chapter or a federal covered investment adviser that has made or is required to make a notice filing under Code Section 10-5-34.

(d) An individual may transact business as an investment adviser representative for more than one investment adviser or federal covered invest-

ment adviser unless a rule adopted or order issued under this chapter prohibits or limits an individual from acting as an investment adviser representative for more than one investment adviser or federal covered investment adviser.

(e) It is unlawful for an individual acting as an investment adviser representative, directly or indirectly, to conduct business in this state on behalf of an investment adviser or a federal covered investment adviser if the registration of the individual as an investment adviser representative is suspended or revoked or the individual is barred from employment or association with an investment adviser or a federal covered investment adviser by an order issued under this chapter, the Securities and Exchange Commission, or a self-regulatory organization. Upon request from a federal covered investment adviser and for good cause, the Commissioner, by order, may waive, in whole or in part, the application of the requirements of this subsection to the federal covered investment adviser.

(f) An investment adviser registered under this chapter, a federal covered investment adviser that has filed a notice under Code Section 10-5-34, or a broker-dealer registered under this chapter is not required to employ or associate with an individual as an investment adviser representative if the only compensation paid to the individual for a referral of investment advisory clients is paid to an investment adviser registered under this chapter, a federal covered investment adviser who has filed a notice under Code Section 10-5-34, or a broker-dealer registered under this chapter with which the individual is employed or associated as an investment adviser representative. (Code 1981, § 10-5-33, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-34. Registration requirements for federal covered investment advisers.**

(a) Except with respect to a federal covered investment adviser described in subsection (b) of this Code section, it is unlawful for a federal covered investment adviser to transact business in this state as a federal covered investment adviser unless the federal covered investment adviser complies with subsection (c) of this Code section.

(b) The following federal covered investment advisers are not required to comply with subsection (c) of this Code section:

(1) A federal covered investment adviser without a place of business in this state if its only clients in this state are:

(A) Federal covered investment advisers, investment advisers registered under this chapter, and broker-dealers registered under this chapter;

(B) Institutional investors;



(C) Bona fide preexisting clients whose principal places of residence are not in this state; or

(D) Other clients specified by rule adopted or order issued under this chapter;

(2) A federal covered investment adviser without a place of business in this state if the person has had, during the preceding 12 months, not more than five clients that are resident in this state in addition to those specified under paragraph (1) of this subsection; and

(3) Any other person excluded by rule adopted or order issued under this chapter.

(c) A person acting as a federal covered investment adviser, not excluded under subsection (b) of this Code section, shall file a notice, a consent to service of process complying with Code Section 10-5-80 and such records as have been filed with the Securities and Exchange Commission under the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., required by rule adopted or order issued under this chapter and pay the fees specified in subsection (e) of Code Section 10-5-39.

(d) The notice under subsection (c) of this Code section becomes effective upon its filing. (Code 1981, § 10-5-34, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-35. Application; consent to service of process.**

(a) A person shall register as a broker-dealer, agent, investment adviser, or investment adviser representative by filing an application and a consent to service of process complying with Code Section 10-5-80, and paying the fee specified in Code Section 10-5-39 and any reasonable fees charged by the Commissioner for processing the filing. The application must contain:

(1) The information or records required for the filing of a uniform application as required for applicants registering through the Central Registration Depository and the Investment Adviser Registration Depository, as applicable; and

(2) Upon request by the Commissioner, any other financial or other information or record that the Commissioner determines is appropriate;

(b)(1) Each individual filing an application to become a salesperson, limited salesperson, designated salesperson, investment adviser, federal covered adviser, or investment adviser representative shall be fingerprinted and have a criminal record check as required by this subsection.

(2) Fingerprints shall be in such form and quality as shall be acceptable for submission to the National Crime Information Center under standards adopted by the Federal Bureau of Investigation or the United

States Department of Justice. It shall be the duty of each law enforcement agency in this state to fingerprint those persons required to be fingerprinted by this subsection.

(3) At the discretion of the Commissioner, fees required for a criminal record check by the Georgia Crime Information Center, the National Crime Information Center, the Federal Bureau of Investigation, or the United States Department of Justice shall be paid by the applicant.

(4) The Commissioner shall transmit two sets of fingerprints to the Georgia Crime Information Center, which shall submit one set of fingerprints to the Federal Bureau of Investigation for a search of bureau records and an appropriate report and shall retain one set of fingerprints and promptly conduct a search of state records. After receiving a report from the Georgia Crime Information Center and the Federal Bureau of Investigation, the Commissioner shall determine whether the applicant shall be licensed. If the applicant's fingerprints had been previously submitted for review to the Central Registration Depository in connection with federal or state licensing, the Commissioner may review and rely upon the criminal history reported pursuant thereto.

(5) The Commissioner shall notify the applicant of his or her rights to challenge the accuracy and completeness of any information provided by the Georgia Crime Information Center or the National Crime Information Center.

(6) Information provided by the Georgia Crime Information Center or the National Crime Information Center shall be used only for those purposes allowed by Code Section 35-3-35 or by applicable federal laws, rules, or regulations.

(7) Neither the Georgia Crime Information Center, the Commissioner, any law enforcement agency, nor the employees of any such entities shall be responsible for the accuracy of the information contained in the criminal background check nor incur any liability for defamation, invasion of privacy, negligence, or any other claim in connection with any dissemination of information or determination based thereon pursuant to this subsection.

(8) The Commissioner shall be authorized to adopt rules and regulations necessary to implement the provisions of this subsection.

(c) If the information or record contained in an application filed under subsection (a) of this Code section is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(d) If an order is not in effect and a proceeding is not pending under Code Section 10-5-41, registration becomes effective at noon on the forty-fifth day after a completed application is filed unless the registration is

denied. A rule adopted or order issued under this chapter may set an earlier effective date or may defer the effective date until noon on the forty-fifth day after the filing of any amendment completing the application.

(e) A registration is effective until midnight on December 31 of the year for which the application for registration is filed. Unless an order is in effect under Code Section 10-5-41, a registration may be automatically renewed each year by filing such records as are required by rule adopted or order issued under this chapter, by paying the fee specified in Code Section 10-5-39, and by paying costs charged by the Commissioner for processing the filings.

(f) A rule adopted or order issued under this chapter may impose such other conditions, not inconsistent with the National Securities Markets Improvement Act of 1996, 15 U.S.C. Section 80b-1, et seq. An order issued under this chapter may waive, in whole or in part, such requirements in connection with registration as are in the public interest and for the protection of investors. (Code 1981, § 10-5-35, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-36. Change of name; change of control.**

(a) A broker-dealer or investment adviser may succeed to the current registration of another broker-dealer or investment adviser or a notice filing of a federal covered investment adviser and a federal covered investment adviser may succeed to the current registration of an investment adviser or notice filing of another federal covered investment adviser by filing as a successor an application for registration pursuant to Code Section 10-5-30 or 10-5-32 or a notice pursuant to Code Section 10-5-34 for the unexpired portion of the current registration or notice filing.

(b) A broker-dealer or investment adviser that changes its form of organization or state of incorporation or organization may continue its registration by filing an amendment to its registration if the change does not involve a material change in its financial condition or management. The amendment becomes effective when filed or on a date designated by the registrant in its filing. The new organization is a successor to the original registrant for the purposes of this chapter. If there is a material change in financial condition or management, the broker-dealer or investment adviser shall file a new application for registration. A predecessor registered under this chapter shall stop conducting its securities business other than winding down transactions and shall file for withdrawal of broker-dealer or investment adviser registration within 45 days after filing its amendment to effect succession.

(c) A broker-dealer or investment adviser that changes its name may continue its registration by filing an amendment to its registration. The amendment becomes effective when filed or on a date designated by the registrant.



(d) A change of control of a broker-dealer or investment adviser may be made in accordance with a rule adopted or order issued under this chapter. (Code 1981, § 10-5-36, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-37. Notice of termination.**

(a) If an agent registered under this chapter terminates employment by or association with a broker-dealer or issuer or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser or federal covered investment adviser or if either registrant terminates activities that require registration as an agent or investment adviser representative, the broker-dealer, issuer, investment adviser or federal covered investment adviser shall promptly file a notice of termination. If the registrant learns that the broker-dealer, issuer, investment adviser, or federal covered investment adviser has not filed the notice, the registrant may do so.

(b) If an agent registered under this chapter terminates employment by or association with a broker-dealer registered under this chapter and begins employment by or association with another broker-dealer registered under this chapter or if an investment adviser representative registered under this chapter terminates employment by or association with an investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under Code Section 10-5-34 and begins employment by or association with another investment adviser registered under this chapter or a federal covered investment adviser that has filed a notice under Code Section 10-5-34, then upon the filing by or on behalf of the registrant, within 30 days after the termination, of an application for registration that complies with the requirement of subsection (a) of Code Section 10-5-35 and payment of the filing fee required under Code Section 10-5-39, the registration of the agent or investment adviser representative is:

(1) Immediately effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record does not contain a new or amended disciplinary disclosure within the previous 12 months; or

(2) Temporarily effective as of the date of the completed filing if the agent's Central Registration Depository record or successor record or the investment adviser representative's Investment Adviser Registration Depository record or successor record contains a new or amended disciplinary disclosure within the preceding 12 months.

(c) The Commissioner may withdraw a temporary registration if there are or were grounds for discipline as specified in Code Section 10-5-41 and the Commissioner does so within 30 days after the filing of the application. If the Commissioner does not withdraw the temporary registration within

the 30 day period, registration becomes automatically effective on the thirty-first day after filing.

(d) The Commissioner may prevent the effectiveness of a transfer of an agent or investment adviser representative under subsection (b) of this Code section based on the public interest and the protection of investors.

(e) If the Commissioner determines that a registrant or applicant for registration is no longer in existence or has ceased to act as a broker-dealer, agent, investment adviser, or investment adviser representative or is the subject of an adjudication of incapacity or is subject to the control of a committee, conservator, or guardian or cannot reasonably be located, a rule adopted or order issued under this chapter may require the registration be canceled or terminated or the application denied. The Commissioner may reinstate a canceled or terminated registration, with or without hearing, and may make the registration retroactive. (Code 1981, § 10-5-37, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-38. Withdrawal of registration.**

Withdrawal of registration by a broker-dealer, agent, investment adviser, or investment adviser representative becomes effective 60 days after the filing of the application to withdraw or within any shorter period as provided by rule adopted or order issued under this chapter unless a revocation or suspension proceeding is pending when the application is filed. If a proceeding is pending, withdrawal becomes effective when and upon such conditions as required by rule adopted or order issued under this chapter. The Commissioner may institute a revocation or suspension proceeding under Code Section 10-5-41 within one year after the withdrawal became effective automatically and issue a revocation or suspension order as of the last date on which registration was effective if a proceeding is not pending. (Code 1981, § 10-5-38, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-39. Fees.**

(a) A person shall pay a fee of \$250.00 when initially filing an application for registration as a broker-dealer and a fee of \$100.00 when filing a renewal of registration as a broker-dealer. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(b) The fee for an individual is \$50.00 when filing an application for registration as an agent, \$40.00 when filing a renewal of registration as an agent, and \$30.00 when filing for a change of registration as an agent. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(c) A person shall pay a fee of \$250.00 when filing an application for registration as an investment adviser and a fee of \$100.00 when filing a

renewal of registration as an investment adviser. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(d) The fee for an individual is \$250.00 when filing an application for registration as an investment adviser representative, a fee of \$100.00 when filing a renewal of registration as an investment adviser representative, and a fee of \$50.00 when filing a change of registration as an investment adviser representative. If the filing results in a denial or withdrawal, the Commissioner shall retain the fee.

(e) A federal covered investment adviser required to file a notice under Code Section 10-5-34 shall pay an initial fee of \$250.00 and an annual notice fee of \$100.00.

(f) A person required to pay a filing or notice fee under this Code section may transmit the fee through or to a designee as a rule adopted or order issued provides under this chapter.

(g) An investment adviser representative who is registered as an agent under Code Section 10-5-31 and who represents a person that is both registered as a broker-dealer under Code Section 10-5-30 and registered as an investment adviser under Code Section 10-5-32 or required as a federal covered investment adviser to make a notice filing under Code Section 10-5-34 is not required to pay an initial or annual registration fee for registration as an investment adviser representative. (Code 1981, § 10-5-39, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-40. Financial requirements.**

(a) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, a rule adopted or order issued under this chapter may establish minimum financial requirements for broker-dealers registered or required to be registered under this chapter and investment advisers registered or required to be registered under this chapter.

(b) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222(b) of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, a broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall file such financial reports, if any, as are required by a rule adopted or order issued under this chapter. If the information contained in a record filed under this subsection is or becomes inaccurate or incomplete in a material respect, the registrant shall promptly file a correcting amendment.

(c) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22:



(1) A broker-dealer registered or required to be registered under this chapter and an investment adviser registered or required to be registered under this chapter shall make and maintain the accounts, correspondence, memoranda, papers, books, and other records required by rule adopted or order issued under this chapter;

(2) Broker-dealer records required to be maintained under paragraph (1) of this subsection may be maintained in any form of data storage acceptable under Section 17(a) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78q(a), if they are readily accessible to the Commissioner; and

(3) Investment adviser records required to be maintained under paragraph (1) of this subsection may be maintained in any form of data storage required by rule adopted or order issued under this chapter.

(d) The records of a broker-dealer registered or required to be registered under this chapter and of an investment adviser registered or required to be registered under this chapter are subject to such reasonable, periodic, special, or other audits or inspections by a representative of the Commissioner, inside or outside this state, as the Commissioner considers necessary or appropriate in the public interest and for the protection of investors. An audit or inspection may be made at any time and without prior notice. The Commissioner may copy, and remove for audit or inspection copies of, all records the Commissioner reasonably considers necessary or appropriate to conduct the audit or inspection. The Commissioner may assess a reasonable charge for conducting an audit or inspection under this subsection.

(e) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, a rule adopted or order issued under this chapter may require a broker-dealer or investment adviser that has custody of or discretionary authority over funds or securities of a customer or client to obtain insurance or post a bond or other satisfactory form of security in an amount not to exceed \$25,000.00. The Commissioner may determine the requirements of the insurance, bond, or other satisfactory form of security. Insurance or a bond or other satisfactory form of security may not be required of a broker-dealer registered under this chapter whose net capital exceeds or of an investment adviser registered under this chapter whose minimum financial requirements exceed the amounts required by rule adopted or order issued under this chapter. The insurance, bond, or other satisfactory form of security must permit an action by a person to enforce any liability on the insurance, bond, or other satisfactory form of security if instituted within the time limitations in paragraph (2) of subsection (j) of Code Section 10-5-58.

(f) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15

U.S.C. Section 78o(h), or Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-22, an agent may not have custody of funds or securities of a customer except under the supervision of a broker-dealer and an investment adviser representative may not have custody of funds or securities of a client except under the supervision of an investment adviser or a federal covered investment adviser. A rule adopted or order issued under this chapter may prohibit, limit, or impose conditions on a broker-dealer regarding custody of funds or securities of a customer and on an investment adviser regarding custody of securities or funds of a client.

(g) With respect to an investment adviser registered or required to be registered under this chapter, a rule adopted or order issued under this chapter may require that information or other record be furnished or disseminated to clients or prospective clients in this state as necessary or appropriate in the public interest and for the protection of investors and advisory clients.

(h) A rule adopted or order issued under this chapter may require an individual registered under Code Section 10-5-31 or 10-5-33 to participate in a continuing education program approved by the Securities and Exchange Commission and administered by a self-regulatory organization or, in the absence of such a program, a rule adopted or order issued under this chapter may require continuing education for an individual registered under Code Section 10-5-33. (Code 1981, § 10-5-40, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-41. Denial of or placement of conditions or limitations on registration.**

(a) If the Commissioner finds that the order is in the public interest and subsection (d) of this Code section authorizes the action, an order issued under this chapter may deny an application or may condition or limit registration:

(1) Of an applicant to be a broker-dealer, agent, investment adviser, or investment adviser representative; and

(2) If the applicant is a broker-dealer or investment adviser, of any partner, officer, director, person having a similar status or performing similar functions, or person directly or indirectly controlling the broker-dealer or investment adviser.

(b) If the Commissioner finds that the order is in the public interest and subsection (d) of this Code section authorizes the action, an order issued under this chapter may revoke, suspend, condition, or limit the registration of a registrant and if the registrant is a broker-dealer or investment adviser, any partner, officer, or director, any person having a similar status or performing similar functions, or any person directly or indirectly controlling the broker-dealer or investment adviser. However, the Commissioner:

(1) May not institute a revocation or suspension proceeding under this subsection based on an order issued by another state that is reported to the Commissioner later than one year after the date of the order on which it is based; and

(2) Under subparagraphs (d)(5)(A) and (d)(5)(B) of this Code section may not issue an order on the basis of an order under the state securities act of another state unless the other order was based on conduct for which subsection (d) of this Code section would authorize the action had the conduct occurred in this state.

(c) If the Commissioner finds that the order is in the public interest and paragraphs (1) through (6) and (8) through (13) of subsection (d) of this Code section authorize the action, an order under this chapter may censure, impose a bar, or impose a civil penalty in an amount not to exceed a maximum of \$50,000.00 for a single violation or \$500,000.00 for several violations on a registrant and if the registrant is a broker-dealer or investment adviser, any partner, officer, or director, any person having similar functions or any person directly or indirectly controlling the broker-dealer or investment adviser.

(d) A person may be disciplined under subsections (a) through (c) of this Code section if the person:

(1) Has filed an application for registration in this state under this chapter or the predecessor Act within the previous ten years, which, as of the effective date of registration or as of any date after filing in the case of an order denying effectiveness, was incomplete in any material respect or contained a statement that, in light of the circumstances under which it was made, was false or misleading with respect to a material fact;

(2) Willfully violated or willfully failed to comply with this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act within the previous ten years;

(3) Has been convicted of a felony or within the previous ten years has been convicted of a misdemeanor involving a security, a commodity future or option contract, or an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;

(4) Is enjoined or restrained by a court of competent jurisdiction in an action instituted by the Commissioner under this chapter or the predecessor Act, a state, the Securities and Exchange Commission, or the United States from engaging in or continuing an act, practice, or course of business involving an aspect of a business involving securities, commodities, investments, franchises, insurance, banking, or finance;

(5) Is the subject of an order, issued after notice and opportunity for hearing by:



- (A) The securities, depository institution, insurance, or other financial services administrator of a state or by the Securities and Exchange Commission or other federal agency denying, revoking, barring, or suspending registration as a broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative;
- (B) The securities administrator of a state or by the Securities and Exchange Commission against a broker-dealer, agent, investment adviser, investment adviser representative, or federal covered investment adviser;
- (C) The Securities and Exchange Commission or by a self-regulatory organization suspending or expelling the registrant from membership in the self-regulatory organization;
- (D) A court adjudicating a United States Postal Service fraud order;
- (E) The insurance regulator of a state denying, suspending, or revoking the registration of an insurance agent; or
- (F) A depository institution regulator suspending or barring a person from the depository institution business;
- (6) Is the subject of an adjudication or determination, after notice and opportunity for hearing, by the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Federal Trade Commission, a federal depository institution regulator, or a depository institution, insurance, or other financial services administrator of a state that the person willfully violated the Securities Act of 1933, 15 U.S.C. Section 77a, et seq., the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., the Investment Company Act of 1940, 15 U.S.C. Section 80a-1, et seq., or the Commodity Exchange Act, 7 U.S.C. Section 1, et seq., the securities or commodities law of a state, or a federal or state law under which a business involving investments, franchises, insurance, banking, or finance is regulated;
- (7) Is insolvent, either because the person's liabilities exceed the person's assets or because the person cannot meet the person's obligations as they mature, but the Commissioner may not enter an order against an applicant or registrant under this paragraph without a finding of insolvency as to the applicant or registrant;
- (8) Refuses to allow or otherwise impedes the Commissioner from conducting an audit or inspection under subsection (d) of Code Section 10-5-40 or refuses access to a registrant's office to conduct an audit or inspection under subsection (d) of Code Section 10-5-40;
- (9) Has failed to reasonably supervise an agent, investment adviser

representative, or other individual, if the agent, investment adviser representative, or other individual was subject to the person's supervision and committed a violation of this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act within the previous ten years;

(10) Has not paid the proper filing fee within 30 days after having been notified by the Commissioner of a deficiency, but the Commissioner shall vacate an order under this paragraph when the deficiency is corrected;

(11) After notice and opportunity for a hearing, has been found within the previous ten years:

(A) By a court of competent jurisdiction to have willfully violated the laws of a foreign jurisdiction under which the business of securities, commodities, investment, franchises, insurance, banking, or finance is regulated;

(B) To have been the subject of an order of a securities administrator of a foreign jurisdiction denying, revoking, or suspending the right to engage in the business of securities as a broker-dealer, agent, investment adviser, investment adviser representative, or similar person; or

(C) To have been suspended or expelled from membership by or participation in a securities exchange or securities association operating under the securities laws of a foreign jurisdiction;

(12) Is the subject of a cease and desist order issued by the Securities and Exchange Commission or issued under the securities, commodities, investment, franchise, banking, finance, or insurance laws of a state;

(13) Has engaged in dishonest or unethical practices in the securities, commodities, investment, franchise, banking, finance, or insurance business within the previous ten years; or

(14) Is not qualified on the basis of factors such as training, experience, and knowledge of the securities business. However, in the case of an application by an agent for a broker-dealer that is a member of a self-regulatory organization or by an individual for registration as an investment adviser representative, a denial order may not be based on this paragraph if the individual has successfully completed all examinations required by subsection (e) of this Code section. The Commissioner may require an applicant for registration under Code Section 10-5-31 or 10-5-33 who has not been registered in a state within the two years preceding the filing of an application in this state to successfully complete an examination.

(e) A rule adopted or order issued under this chapter may require that an examination, including an examination developed or approved by an organization of securities regulators, be successfully completed by a class of individuals or all individuals. An order issued under this chapter may waive, in whole or in part, an examination as to an individual and a rule adopted under this chapter may waive, in whole or in part, an examination as to a class of individuals if the Commissioner determines that the examination is not necessary or appropriate in the public interest and for the protection of investors.

(f) The Commissioner may suspend or deny an application summarily; restrict, condition, limit, or suspend a registration; or censure, bar, or impose a civil penalty on a registrant before final determination of an administrative proceeding. Upon the issuance of an order, the Commissioner shall promptly notify each person subject to the order that the order has been issued, the reasons for the action, and that within 30 days after the receipt of a request in a record from the person the matter will be scheduled for a hearing. If a hearing is not requested and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final by operation of law. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend the order until final determination.

(g) Except under subsection (f) of this Code section, an order may not be issued under this Code section without:

(1) Appropriate notice to the applicant or registrant;

(2) Opportunity for hearing; and

(3) Findings of fact and conclusions of law in a record in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(h) A person that controls, directly or indirectly, a person not in compliance with this Code section may be disciplined by order of the Commissioner under subsections (a) through (c) of this Code section to the same extent as the noncomplying person, unless the controlling person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct that is a ground for discipline under this Code section.

(i) The Commissioner may not institute a proceeding under subsection (a), (b), or (c) of this Code section based solely on material facts actually known by the Commissioner unless an investigation or the proceeding is instituted within one year after the Commissioner actually acquires knowledge of the material facts. (Code 1981, § 10-5-41, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)



## ARTICLE 5

## VIOLATIONS, PENALTIES, AND CIVIL LIABILITY

**Law reviews.** — For article examining interface between law and business in regards to marketing of thrift notes, see 26 Mercer L. Rev. 311 (1974). For article, uniformity under the securities laws: regulation D and the new Georgia uniform limited offering exemption, see 19 Ga. St. B.J. 74 (1982). For article, “Statutes of Limitation: Counterproductive Complexities,” see 37 Mercer L. Rev. 1 (1985). For annual survey of administrative law, see 38 Mercer L. Rev. 17 (1986). For article, “The Civil Jurisdiction of State and Magistrate Courts,” see 24 Ga. St. B.J. 29 (1987). For article, “Start Making Sense: An Analysis and Proposal for Insider Trading Regulation,” see 26 Ga. L. Rev. 179 (1992). For article, “Common Fact Patterns of Stock Broker Fraud and Miscon-

duct,” see 7 Ga. St. B.J. 14 (2002). For article, “Theories of Stockbroker and Brokerage Firm Liability,” see 9 Ga. St. B.J. 12 (2004). For annual survey of law of business associations, see 56 Mercer L. Rev. 77 (2004). For article, “Georgia Securities Act — Let the Buyer Beware,” see 10 Ga. St. B.J. 14 (2005). For survey of 11th Circuit securities regulation cases, see 56 Mercer L. Rev. 1341 (2005). For annual survey of cases discussing business associations, see 57 Mercer L. Rev. 49 (2005).

For comment, the purchase of all the shares of stock of a business is not the purchase of a “Security” within the meaning of the Federal Securities Act of 1933 or the Georgia Securities Act of 1973, see 30 Emory L.J. 1212 (1981).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## SCHEMES TO DEFRAUD

LIABILITY OF CONTROLLING PERSONS, PARTNERS, EXECUTIVE OFFICERS, AND DIRECTORS  
STATUTE OF LIMITATIONS

## General Consideration

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134, former Code 1933, §§ 97-112, 97-113, 97-114, and former O.C.G.A. §§ 10-5-12, 10-5-13, and 10-5-14, as amended, which were subsequently repealed but were succeeded by provisions in this article, are included in the annotations for this article.

**Section resembles federal regulation.** — Although the defenses available may differ between this section and federal Rule 10(b)-5, the resemblance goes beyond each requiring an element of culpability, as this section bears a close resemblance to Rule 10(b)-5 and shares a commonality of purpose with that rule. *Osterneck v. E.T. Barwick Indus., Inc.*, 79 F.R.D. 47 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

As there was no dispute that agreements and notes defendant provided the victims in

exchange for money were investments and that the victims relied on defendant to manage the investments and to provide a return on the investments, the instruments were “securities” within the meaning of Georgia’s blue sky law; that the amount of expected return was fixed was immaterial. *Rasch v. State*, 260 Ga. App. 379, 579 S.E.2d 817 (2003) (decided under former O.C.G.A. § 10-5-12).

**Standing.** — Because plaintiff’s injuries did not flow directly from the commission of predicate acts by defendant, the plaintiff did not have standing to bring a RICO action. *Longino v. Bank of Ellijay*, 228 Ga. App. 37, 491 S.E.2d 81 (1997) (decided under former O.C.G.A. § 10-5-12).

**State limitation period applies in federal action for securities fraud.** — A two-year statute of limitations was applicable to an action alleging violations of 15 U.S.C. §§ 78j(b) and 78g, 17 C.F.R. 240.10b-5, and the common law of Georgia, in that plaintiffs were induced to trade their stock in a cor-

**General Consideration (Cont'd)**

poration for stock in another by misrepresentations in the latter's financial statements. *Osterneck v. E.T. Barwick Indus., Inc.*, 79 F.R.D. 47 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

Georgia Blue Sky Law are most analogous to § 10(b) of the federal Securities Exchange Act, and federal Rule 10b-5, and thus the two-year statute of limitations applies to § 10(b) and Rule 10b-5 claims. *Friedlander v. Troutman, Sanders, Lockerman & Ashmore*, 788 F.2d 1500 (11th Cir. 1986) (decided under former O.C.G.A. §§ 10-5-12 and 10-5-14).

**Limitation period for federal action by defrauded seller.** — Since under the securities law defrauded sellers have no remedy, the applicable statute of limitations for federal 10b-5 cases brought in Georgia by allegedly defrauded sellers is the four-year limitation associated with Georgia's fraud remedy (see O.C.G.A. §§ 9-3-31, 51-6-1 et seq.) and not the two-year period found in the securities law. *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

**Limitation period for action against broker for churning, margin violations.** — The four-year period of limitations applicable to actions under Georgia's general fraud statute (see O.C.G.A. §§ 9-3-31, 51-6-1 et seq.), and not the two-year limitation applicable to actions brought under former Code 1933, § 97-114, was applicable to causes of action alleged under both 15 U.S.C. § 78j(b) and 15 U.S.C. § 78g. *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979) (Action not against principal in securities transaction for rescission; decided under former Ga. L. 1957, p. 134, as amended).

**State limitation period applied as existed when action accrued.** — In a federal security case, the state statute of limitations was looked to as it existed when the cause of action accrued, for example, when the alleged churning by a broker took place. *McNeal v. Paine, Webber, Jackson & Curtis, Inc.*, 598 F.2d 888 (5th Cir. 1979) (decided under former Ga. L. 1957, p. 134, as amended).

**State need only prove date within period of limitations.** — Defendant's conviction for

misstating a material fact to a victim in connection with the sale of a security for an indictment dated December 22, 2004, was properly proven by the state to have occurred within the four year statute of limitations period by the state establishing that the victim invested in the stock by two checks, dated November 28 and December 13, 2001, and the victim testified that the investment was made based on conversations with defendant during the months of October and November of 2001; as a result, the evidence was sufficient to show that defendant's violative acts as to the sale of securities occurred within the period provided by the statute of limitations. *Haupt v. State*, 290 Ga. App. 616, 660 S.E.2d 383 (2008) (decided under former O.C.G.A. § 10-5-12).

**Shares of stock are "securities"** which it is unlawful to sell in violation of subsection (a) of former Code 1933, § 97-103 and former Code 1933, § 97-112. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-112).

Demand promissory note and option to purchase shares of corporation given in exchange for checks for \$12,500,000 was a transaction to which requirements of subsection (a) of former Code 1933, § 97-112 and former Code 1933, § 97-103 applied. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-112).

**Cause of action is expressly provided by former O.C.G.A. § 10-5-14(a)** in favor of purchasers for the violation of paragraph (a)(2) of former O.C.G.A. § 10-5-12. *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-12).

**Intent not element of crime under subsection (b).** — Under counts charging the defendants with representations to the effect that the securities commissioner had passed upon the merits of the stock, an intent to deceive is not an essential element of the crime charged; the criminal act is complete upon the making of the representation. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Scienter is element under subsection (a).** — Trial court did not err in charging a jury that scienter was an element of securities



fraud under former O.C.G.A. §§ 10-5-12(a)(2) and 10-5-14(a); further, the trial court properly charged the jury that justified reliance was an element of securities fraud. *Keogler v. Krasnoff*, 268 Ga. App. 250, 601 S.E.2d 788 (2004) (decided under former O.C.G.A. § 10-5-12).

**Two types of crimes are prohibited by this section:** (1) the making of an intentional representation that by the filing of a registration statement, the commissioner of securities had passed upon the merits of the security and (2) the use of a device, scheme, or artifice to defraud, or the commission of any act, practice, or course of business which would operate as a fraud on the purchaser. In the former instance the making of the representation completes the criminal act, whereas in the latter instance an intent to defraud has to be shown. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Physical presence unnecessary for venue of conspiracy.** — If the jury finds defendants conspired to sell stock by means of practices and misrepresentations inhibited by this section, and pursuant to such conspiracy stock was in fact offered and the misrepresentations made in Hall County, the fact that the defendants were not physically present in the county at the time their agents put the scheme into operation does not operate to relieve the agents from being tried and convicted in such county. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Transaction held as not taking place in Georgia.** — Where a plaintiff, a Georgia resident, and a defendant, a Tennessee resident, discussed by telephone an arrangement whereby the defendant's company would serve as plaintiff's investment advisor in trading of commodity futures, and the defendant mailed to the plaintiff two letter agreements setting out the contract terms, and the plaintiff signed the letters and returned the letters for signature of the other party, under Georgia law the transaction did not take place in Georgia. *Rasmussen v. Thomson & McKinnon Auchincloss Kohlmeier, Inc.*, 608 F.2d 175 (5th Cir. 1979) (decided under former Code 1933, § 97-112).

**Transaction held as taking place in Georgia.** — With regard to defendant's convic-

tions on two counts of making an untrue material statement of fact and omitting other material facts in selling stock, the state unequivocally proved venue in Chatham County, Georgia, by establishing, via a victim's testimony, that the offense occurred within the Chatham County area and the evidence otherwise showed that the victim executed a relevant stock purchase agreement that included the language in the "State of Georgia, County of Chatham." *Haupt v. State*, 290 Ga. App. 616, 660 S.E.2d 383 (2008) (decided under former O.C.G.A. § 10-5-12).

**Burden on controlling officer seeking to escape liability under subsection (a).** — Former Code 1933, § 97-114 imposed liability upon controlling officer of corporation for transaction executed by corporate treasurer administering affairs in the officer's absence, which transaction violated subsection (a) of former Code 1933, § 97-112 and former Code 1933, § 97-103, if the officer directly or indirectly controlled treasurer, unless the officer sustained burden of proof that the officer did not know, and in exercise of reasonable care could not have known, of existence of facts by reason of which liability was alleged to exist. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-112).

**To hold an individual to be an agent** who has participated or aided in making sales of securities, the court must find that the individual was so entangled in the actual sale of securities that the individual's activities were at least a substantial factor in the purchaser's decision to buy the security and that the individual's activities were either authorized or ratified by the issuer. *In re N. Am. Acceptance Corp. Sec. Cases*, 513 F. Supp. 608 (N.D. Ga. 1981) (decided under former O.C.G.A. § 10-5-12).

**Civil liability for pre-1974 violations of anti-fraud provisions.** — While Ga. L. 1973, p. 1202 now provides for express civil liability for anyone who violates its general anti-fraud provisions, former Code 1933, §§ 97-104, 97-112, 97-114, which apply to transactions occurring before April 1, 1974, provide for civil liability only as provided for in former Code 1933, § 97-114. *In re N. Am. Acceptance Corp. Sec. Cases*, 513 F. Supp. 608 (N.D. Ga. 1981) (decided under former O.C.G.A. § 10-5-12).



**General Consideration (Cont'd)**

**Prosecution did not abate** due to the 1986 repeal and reenactment of former O.C.G.A. § 10-5-12, where the conduct with which defendant was charged and convicted was not decriminalized at any time during the various redefinitions of the statute. *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577, cert. denied, 199 Ga. App. 906, 404 S.E.2d 557 (1991) (decided under former O.C.G.A. § 10-5-12).

**Federal equitable tolling principles inapplicable.** — As a claim under former O.C.G.A. § 10-5-12 could not be characterized as a federally created remedy, federal equitable tolling principles did not apply, and such a claim, brought over two years after the purchase of stock, was time-barred by former O.C.G.A. § 10-5-14. *Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.*, 585 F. Supp. 23 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-12).

**Complaint not showing intent to defraud dismissed.** — A motion to dismiss a complaint alleging violations of the Georgia Securities Act, the Uniform Limited Partnership Act, and common-law fraud was granted on the ground that the complaint did not show an intent to defraud. *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984), aff'd in part, rev'd in part on other grounds, 835 F.2d 780 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-12).

**Evidence of fraud possibly sufficient.** — Trial court erred in granting the defendant broker's motion to dismiss plaintiff's claim of securities fraud for failure to state a claim upon which relief can be granted because a statement of the broker made in connection with the sale of stock was possibly sufficient to warrant a grant of the relief sought. *GCA Strategic Inv. Fund, Ltd. v. Joseph Charles & Assocs.*, 245 Ga. App. 460, 537 S.E.2d 677 (2000) (decided under former O.C.G.A. § 10-5-12).

**No claim where profits dependent on purchaser's efforts.** — Where the return to be expected from the purchase of securities depended in part upon the purchaser's own efforts and not solely from the efforts of others, the purchaser has no claim under subsections (a)(2) or (d)(1) of former O.C.G.A. § 10-5-12. *Nicholson v. Harris*, 179

Ga. App. 35, 345 S.E.2d 63 (1986) (decided under former O.C.G.A. § 10-5-12).

**Theft by taking did not merge with securities violation.** — Defendant's convictions for theft by taking under O.C.G.A. § 16-8-2 and for violating the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12 et seq., did not merge for sentencing purposes because the language of the statutes indicated that the offenses were separate offenses as a matter of law and because while theft required that the victim sustain a loss, a securities violation did not. *Branan v. State*, 285 Ga. App. 717, 647 S.E.2d 606 (2007) (decided under former O.C.G.A. § 10-5-12).

**Requested jury instruction properly refused.** — Trial court did not err by failing to charge the jury that the reckless representation of facts as true without knowledge was actionable as a species of fraud without scienter; the proposed charge was an incorrect statement of law because it obviated the necessity to prove that the party making the alleged reckless misrepresentation intended to deceive the party relying thereon and the proposed charge was not precisely tailored or adjusted to the evidence. *Keogler v. Krasnoff*, 268 Ga. App. 250, 601 S.E.2d 788 (2004) (decided under former O.C.G.A. § 10-5-12).

**Court had no duty to charge jury on definition of "security."** — Trial court did not err, with regard to defendant's convictions on two counts of making an untrue material statement of fact and omitting other material facts in selling stock, by failing to sua sponte charge the jury on the statutory definition of the word "security" and other specifics as the record showed that the trial court properly charged the jury that the term security meant any stock or share or any other instrument commonly known as a security, which was in consonance with the evidence and the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12(a)(1) and (2)(B); further, since defendant made no request to charge, the trial court had no sua sponte duty to give a charge. *Haupt v. State*, 290 Ga. App. 616, 660 S.E.2d 383 (2008) (decided under former O.C.G.A. § 10-5-12).

**Scienter contemplates intent to deceive.** — Scienter, for purposes of former O.C.G.A. § 10-5-12(a)(2), even if based on a reckless misrepresentation, contemplates the intent

to deceive. *Keogler v. Krasnoff*, 268 Ga. App. 250, 601 S.E.2d 788 (2004) (decided under former O.C.G.A. § 10-5-12).

**Under this section it is not essential that criminal proceedings be instituted**, but the commissioner has the right to issue an order to prohibit sales people from continuing the sale of questionable securities and also to apply for an injunction to restrain such acts and, further, to turn over any evidence to the district attorney, who may institute the necessary criminal proceedings. *Cohen v. State*, 101 Ga. App. 23, 112 S.E.2d 672 (1960) (decided under former Ga. L. 1957, p. 134).

**Provisions for initiating criminal proceedings not exclusive.** — This section is permissive in character and provides for a manner of initiating criminal proceedings through the commissioner and Attorney General, but the statute is by no means intended to be exclusive, and the fact that the district attorney rather than the Attorney General appears before the grand jury, or that warrants are sworn out in the first instance and prior to the grand jury proceedings by affidavit of the individual prosecutors, in no way renders the indictment illegal. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**“Willfully.”** — Court of Appeals of Georgia, First Division, concludes that the term “willfully” in former O.C.G.A. § 10-5-13(a)(1)(A)(iv) has the same meaning that it has been construed to have in former O.C.G.A. § 10-5-24. Before any of the civil penalties of up to \$50,000 for single violations and up to \$500,000 for multiple violations can be imposed under former O.C.G.A. § 10-5-13(a)(1)(A)(iv), there must be a knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq. *Garvin v. Sec’y of State*, 266 Ga. App. 66, 596 S.E.2d 166 (2004) (decided under former O.C.G.A. § 10-5-13).

**Civil fines and cease and desist order.** — Seller of investment contracts, whereby the seller sold an investment venture of payphones to a purchaser, who then leased back the phones for an expected fixed monthly return, was not properly sanctioned with a fine by the Commissioner of Securities pursuant to former O.C.G.A. § 10-5-13(a)(1)(A)(iv) since it was found that the seller had acted willfully, but there was

no showing that the seller had acted in knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq.; the Commissioner’s issuance of a cease and desist order which was not limited solely to the willful acts of the seller was proper under former O.C.G.A. § 10-5-13(a)(1). *Garvin v. Sec’y of State*, 266 Ga. App. 66, 596 S.E.2d 166 (2004) (decided under former O.C.G.A. § 10-5-13).

**Construction with O.C.G.A. § 13-6-11.** — Ancillary award of attorney fees and expenses in favor of a seller was ordered struck, pursuant to O.C.G.A. § 9-12-8, as: (1) the jury failed to find the buyers liable on the seller’s underlying substantive claims; (2) the award was based on O.C.G.A. § 13-6-11, not former O.C.G.A. § 10-5-14; and, as a result, (3) the lack of a damages award in favor of the seller did not support the award. *Davis v. Johnson*, 280 Ga. App. 318, 634 S.E.2d 108 (2006) (decided under former O.C.G.A. § 10-5-14).

**Remedy afforded by section is not sole remedy** which a purchaser of securities is entitled to pursue. *Turpin v. Wilson*, 133 Ga. App. 239, 211 S.E.2d 316 (1974) (noting subsection (e) of former Code 1933, § 97-114 preserves former Ga. L. 1957, p. 134, § 13(c)).

Although former O.C.G.A. § 10-5-14 prevented a purchaser of unregistered securities from pursuing civil damages arising from their sale, this statute of limitation did not otherwise prevent the purchaser from arguing that the contract remained unlawful and unenforceable, because the passage of two years did not erase the unlawful nature of the underlying contract, but merely limited the remedies available. *Carter v. Moody*, 236 Ga. App. 262, 511 S.E.2d 520 (1999) (decided under former O.C.G.A. § 10-5-14).

**Cause of action is expressly provided by subsection (a) of former O.C.G.A. § 10-5-14** in favor of purchasers for the violation of former O.C.G.A. § 10-5-12(a)(2). *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983) (considering sales made before April 1, 1974, the effective date of this chapter, but noting two-year limitation appears in both Ga. L. 1957, p. 134, § 13(a), and subsection (c) of former O.C.G.A. § 10-5-14).

**Remedy limited to buyer.** — This section limits the civil remedy to the buyer of a



**General Consideration (Cont'd)**

security. *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

It is clear that only buyers of security shall have a remedy for fraud. *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141 (M.D. Ga. 1977) (decided under former Ga. L. 1957, p. 134, as amended).

Party who was both attorney for the transfer and a transferee of the stock was a purchaser and had standing to sue the sellers under subsection (a) of former O.C.G.A. § 10-5-14. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-14).

**Right of action against any transferor.** — Legislative intent under the securities Acts has been to give the right of action against the party transferring the title to the unregistered stock, whether the title was transferred by the original issuance of the stock or a transfer of stock already issued. Such an intent provides protection for different transferees who might have paid various prices for the stock. *Utzman v. Caribbean & S.E. Dev. Corp.*, 107 Ga. App. 56, 129 S.E.2d 62 (1962) (decided under Ga. L. 1957, p. 134, as amended).

**Any sale violating securities law voidable by purchaser.** — This section provides that any sale of securities in violation of the securities law shall be voidable at the election only of the purchaser. *Collins v. Norton*, 136 Ga. App. 105, 220 S.E.2d 279 (1975) (decided under former Code 1933, § 97-114).

**No action for violation of former O.C.G.A. § 10-5-12(d).** — Although the Georgia Securities Act does have a provision tracking the language of Securities and Exchange Rule 10b-5, former O.C.G.A. § 10-5-12(d), no cause of action was expressly provided for its violation. *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983) (decided under former O.C.G.A. §§ 10-5-12 and 10-5-14).

**Right of rescission.** — A purchaser of securities sold without compliance with the prescribed regulations, who is not in pari delicto with the seller, may, within a specified or reasonable time, rescind the transaction and recover the money or other compensation paid therefore. *Nash v. Jones*, 224 Ga.

372, 162 S.E.2d 392 (1968) (decided under former Ga. L. 1957, p. 134, as amended).

**Purported offers of rescission**, stating that “you have the opportunity to rescind your subscription ... by letter notice to us within 72 hours after receipt of this letter,” did not meet the specific requirements of paragraph (d)(1) of former O.C.G.A. § 10-5-14 in that they did not (1) offer repayment of consideration; (2) within 30 days from the date of acceptance with (3) accrued interest thereon. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

**Action for money had and received is substitute for suit in equity** and, while founded on causes of action arising out of application of equitable principles, is an action at law by reason of its origin as a mode of action in the common-law courts. *Turpin v. Wilson*, 133 Ga. App. 239, 211 S.E.2d 316 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

**Action lies where securities not delivered, refund refused.** — It is not inappropriate for a purchaser to pursue recovery on a theory of assumpsit or money had and received where defendant fails to deliver the securities contracted for and refuses to refund the moneys received from the purchaser. *Turpin v. Wilson*, 133 Ga. App. 239, 211 S.E.2d 316 (1974) (decided under former Ga. L. 1957, p. 134, as amended).

Trial court did not err in charging a jury that scienter is an element of securities fraud under former O.C.G.A. §§ 10-5-12(a)(2) and 10-5-14(a); further, the trial court properly charged the jury that justified reliance is an element of securities fraud. *Keogler v. Krasnoff*, 268 Ga. App. 250, 601 S.E.2d 788 (2004) (decided under former O.C.G.A. § 10-5-14).

**Tender of security into court is sufficient tender**, even though no other tender has been made. *Rushing v. Williams*, 125 Ga. App. 601, 188 S.E.2d 437 (1972) (decided under former Ga. L. 1957, p. 134, as amended).

Purchaser was not required to tender the original stock certificates where purchaser tendered certificates equal to the number of shares purchased. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-14).

**Purchaser's issuance of additional shares of stock** to new investors following the sale



did not affect purchaser's entitlement to the repurchase remedy. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-14).

**Attorney's fees.** — Purchaser of securities who became director and key employee of corporation had no claim for attorney's fees in an abortive action for violation of the Securities Act. *Nicholson v. Harris*, 179 Ga. App. 35, 345 S.E.2d 63 (1986) (decided under former O.C.G.A. § 10-5-14).

Former O.C.G.A. § 10-5-114 did not permit recovery of all attorney fees in a multicount action; only fees attributable to claims under the Georgia Securities Act are recoverable. *Huggins v. Chapin*, 233 Ga. App. 109, 503 S.E.2d 356 (1998).

**Cited in** *Jones v. International Inventors, Inc. E.*, 429 F. Supp. 119 (N.D. Ga. 1976); *D.K. Properties, Inc. v. Osborne*, 143 Ga. App. 832, 240 S.E.2d 293 (1977); *Security Branding, Inc. v. Corbitt*, 144 Ga. App. 164, 240 S.E.2d 728 (1977); *Freedman v. United States*, 437 F. Supp. 1252 (N.D. Ga. 1977); *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979); *Hirsch v. Equilateral Assocs.*, 245 Ga. 373, 264 S.E.2d 885 (1980); *Murray v. Shearson Hayden Stone, Inc.*, 524 F. Supp. 304 (N.D. Ga. 1980); *Martin v. T.V. Tempo, Inc.*, 628 F.2d 887 (5th Cir. 1980); *Putnam v. Williams*, 652 F.2d 497 (5th Cir. 1981); *Jones v. Miles*, 656 F.2d 103 (5th Cir. 1981); *Cocklereece v. Moran*, 532 F. Supp. 519 (N.D. Ga. 1982); *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983); *Friedlander v. Nims*, 571 F. Supp. 1188 (N.D. Ga. 1983); *Miller v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 572 F. Supp. 1180 (N.D. Ga. 1983); *Mack v. Smith*, 178 Ga. App. 652, 344 S.E.2d 474 (1986); *Cook v. State*, 183 Ga. App. 720, 359 S.E.2d 716 (1987); *Pelletier v. Zweifel*, 921 F.2d 1465 (11th Cir. 1991); *Wells v. HBO & Co.*, 813 F. Supp. 1561 (N.D. Ga. 1992); *Fuller v. Dreischarf*, 238 Ga. App. 18, 517 S.E.2d 89 (1999); *Garland v. Advance Med. Funding L.P.*, 86 F. Supp. 2d 1195 (N.D. Ga. 2000); *Hafner v. Infocure Corp.*, 210 F. Supp. 2d 1331 (N.D. Ga. 2002); *McCondichie v. Groover*, 261 Ga. App. 784, 584 S.E.2d 57 (2003).

### Schemes to Defraud

**Editor's notes.** — Subsection (d) was added to former O.C.G.A. § 10-5-12 by Ga.

L. 1975, p. 928, § 24, and amended by Ga. L. 1979, p. 1296, § 8. As amended, it was now similar to the last paragraph of former Ga. L. 1957, p. 134, § 11, which was repealed by Ga. L. 1973, p. 1202, § 26. Most of the cases cited below were decided under the 1957 Act, as indicated.

**What constitutes "securities."** — For purposes of a criminal conviction under the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-12 et seq., a scheme whereby the defendant convinced the victims to invest in boat docks, slips, or storage docks with a return on the victims' investment in a year involved "securities" because there was an investment and a reasonable expectation of profits and the victims relied on the defendant to bring about the profits. *Branan v. State*, 285 Ga. App. 717, 647 S.E.2d 606 (2007) (decided under former O.C.G.A. § 10-5-12).

**Only buyers have remedy.** — This section and § 10-5-14 make it clear that only buyers of security shall have a remedy for fraud. *Kirk v. First Nat'l Bank*, 439 F. Supp. 1141 (M.D. Ga. 1977) (decided under former Code 1933, § 97-112).

**Section inhibits use of scheme with intent to defraud.** — Under this section, the existence of the scheme, device, or artifice, and its use with an intent to defraud, regardless of outcome, constitutes the inhibited act. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134); *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Whether fraud results or not.** — Under this section, which penalizes any device, scheme or artifice to defraud, it is necessary only to prove the false statement and that the statement was made with an intent to defraud, whether fraud resulted or not. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

This section makes it a penal offense to do certain acts which would operate as a fraud regardless of whether a fraud was in fact successfully perpetrated or not. *Cohen v. State*, 101 Ga. App. 23, 112 S.E.2d 672 (1960) (decided under former Ga. L. 1957, p. 134).

This section does not require the accomplished overt act of defrauding a person, but

**Schemes to Defraud (Cont'd)**

it is the use of the scheme, trick, or artifice with an intent to deceive which is prohibited. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Intent, not loss, subject matter of crime.**

— A scheme to defraud is such a scheme as is initiated by the perpetrator with an intent to defraud another and cause the other to suffer a pecuniary loss, but the intent, not the loss, is the subject matter of the crime. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134); *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

Intent to defraud is the gist of an offense under that portion of this section which prohibits the use of a device, scheme, or artifice to defraud. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Victim's reaction to fraudulent practice is not essential element** before a conviction is authorized under this section. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Defrauding in fact need not be alleged.** — It is not necessary in an indictment under this section to allege that the victim was in fact defrauded. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

The purpose of this section, making it unlawful in any transaction involving an offer to sell or buy securities to employ any scheme or device to defraud or engage in any act which would operate as a fraud upon a purchaser or seller, is to prevent practices in connection with the purchase or sale of such securities which are carried on with intent to defraud. An indictment alleging such a scheme or transaction is not subject to general demurrer (now motion to dismiss) although it fails to allege that the victim was in fact defrauded, since the only criminal intent necessary to be proved is the intent to defraud in the commission of the act or acts denounced by the statute. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**Section also punishes scheme that operates or would operate as fraud.** — While this

section penalizes a false statement made with intent to defraud, whether loss is sustained or not, it also provides for punishment of a scheme or artifice which "operates or would operate" as a fraud, and thus subjects the offender to punishment (a) in the event the scheme to defraud actually operates as a fraud or (b) would, if successfully consummated according to the intentions of the perpetrator, be a fraud on the purchaser, even though it did not in fact so result. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**If operation alleged as fraud, allegations must support conclusion.** — Where it is alleged that a certain act, practice, or transaction operated as a fraud and the indictment sets out the facts on which the state relies to prove this allegation, it is necessary, as against appropriate special demurrer, that the facts alleged sustain the conclusion that the transaction did in fact operate as a fraud against the named purchaser of stock. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**If operation alleged as fraud, pecuniary loss must be alleged.** — An indictment is defective which alleges that a certain scheme did operate as a fraud upon the person who purchased the stocks, but does not also allege that the person defrauded also suffered a pecuniary loss. *Curtis v. State*, 99 Ga. App. 732, 109 S.E.2d 868 (1959) (decided under former Ga. L. 1957, p. 134).

**Each count of defrauding separate person charges separate offense.** — Where each count of the indictment charges the accused with defrauding a separate and distinct person in a separate and distinct transaction of a stated amount of money, each count therefore charges the commission of a separate and distinct offense, which is clearly authorized under this section. *Strauss v. Stynchcombe*, 224 Ga. 859, 165 S.E.2d 302 (1968) (decided under Ga. L. 1957, p. 134).

**Defrauding in fact must be proved.** — When a completed fraud is alleged, it is necessary to show the elements thereof, that is, that some person was in fact defrauded. *Cohen v. State*, 101 Ga. App. 23, 112 S.E.2d 672 (1960) (decided under former Ga. L. 1957, p. 134).

**Fact that misrepresentations are occasional and isolated will not constitute de-**



**fense** so long as defendants direct the misrepresentations to be made, the misrepresentations are falsely made, the misrepresentations are made with intent to defraud, and are such as would operate as a fraud on the purchaser. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Jury may consider activities during formation of corporation.** — Activities occurring during the formation of the corporation, including the sale of the stock, from which transaction the alleged violation of the securities law occurred, are properly considered by the jury when determining defendants' intentions. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Isolated transaction might or might not be sufficient evidence of scheme to defraud,** and it cannot be said that such is not contemplated by the law. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**Evidence sufficient to prove scheme to defraud.** — Considering the victim's testimony concerning representations made by defendant and the statements in the defendant's proposal regarding profitable investment portfolio applications of the victim's funds, the evidence was sufficient to prove a scheme in violation of subsection (h) of former O.C.G.A. § 10-5-12. *Moss v. State*, 209 Ga. App. 486, 433 S.E.2d 692 (1993) (decided under former O.C.G.A. § 10-5-12).

Evidence was sufficient to support defendant's convictions on those securities fraud counts in which the state proved the defendant made misrepresentations to the defendant's victims that the defendant would invest the money the victims gave the defendant; but on those counts where no such evidence was presented, the defendant's convictions were reversed. *Rasch v. State*, 260 Ga. App. 379, 579 S.E.2d 817 (2003) (decided under former O.C.G.A. § 10-5-12).

**Evidence held sufficient to support conspiracy convictions.** — Where the evidence discloses that sales people were instructed by the defendants to make certain representations, which were ultimately shown to be false, for the purpose of securing purchasers of stock in the corporation, a finding that an unlawful scheme was entered into by and

between the defendants and was perpetrated to defraud the investors is authorized, and supports conspiracy convictions. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under Ga. L. 1957, p. 134).

**Instruction on right to rely on statements properly refused.** — It is not error for the trial court to refuse a requested charge based on the theory that without a relation of trust or fiduciary relationship a purchaser has no right blindly to rely on general statements and must exercise precaution to ascertain their basis of fact. *Curtis v. State*, 102 Ga. App. 790, 118 S.E.2d 264 (1960) (decided under former Ga. L. 1957, p. 134).

**No cause of action for violation of subsection (d).** — Although the Georgia Securities Act does have a provision tracking the language of Securities and Exchange Rule 10b-5, subsection (d) of former O.C.G.A. § 10-5-12, no cause of action was expressly provided for subsection (d)'s violation. *Diamond v. Lamotte*, 709 F.2d 1419 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-12).

#### **Liability of Controlling Persons, Partners, Executive Officers, and Directors**

**Liability under former subsection (b) was predicated on control of agent,** and habit and course of dealing may be considered in determining agency. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-114).

**Director or officer not liable absent participation.** — A director or officer of a corporation is not liable, merely because of the director's official character, for the fraud or false representations of the other officers or agents of the corporation or for fraud attributable to the corporation itself, if such director or officer is not personally connected with the wrong and does not participate in the wrong. *Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979) (decided under former Code 1933, § 97-114).

**Outside directors exercising reasonable care deemed exempt.** — Outside directors of a corporation — i.e., those who are not full-time employees of the corporation — who exercise reasonable care in carrying out their duties are exempt from liability as controlling persons under this section.



**Liability of Controlling Persons, Partners, Executive Officers, and Directors (Cont'd)**

*Hamilton Bank & Trust Co. v. Holliday*, 469 F. Supp. 1229 (N.D. Ga. 1979) (decided under former Code 1933, § 97-114).

**Burden of establishing defendant as "controlling person".** — The plaintiff bears the burden of establishing that a given defendant is a "controlling person" under the provisions of subsection (c) of former O.C.G.A. § 10-5-14. Such defendant, however, may then assert the so-called "good faith" affirmative defense to "controlling person" liability. *Binder v. Gordian Sec., Inc.*, 742 F. Supp. 663 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

**Controlling officer estopped from asserting lack of responsibility.** — In action seeking to impose liability under former subsection (c) of this section upon controlling officer of corporation, where there was evidence from which inference is authorized that sums from transaction were deposited in accounts controlled by such officer, the officer's failure to offer to return these amounts, if jury believed the officer had in fact received them, estops the officer from asserting any lack of responsibility for the transaction. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-114).

**Assumption of risks inferred from affirmation of unauthorized act.** — Under former subsection (c) of this section, where one becomes aware of facts sufficient to put one on notice of an unauthorized act and affirms the act without further investigation, there may be an inference of willingness to assume concomitant risks. *DeBoard v. Schulhofer*, 156 Ga. App. 158, 273 S.E.2d 907 (1980) (decided under former Code 1933, § 97-114).

**Purchaser who was given power of attorney to record the transfer of stock** on the books of the corporation at the time of the sale was not thereby rendered jointly and severally liable for the sale of unregistered securities. *Bell v. Sasser*, 238 Ga. App. 843, 520 S.E.2d 287 (1999) (decided under former O.C.G.A. § 10-5-14).

**Statute of Limitations**

**Common-law fraud.** — Common-law fraud claim, governed by four-year statute of

limitations, was not reduced to the two-year period applicable to violations of securities laws simply because the alleged fraud involved the sale of stock. *Stricker v. Epstein*, 213 Ga. App. 226, 444 S.E.2d 91 (1994) (decided under former O.C.G.A. § 10-5-14).

**Federal equitable tolling principles inapplicable.** — As a claim under former O.C.G.A. § 10-5-12 could not be characterized as a federally created remedy, federal equitable tolling principles did not apply, and such a claim, brought over two years after the purchase of stock, was time-barred. *Wilkinson v. Paine, Webber, Jackson & Curtis, Inc.*, 585 F. Supp. 23 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-14).

**Action for gross negligence.** — A cause of action for gross negligence in failing to discover and communicate the true facts and circumstances surrounding a corporation could arise solely by virtue of the securities laws as they exist at the time of the sales involved. No action to recover the purchase price of a security in violation of the securities law can be brought after two years from the date of such sale or contract for sale. *Dehler v. Setliff*, 143 Ga. App. 430, 238 S.E.2d 723 (1977) (considering sales made before April 1, 1974, but noting two-year limitation appears in both Ga. L. 1957, p. 134, § 13(a), and subsection (c) of former Code 1933, § 97-114; decided under former Code 1933, § 97-114).

**Section 10(b) and Rule 10(b)(5) claims.** — The applicable statute of limitations to be applied with respect to claims brought pursuant to § 10(b) of the Securities and Exchange Act of 1934 and SEC Rule 10(b)(5) is the two-year limitations period found in former O.C.G.A. § 10-5-14. *Pidcock v. Sunnyland Am., Inc.*, 682 F. Supp. 1563 (S.D. Ga. 1987), rev'd on other grounds, 854 F.2d 443 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

For purposes of a suit brought pursuant to § 10(b) of the federal Securities Exchange Act and Rule 10b-5 promulgated thereunder, against the actual sellers of the securities in question, Georgia's two-year statute of limitations applies. *Currie v. Cayman Resources Corp.*, 595 F. Supp. 1364 (N.D. Ga. 1984), aff'd in part, rev'd in part on other grounds, 835 F.2d 780 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

**Federal action for securities fraud.** — The two-year limitation period in this section,

rather than the four-year limitation period pertinent to common-law fraud actions (see O.C.G.A. §§ 9-3-31, 51-6-1 et seq.), is applicable to federal security cases, as the state security law more nearly effectuates the goals of the federal securities laws. *Osterneck v. E.T. Barwick Indus., Inc.*, 79 F.R.D. 47 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended) (plaintiffs allegedly induced to trade stock by misrepresentations in financial statements; decided under former Code 1933, § 97-114).

**Federal churning claims.** — Two-year state limitation applies to federal churning claims asserted under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission. *Miller v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 572 F. Supp. 1180 (N.D. Ga. 1983) (decided under former O.C.G.A. § 10-5-14).

**When limitations period begins to run.** — The two-year period under former O.C.G.A. § 10-5-14 begins to run at the moment plaintiff actually discovered, or in the exercise of reasonable diligence should have discovered the alleged federal securities law violation. *Pidcock v. Sunnyland Am., Inc.*, 682 F. Supp. 1563 (S.D. Ga. 1987), rev'd on other grounds, 854 F.2d 443 (11th Cir. 1988) (decided under former O.C.G.A. § 10-5-14).

**Federal law determines when period begins to run.** — When a state limitation period is applied in an action for violating federal securities law, federal law determines when the limitation period begins to run. *Osterneck v. E.T. Barwick Indus., Inc.*, 79 F.R.D. 47 (N.D. Ga. 1978) (decided under former Ga. L. 1957, p. 134, as amended).

The statute of limitations in an action under § 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 is taken from the

state law remedy which bears the closest resemblance since the federal securities laws do not establish a specific time period in which an action must be filed, but the time at which the action accrues and the statute begins to run is a question of federal law. *Kennedy v. Tallant*, 710 F.2d 711 (11th Cir. 1983) (decided under former O.C.G.A. § 10-5-14).

**Arbitration proceedings did not toll statute of limitations.** — The two-year statute of limitation was not tolled with regard to plaintiff's claim under subsection (c) of former O.C.G.A. § 10-5-14 during arbitration proceedings against defendants where the arbitration proceedings had been dismissed against the defendants because the defendants were never served with the time, date and location of the arbitration proceedings. *Mitcham v. Blalock*, 214 Ga. App. 29, 447 S.E.2d 83 (1994) (decided under former O.C.G.A. § 10-5-14).

**Tolling of limitations by fraudulent concealment.** — Statements made to investors to the effect that counsel were working to recover misappropriated assets, which would be used to repay the investors, were essentially opinions that did not support fraudulent concealment so as to toll the two-year limitation of subsection (d). *Barton v. Peterson*, 733 F. Supp. 1482 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

**Tolling of limitations in federal action for securities fraud.** — Former O.C.G.A. § 10-5-14 applied in an action brought under § 10(b) of the federal Securities and Exchange Act of 1934. Though the statute of limitations is borrowed from state law, tolling is governed by federal law. *Leonard v. Stuart-James Co.*, 742 F. Supp. 653 (N.D. Ga. 1990) (decided under former O.C.G.A. § 10-5-14).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, §§ 11 et seq., 80, 81, 92, 96.

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, §§ 378, 418, 426, 427, 433, 435, 441, 442, 445, 448 et seq.

**ALR.** — Rights inter se of customers whose securities have been repledged by broker, 1 ALR 664; 24 ALR 479; 48 ALR 803; 76 ALR 794.

Liability of public corporation for money received by it for unlawfully issued instrument of indebtedness, 7 ALR 353.

Measure of damages for fraud inducing the purchase of corporate securities, 57 ALR 1142; 108 ALR 1060.

Fraud: necessity for knowledge of falsity of representation as to value, inducing subscription to or purchase of corporate stock or other securities, 73 ALR 1120.

Duty of stockbroker, in performance of



obligation to deliver certificate of stock or other security, to tender identical certificate or security, 75 ALR 746.

Duty of stockbroker in respect of demand for additional margins before selling securities carried on margin, 76 ALR 1517.

Delay by stockbroker in executing customer's order to buy or sell, or in tendering to customer securities purchased on his account, 77 ALR 308.

Liability of transferrer of corporate stock for calls or assessments as affected by insolvency, fraud, or illegality in transfer, 86 ALR 57.

Personal liability of directors to holders of corporate securities because of false statements therein, 99 ALR 852.

Damages for fraud inducing the purchase of corporate securities, 108 ALR 1060.

Assignability or survivability of cause of action to enforce civil liability under securities Acts, 133 ALR 1038.

Liability of seller to purchaser of invalid nonnegotiable public warrants, bonds, certificates, etc., 139 ALR 1426.

Personal civil liability of corporate officers and directors in case of sale of bonds or stock in violation of statutory requirements, 144 ALR 1356.

Effect of fraud to toll the period for bringing action prescribed in statute creating the right of action, 15 ALR2d 500.

Who, other than officers and directors of a corporation, is civilly liable under the state securities Acts (Blue Sky Laws) for purchase price of unauthorized securities, 59 ALR2d 1030.

Corporate insider's nondisclosure of information to seller or purchaser of corporation's stock as manipulative or deceptive device prohibited by § 10(b) of the Securities Exchange Act of 1934 (15 U.S.C. § 78j(b)), 22 ALR3d 793.

Stockbroker's liability for allegedly "churning" or engaging customer's account in excessive activity, 32 ALR3d 635.

What amounts to participation by corporate officer or agent in illegal issuance of security, in order to impose liability upon him under state securities regulations, 44 ALR3d 588.

Attorney's preparation of legal document incident to sale of securities as rendering him liable under state securities regulation statutes, 62 ALR3d 252.

Duty to disclose material facts to stock purchaser, 80 ALR3d 13.

What gives rise to right of recession under state blue-sky laws, 52 ALR 5th 491.

When is it unnecessary to show direct reliance on misrepresentation or omission in civil securities fraud action under § 10(b) of Securities Exchange Act of 1934 (15 USCS § 78j(b)) and SEC Rule 10b-5 (17 CFR § 240.10b-5), 93 ALR Fed. 444.

Who may be liable in civil action, under § 12(1) of Securities Act of 1933 (15 USCS § 771(1)), for selling or offering securities for sale in violation of registration or prospectus provisions of Act — post-Pinter cases, 105 ALR Fed. 725.

Who may be liable in actions under § 12(2) of Securities Act of 1933 (15 USCS § 771(2)), on basis of false or misleading statement in prospectus or oral communication, 106 ALR Fed. 753.

Defense of ignorance of untruth or omission in civil action under § 12(2) of Securities Act of 1933 (15 USCS § 771(2)), 109 ALR Fed. 444.

Conduct creating civil liability, under § 12(2) of Securities Act of 1933 (15 USC § 771(2)), based on misrepresentations in or omissions from prospectus or oral communication regarding sale of security, 112 ALR Fed. 387.

Standard of liability in private actions under § 14(a) of Securities Exchange Act of 1934 (15 USCS § 78n(a)) and SEC rules thereunder, 125 ALR Fed. 377.

Scienter requirement in actions under antifraud provision of Investment Advisers Act (15 USCS § 80b-6), 133 ALR Fed. 549.

What constitutes "willfulness" for purposes of criminal provisions of federal securities laws, 136 ALR Fed 457.

Limitations of actions with respect to actions for contribution under § 10(b) of Securities Exchange Act of 1934 (15 USCA § 78j(b)) and SEC Rule 10b-5 (17 CFR § 240.10b-5), 146 ALR Fed. 643.

Assertion of double jeopardy defense based on sanction sought or imposed during civil or administrative proceeding initiated by securities and exchange commission or national securities organization or exchange, 147 ALR Fed. 585.

What constitutes "inquiry notice" sufficient to commence running of statute of limitations in securities fraud action — Post-Lampf cases, 148 ALR Fed. 629.



**10-5-50. Unlawful practices with offer, sale, or purchase of security.**

It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly:

- (1) To employ a device, scheme, or artifice to defraud;
- (2) To make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statement made, in the light of the circumstances under which it is made, not misleading; or
- (3) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person. (Code 1981, § 10-5-50, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-51. Fraud or deceit unlawful; adoption of rule.**

(a) It is unlawful for a person that advises others for compensation, either directly or indirectly, or through publications or writings, as to the value of securities or the advisability of investing in, purchasing, or selling securities or that, for compensation and as part of a regular business, issues or promulgates analyses or reports relating to securities:

- (1) To employ a device, scheme, or artifice to defraud another person;  
or

- (2) To engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person.

(b) A rule adopted under this chapter may define an act, practice, or course of business of an investment adviser or an investment adviser representative, other than a supervised person of a federal covered investment adviser, as fraudulent, deceptive, or manipulative and prescribe means reasonably designed to prevent investment advisers and investment adviser representatives, other than supervised persons of a federal covered investment adviser, from engaging in acts, practices, and courses of business defined as fraudulent, deceptive, or manipulative.

(c) A rule adopted under this chapter may specify the contents of an investment advisory contract entered into, extended, or renewed by an investment adviser. (Code 1981, § 10-5-51, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-52. Civil and criminal proceedings.**

(a) In a civil action or administrative proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden to prove the applicability of the claim.

(b) In a criminal proceeding under this chapter, a person claiming an exemption, exception, preemption, or exclusion has the burden of going

forward with evidence of the claim. (Code 1981, § 10-5-52, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-53. Order or rule may require filing of prospectus and additional information.**

(a) Except as otherwise provided in subsection (b) of this Code section, a rule adopted or order issued under this chapter may require the filing of a prospectus, pamphlet, circular, form letter, advertisement, sales literature, or other advertising record relating to a security or investment advice, addressed or intended for distribution to prospective investors, including clients or prospective clients of a person registered or required to be registered as an investment adviser under this chapter.

(b) This Code section does not apply to sales and advertising literature specified in subsection (a) of this Code section which relates to a federal covered security, a federal covered investment adviser, or a security or transaction exempted by Code Sections 10-5-10 through 10-5-12, except as required pursuant to paragraph (7) of Code Section 10-5-10. (Code 1981, § 10-5-53, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-54. Unlawful to make false or misleading statements.**

It is unlawful for a person to make or cause to be made, in a record that is used in an action or proceeding or filed under this chapter, a statement that, at the time and in the light of the circumstances under which it is made, is false or misleading in a material respect, or, in connection with the statement, to omit to state a material fact necessary to make the statement made, in the light of the circumstances under which it was made, not false or misleading. (Code 1981, § 10-5-54, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-55. Filing under this chapter does not constitute a finding by Commissioner that records are accurate or upon the merits or qualifications of any person.**

The filing of an application for registration, a registration statement, a notice filing under this chapter, the registration of a person, the notice filing by a person, or the registration of a security under this chapter does not constitute a finding by the Commissioner that a record filed under this chapter is true, complete, and not misleading. The filing or registration or the availability of an exemption, exception, preemption, or exclusion for a security or a transaction does not mean that the Commissioner has passed upon the merits or qualifications of, or recommended or given approval to, a person, security, or transaction. It is unlawful to make, or cause to be made, to a purchaser, customer, client, or prospective customer or client a

representation inconsistent with this Code section. (Code 1981, § 10-5-55, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-56. Liability for defamation related to information contained in record.**

A broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative is not liable to another broker-dealer, agent, investment adviser, federal covered investment adviser, or investment adviser representative for defamation relating to a statement that is contained in a record required by the Commissioner, or a designee of the Commissioner, the Securities and Exchange Commission, or a self-regulatory organization, unless the person knew that it was false in a material respect or the person acted in reckless disregard of the statement's truth or falsity. (Code 1981, § 10-5-56, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-57. Penalties for violations.**

(a) A person that willfully violates this chapter, or a rule adopted or order issued under this chapter, except Code Section 10-5-53 or the notice filing requirements of Code Section 10-5-21 or 10-5-34, or that willfully violates Code Section 10-5-54 knowing the statement made to be false or misleading in a material respect, upon conviction, shall be fined not more than \$500,000.00 or imprisoned not more than five years, or both. An individual convicted of violating a rule adopted or order issued under this chapter may be fined but may not be imprisoned if the individual did not have knowledge of the rule or order.

(b) The Attorney General or the proper prosecuting attorney with or without a reference from the Commissioner may institute criminal proceedings under this chapter.

(c) This chapter does not limit the power of this state to punish a person for conduct that constitutes a crime under other laws of this state. (Code 1981, § 10-5-57, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**JUDICIAL DECISIONS**

**Editor's notes.** — In light of the similarity of the statutory provisions, decisions under former Ga. L. 1957, p. 134 and former O.C.G.A. § 10-5-24, which were subsequently repealed but were succeeded by provisions in this Code section, are included in the annotations for this Code section.

**Punishment not jury issue.** — Trial court's failure to submit the issue of punishment to the jury does not deny the defendant a

substantial right. *Bowler v. State*, 145 Ga. App. 633, 244 S.E.2d 142 (1978) (decided under former Ga. L. 1957, p. 134, as amended).

**"Willfully."** — Court of Appeals of Georgia, First Division, concludes that the term "willfully" in former O.C.G.A. § 10-5-13(a)(1)(A)(iv) had the same meaning that it had been construed to have in former O.C.G.A. § 10-5-24. Before any of



the civil penalties of up to \$50,000 for single violations and up to \$500,000 for multiple violations can be imposed under former O.C.G.A. § 10-5-13(a)(1)(A)(iv), there must be a knowing and intentional violation of the Georgia Securities Act of 1973, former O.C.G.A. § 10-5-1 et seq. *Garvin v. Sec'y of*

*State*, 266 Ga. App. 66, 596 S.E.2d 166 (2004) (decided under former O.C.G.A. § 10-5-24).

**Cited in** *Mills v. Fitzgerald*, 668 F. Supp. 1554 (N.D. Ga. 1987); *Greenhill v. State*, 199 Ga. App. 218, 404 S.E.2d 577 (1991).

## RESEARCH REFERENCES

**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, §§ 445, 448.

### 10-5-58. Enforcement of civil liability; damages.

(a) Enforcement of civil liability under this Code section is subject to the Securities Litigation Uniform Standards Act of 1998, 112 Stat. 3227.

(b) A person is liable to the purchaser if the person sells a security in violation of Code Section 10-5-20, or, by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The purchaser may maintain an action to recover the consideration paid for the security, less the amount of any income received on the security, and interest at the legal rate of interest from the date of the purchase, costs, and reasonable attorney fees determined by the court upon the tender of the security or for actual damages as provided in paragraph (3) of this subsection;

(2) The tender referred to in paragraph (1) of this subsection may be made any time before entry of judgment. Tender requires only notice in a record of ownership of the security and willingness to exchange the security for the amount specified. A purchaser that no longer owns the security may recover actual damages as provided in paragraph (3) of this subsection; and

(3) Actual damages in an action arising under this subsection are the amount that would be recoverable upon a tender less the value of the security when the purchaser disposed of it and interest at the legal rate of interest from the date of the purchase, costs, and reasonable attorney fees determined by the court.

(c) A person is liable to the seller if the person buys a security by means of an untrue statement of a material fact or omission to state a material fact

necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the seller not knowing of the untruth or omission, and the purchaser not sustaining the burden of proof that the purchaser did not know, and in the exercise of reasonable care, could not have known of the untruth or omission. An action under this subsection is governed by the following:

(1) The seller may maintain an action to recover the security and any income received on the security, costs, and reasonable attorney fees determined by the court upon the tender of the purchase price or for actual damages as provided in paragraph (3) of this subsection;

(2) The tender referred to in paragraph (1) of this subsection may be made any time before entry of judgment. Tender requires only notice in a record of the present ability to pay the amount tendered and willingness to take delivery of the security for the amount specified. If the purchaser no longer owns the security, the seller may recover actual damages as provided in paragraph (3) of this subsection; and

(3) Actual damages in an action arising under this subsection are the difference between the price at which the security was sold and the value the security would have had at the time of the sale in the absence of the purchaser's conduct causing liability and interest at the legal rate of interest from the date of the sale of the security, costs, and reasonable attorney fees determined by the court.

(d) A person acting as a broker-dealer or agent that sells or buys a security in violation of subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, or Code Section 10-5-55 is liable to the customer. The customer, if a purchaser, may maintain an action for recovery of actual damages as specified in subsection (b) of this Code section, or, if a seller, for a remedy as specified in subsection (c) of this Code section.

(e) A person acting as an investment adviser or investment adviser representative that provides investment advice for compensation in violation of subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, or Code Section 10-5-55 is liable to the client. The client may maintain an action to recover the consideration paid for the advice, interest from the date of payment, costs, and reasonable attorney fees determined by the court.

(f) A person that receives directly or indirectly any consideration for providing investment advice to another person and that employs a device, scheme, or artifice to defraud the other person or engages in an act, practice, or course of business that operates or would operate as a fraud or deceit on the other person is liable to the other person. An action under this subsection is governed by the following:

(1) The person defrauded may maintain an action to recover the consideration paid for the advice and the amount of any actual damages

caused by the fraudulent conduct, interest from the date of the fraudulent conduct, costs, and reasonable attorney fees determined by the court, less the amount of any income received as a result of the fraudulent conduct; and

(2) This subsection does not apply to a broker-dealer or its agents if the investment advice provided is solely incidental to transacting business as a broker-dealer and no special compensation is received for the investment advice.

(g) The following persons are liable jointly and severally with and to the same extent as persons liable under subsections (b) through (f) of this Code section:

(1) A person that directly or indirectly controls a person liable under subsections (b) through (f) of this Code section, unless the controlling person sustains the burden of proof that the person did not know, and in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(2) An individual who is a managing partner, executive officer, or director of a person liable under subsections (b) through (f) of this Code section, including an individual having a similar status or performing similar functions, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist;

(3) An individual who is an employee of or associated with a person liable under subsections (b) through (f) of this Code section and who materially aids the conduct giving rise to the liability, unless the individual sustains the burden of proof that the individual did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which the liability is alleged to exist; and

(4) A person that is a broker-dealer, agent, investment adviser, or investment adviser representative that materially aids the conduct giving rise to the liability under subsections (b) through (f) of this Code section, unless the person sustains the burden of proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of conduct by reason of which liability is alleged to exist.

(h) A person liable under this Code section has a right of contribution as in cases of contract against any other person liable under this Code section for the same conduct.

(i) A cause of action under this Code section survives the death of an individual who might have been a plaintiff or defendant.

(j) A person may not obtain relief under subsection (b) of this Code section:



(1) For a violation of Code Section 10-5-20 or for a violation of subsection (d) or (e) of this Code section, unless the action is instituted within two years after the violation occurred; or

(2) Other than for a violation of Code Section 10-5-20 or for a violation of subsection (c) or (f) of this Code section, unless the action is instituted within the earlier of two years after discovery of the facts constituting the violation or five years after the violation occurred.

(k) A person that has made or has engaged in the performance of a contract in violation of this chapter or a rule adopted or order issued under this chapter or that has acquired a purported right under the contract with knowledge of conduct by reason of which its making or performance was in violation of this chapter may not base an action on the contract.

(l) A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this chapter or a rule adopted or order issued under this chapter is void.

(m) The rights and remedies provided by this chapter are in addition to any other rights or remedies that may exist, but this chapter does not create a cause of action not specified in this Code section or subsection (e) of Code Section 10-5-40. (Code 1981, § 10-5-58, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-59. Exemptions to liability.**

A purchaser, seller, or recipient of investment advice may not maintain an action under Code Section 10-5-58 if:

(1) The purchaser, seller, or recipient of investment advice receives in a record, before the action is instituted:

(A) An offer stating the respect in which liability under Code Section 10-5-58 may have arisen and fairly advising the purchaser, seller, or recipient of investment advice of that person's rights in connection with the offer and any financial or other information necessary to correct all material misrepresentations or omissions in the information that was required by this chapter to be furnished to that person at the time of the purchase, sale, or investment advice;

(B) If the basis for relief may have been a violation of subsection (b) of Code Section 10-5-58, an offer to repurchase the security for cash, payable on delivery of the security, equal to the consideration paid and interest from the date of the purchase, less the amount of any income received on the security; or, if the purchaser no longer owns the security, an offer to pay the purchaser upon acceptance of the offer damages in an amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it and interest

from the date of the purchase in cash equal to the damages computed in the manner provided in this subparagraph;

(C) If the basis for relief may have been a violation of subsection (c) of Code Section 10-5-58, an offer to tender the security on payment by the seller of an amount equal to the purchase price paid, less income received on the security by the purchaser, and interest from the date of the sale; or, if the purchaser no longer owns the security, an offer to pay the seller upon acceptance of the offer, in cash, damages in the amount of the difference between the price at which the security was purchased and the value the security would have had at the time of the purchase in the absence of the purchaser's conduct that may have caused liability and interest from the date of the sale;

(D) If the basis for relief may have been a violation of subsection (d) of Code Section 10-5-58 and if the customer is a purchaser, an offer to pay as specified in subparagraph (B) of this paragraph; or, if the customer is a seller, an offer to tender or to pay as specified in subparagraph (C) of this paragraph;

(E) If the basis for relief may have been a violation of subsection (e) of Code Section 10-5-58, an offer to reimburse in cash the consideration paid for the advice and interest from the date of payment; or

(F) If the basis for relief may have been a violation of subsection (f) of Code Section 10-5-58, an offer to reimburse in cash the consideration paid for the advice, the amount of any actual damages that may have been caused by the conduct, and interest from the date of the violation causing the loss;

(2) The offer under paragraph (1) of this Code section states that it must be accepted by the purchaser, seller, or recipient of investment advice within 30 days after the date of its receipt by the purchaser, seller, or recipient of investment advice or any shorter period, of not less than three days, that the Commissioner, by order, specifies;

(3) The offeror has the present ability to pay the amount offered or to tender the security under paragraph (1) of this Code section;

(4) The offer under paragraph (1) of this Code section is delivered to the purchaser, seller, or recipient of investment advice or sent in a manner that ensures receipt by the purchaser, seller, or recipient of investment advice; and

(5) The purchaser, seller, or recipient of investment advice that accepts the offer under paragraph (1) of this Code section in a record within the period specified under paragraph (2) of this Code section is paid in accordance with the terms of the offer. (Code 1981, § 10-5-59, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

ARTICLE 6  
ADMINISTRATION

**Law reviews.** — For article, “Securities Investigations Under the Georgia Securities Act,” see 17 Ga. St. B.J. 14 (1980).

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-11, which was subsequently repealed but was succeeded by provisions in this article, are included in the annotations for this article.

**Privilege against incrimination.** — Generally, corporate books and records cannot be insulated from reasonable demands by governmental authorities by claim of personal privilege as the privilege only applies to private property of a person claiming a privilege; thus, a corporate officer may not withhold testimony or documents on the ground that the corporation would be incriminated, nor may the custodian of corporate books or records withhold the books or records on the ground that the custodian personally might be incriminated by their production. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981) (decided under former O.C.G.A. § 10-5-11).

Custodian of corporate or association books, by accepting custodianship, voluntarily assumes duty which overrides a claim of privilege with respect to production of records themselves, but does not waive a

constitutional privilege as to oral testimony; therefore, a corporate officer who is a custodian of records may not resist production of corporate books in response to a subpoena even though such books may tend to incriminate the officer as an individual. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981) (decided under former O.C.G.A. § 10-5-11).

**Custodian must produce and identify records.** — Custodian of corporate records must produce records if the custodian has the records and the custodian may also be required to identify the records. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981) (decided under former O.C.G.A. § 10-5-11).

**Disclosure of whereabouts of records or who has possession.** — Custodian of corporate records may not be required to disclose whereabouts of such records or who has possession of the records if the custodian claims personal privilege of refusing to answer on ground that to do so would tend to incriminate the custodian. *Jacobs v. State*, 157 Ga. App. 466, 278 S.E.2d 21 (1981) (decided under former O.C.G.A. § 10-5-11).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, § 79.  
**C.J.S.** — 79A C.J.S., Securities Regulation and Commodity Futures Trading Regulation, § 413.

10-5-70. Administration of chapter; Commissioner of Securities; authority.

- (a) The administration of this chapter shall be vested in the Secretary of State, who is designated as the Commissioner of Securities.
- (b) The Commissioner shall have the authority to administer oaths in and to prescribe forms for all matters arising under this chapter. The Commissioner shall cooperate with the administrators of the securities laws of other states and of the United States with a view to assisting those



administrators in the enforcement of their securities and investment adviser laws and to achieving maximum uniformity in the interpretation of like provisions of the laws administered by them and in the forms which are required to be filed under such laws.

(c) The Commissioner shall have authority to employ examiners, clerks and stenographers, and other employees as the administration of this chapter may require. The Commissioner shall also have authority to appoint and employ investigators who shall have, in any case that there is reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(d) The Commissioner shall have the power to make such rules and regulations from time to time as he or she may deem necessary and proper for the enforcement of this chapter. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(e) The Commissioner or any persons employed by the Commissioner shall be paid, in addition to their regular compensation, the transportation fare, board, lodging, and other traveling expenses necessary and actually incurred by each of them in the performance of their duties under this chapter.

(f) The Commissioner shall appoint, with the approval of the Governor, a person as assistant Commissioner and delegate such powers and duties under this chapter to such assistant Commissioner as he or she desires.

(g) To encourage uniform interpretation and administration of this chapter and effective securities regulation and enforcement, the Commissioner may cooperate with the securities agencies or administrators of one or more states, Canadian provinces or territories, another country, the Securities and Exchange Commission, the Commodity Futures Trading Commission, the Securities Investor Protection Corporation, any self-regulatory organization, any national or international organization, securities officials or agencies, or any governmental law enforcement or regulatory agency. The cooperation authorized may include, but is not limited to, participation in a central registration depository under this chapter for documents or records required or allowed to be maintained under this chapter and the designation of any such system as an agent for registration or receipt.

(h) Neither the Commissioner, the assistant Commissioner, nor any employee of the Commissioner may use for personal gain or benefit information filed with or obtained by the Commissioner which is not public information nor may the Commissioner, assistant Commissioner, or any employee of the Commissioner conduct securities dealings based upon information filed with or obtained by the Commissioner, even though such information is known to the public, if there has not been a sufficient period for the securities markets to assimilate the information.

(i) This chapter does not create or diminish a privilege or exemption that exists at common law, by statute or rule, or otherwise.

(j) The Commissioner may develop and implement investor education initiatives to inform the public about investing in securities, with particular emphasis on the prevention and detection of securities fraud. In developing and implementing these initiatives, the Commissioner may collaborate with public and nonprofit organizations with an interest in investor education. This subsection does not authorize the Commissioner to require participation or monetary contributions of a registrant in an investor education program. (Code 1981, § 10-5-70, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Cross references.** — Authority of Secretary of State to employ assistants to discharge functions imposed by chapter, § 45-13-25.

JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the statutory provisions, decisions under former O.C.G.A. § 10-5-21, which was subsequently repealed but was succeeded by provisions in this Code section, are included in the annotations for this Code section.

**Constitutionality.** — Former O.C.G.A. § 10-5-21 was not unconstitutional for pre-

cluding counterclaims against the state Commissioner of Securities because immunity from suit is a legislative prerogative, and the legislature prescribed the terms and conditions upon which the state agreed to be sued. *Womack v. State*, 270 Ga. 56, 507 S.E.2d 425 (1998) (decided under former O.C.G.A. § 10-5-21).

OPINIONS OF THE ATTORNEY GENERAL

**Editor’s notes.** — In light of the similarity of the statutory provisions, an opinion under former Ga. L. 1957, p. 134, as amended, which was subsequently repealed but was succeeded by provisions in this Code section, is included in the annotations for this section.

**Secretary of State may not retain fees.** — Fees collected by the Secretary of State as

the commissioner of securities must be paid to the Fiscal Division of the Department of Administrative Services (now the Office of Treasury and Fiscal Services), and such fees may not be retained by the office of Secretary of State as reimbursements for the expenses of that office. 1969 Op. Att’y Gen. No. 69-13 (decided under Ga. L. 1957, p. 134).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 69A Am. Jur. 2d, Securities Regulation — State, §§ 69, 77 et seq.

and Commodity Futures Trading Regulation, § 410 et seq.

**C.J.S.** — 79A C.J.S., Securities Regulation

10-5-71. Powers of Commissioner.

(a) The Commissioner may:

(1) Conduct public or private investigations inside or outside this state which the Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this

chapter or a rule adopted or order issued under this chapter or to aid in the enforcement of this chapter or in the adoption of rules and forms under this chapter;

(2) Require or permit a person to testify, file a statement, or produce a record, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning a matter to be investigated or about which an action or proceeding is to be instituted; and

(3) Publish a record concerning an action, proceeding, or an investigation under or a violation of this chapter or a rule adopted or order issued under this chapter if the Commissioner determines it is necessary or appropriate in the public interest and for the protection of investors.

(b) For the purpose of an investigation under this chapter, the Commissioner or his or her designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Commissioner considers relevant or material to the investigation.

(c) If a person does not appear or refuses to testify, file a statement, produce records, or otherwise does not obey a subpoena as required by the Commissioner under this chapter, the Commissioner may refer the matter to the Attorney General or the proper district attorney, who may apply to the superior court or a court of another state to enforce compliance. The court may:

(1) Hold the person in contempt;

(2) Order the person to appear before the Commissioner;

(3) Order the person to testify about the matter under investigation or in question;

(4) Order the production of records;

(5) Grant injunctive relief, including restricting or prohibiting the offer or sale of securities or the providing of investment advice;

(6) Impose a civil penalty of not less than \$5,000.00 and not greater than \$50,000.00 for each violation; and

(7) Grant any other necessary or appropriate relief.

(d) This Code section does not preclude a person from applying to superior court or a court of another state for relief from a request to appear, testify, file a statement, produce records, or obey a subpoena.

(e) An individual is not excused from attending, testifying, filing a statement, producing a record or other evidence, or obeying a subpoena of the Commissioner under this chapter or in an action or proceeding



instituted by the Commissioner under this chapter on the ground that the required testimony, statement, record, or other evidence, directly or indirectly, may tend to incriminate the individual or subject the individual to a criminal fine, penalty, or forfeiture. If the individual refuses to testify, file a statement, or produce a record or other evidence on the basis of the individual's privilege against self-incrimination, the Commissioner may apply to superior court to compel the testimony, the filing of the statement, the production of the record, or the giving of other evidence. The testimony, record, or other evidence compelled under such an order may not be used, directly or indirectly, against the individual in a criminal case, except in a prosecution for perjury or contempt or otherwise failing to comply with the order.

(f) At the request of the securities administrator of another state or a foreign jurisdiction, the Commissioner may provide assistance if the requesting administrator states that it is conducting an investigation to determine whether a person has violated, is violating, or is about to violate a law or rule of the other state or foreign jurisdiction relating to securities matters that the requesting administrator regulates or enforces. The Commissioner may provide the assistance by using the authority to investigate and the powers conferred by this Code section as the Commissioner determines is necessary or appropriate. The assistance may be provided without regard to whether the conduct described in the request would also constitute a violation of this chapter or other law of this state if occurring in this state. In deciding whether to provide the assistance, the Commissioner may consider whether the requesting administrator is permitted and has agreed to provide assistance reciprocally within its state or foreign jurisdiction to the Commissioner on securities matters when requested; whether compliance with the request would violate or prejudice the public policy of this state; and the availability of resources and employees of the Commissioner to carry out the request for assistance.

(g) In the case of any investigation conducted under this Code section, the Commissioner may appoint an investigative agent who shall have the same investigative powers and authority as the Commissioner. The agent shall possess such qualifications as the Commissioner may require. (Code 1981, § 10-5-71, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-72. Violations; remedies and penalties.**

(a) If the Commissioner believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this chapter or a rule adopted or order issued under this chapter, the Commissioner may maintain an action in the superior court to enjoin the act, practice, or

course of business and to enforce compliance with this chapter or a rule adopted or order issued under this chapter.

(b) In an action under this Code section and on a proper showing, the court may:

(1) Issue a permanent or temporary injunction, restraining order, or declaratory judgment;

(2) Order other appropriate or ancillary relief, which may include:

(A) An asset freeze, accounting, writ of attachment, writ of general or specific execution, and appointment of a receiver or conservator, that may be the Commissioner, for the defendant or the defendant's assets;

(B) Ordering the Commissioner to take charge and control of a defendant's property, including investment accounts and accounts in a depository institution, rents, and profits; to collect debts; and to acquire and dispose of property;

(C) Imposing a civil penalty up to \$50,000.00 for a single violation or up to \$500,000.00 for more than one violation; an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this chapter or the predecessor Act or a rule adopted or order issued under this chapter or the predecessor Act; and

(D) Ordering the payment of prejudgment and postjudgment interest; or

(3) Order such other relief as the court considers appropriate.

(c) The Commissioner may not be required to post a bond in an action or proceeding under this chapter. (Code 1981, § 10-5-72, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Code Commission notes.** — Pursuant to 10-5-67, was redesignated as Code Section 10-5-72. Code Section 28-9-5, in 2008, this Code section, which was enacted as Code Section

### **10-5-73. Cease and desist orders; denying, revoking, or conditioning exemptions for broker-dealers.**

(a) If the Commissioner determines that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter or that a person has materially aided, is materially aiding, or is about to materially aid an act, practice, or course of business constituting a violation of this chapter or a rule adopted or order issued under this chapter, the Commissioner may:

(1) Issue an order directing the person to cease and desist from engaging in the act, practice, or course of business or to take other action necessary or appropriate to comply with this chapter;

(2) Issue an order denying, suspending, revoking, or conditioning the exemptions for a broker-dealer under subparagraph (b)(1)(D) or (b)(1)(F) of Code Section 10-5-30 or an investment adviser under subparagraph (b)(1)(C) of Code Section 10-5-32; or

(3) Issue an order under Code Section 10-5-13.

(b) An order under subsection (a) of this Code section is effective on the date of issuance. Upon issuance of the order, the Commissioner shall promptly serve each person subject to the order with a copy of the order and a notice that the order has been entered. The order must include a statement whether the Commissioner will seek a civil penalty or costs of the investigation, a statement of the reasons for the order, and notice that, within 30 days after receipt of a request in a record from the person, the matter will be scheduled for a hearing. If a person subject to the order does not request a hearing and none is ordered by the Commissioner within 30 days after the date of service of the order, the order becomes final as to that person by operation of law. If a hearing is requested or ordered, the Commissioner, after notice of and opportunity for hearing to each person subject to the order, may modify or vacate the order or extend it until final determination.

(c) If a hearing is requested or ordered pursuant to subsection (b) of this Code section, a hearing must be held pursuant to the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act" and this chapter. A final order may not be issued unless the Commissioner makes findings of fact and conclusions of law in a record. The final order may make final, vacate, or modify the order issued under subsection (a) of this Code section.

(d) In a final order under subsection (c) of this Code section, the Commissioner may impose a civil penalty up to \$50,000.00 for a single violation or up to \$500,000.00 for more than one violation.

(e) In a final order under subsection (c) of this Code section, the Commissioner may charge the actual cost of an investigation or proceeding for a violation of this chapter or a rule adopted or order issued under this chapter.

(f) If a petition for judicial review of a final order is not filed in accordance with Code Section 10-5-78, the Commissioner may file a certified copy of the final order with the clerk of a court of competent jurisdiction. The order so filed has the same effect as a judgment of the court and may be recorded, enforced, or satisfied in the same manner as a judgment of the court.



(g) If a person does not comply with an order under this Code section, the Commissioner may petition a court of competent jurisdiction to enforce the order. The court may not require the Commissioner to post a bond in an action or proceeding under this Code section. If the court finds, after service and opportunity for hearing, that the person was not in compliance with the order, the court may adjudge the person in civil contempt of the order. The court may impose a further civil penalty against the person for contempt in an amount not less than \$5,000.00 but not greater than \$50,000.00 for each violation and may grant any other relief the court determines is just and proper in the circumstances. (Code 1981, § 10-5-73, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-74. Issuance of forms and orders; adoption and amendment of rules.**

(a) The Commissioner may:

(1) Issue forms and orders and, after notice and comment, may adopt and amend rules necessary or appropriate to carry out this chapter and may repeal rules, including rules and forms governing registration statements, applications, notice filings, reports, and other records;

(2) By rule, define terms, whether or not used in this chapter, but those definitions may not be inconsistent with this chapter; and

(3) By rule, classify securities, persons, and transactions and adopt different requirements for different classes.

(b) Under this chapter, a rule or form may not be adopted or amended or an order issued or amended unless the Commissioner finds that the rule, form, order, or amendment is necessary or appropriate in the public interest or for the protection of investors and is consistent with the purposes intended by this chapter. In adopting, amending, and repealing rules and forms, Code Section 10-5-77 applies in order to achieve uniformity among the states and coordination with federal laws in the form and content of registration statements, applications, reports, and other records, including the adoption of uniform rules, forms, and procedures.

(c) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and Section 222 of the Investment Advisers Act of 1940, 15 U.S.C. Section 80b-1, et seq., the Commissioner may require that a financial statement filed under this chapter be prepared in accordance with generally accepted accounting principles in the United States and comply with other requirements specified by rule adopted or order issued under this chapter. A rule adopted or order issued under this chapter may establish:

(1) Subject to Section 15(h) of the Securities Exchange Act of 1934, 15 U.S.C. Section 78a, et seq., and Section 222 of the Investment Advisers

Act of 1940, 15 U.S.C. Section 80b-1, et seq., the form and content of financial statements required under this chapter;

(2) Whether unconsolidated financial statements must be filed; and

(3) Whether required financial statements must be audited by an independent certified public accountant.

(d) The Commissioner may provide interpretative opinions or issue determinations that the Commissioner will not institute a proceeding or an action under this chapter against a specified person for engaging in a specified act, practice, or course of business if the determination is consistent with this chapter. A rule adopted or order issued under this chapter may establish a reasonable charge for interpretative opinions or determinations that the Commissioner will not institute an action or a proceeding under this chapter.

(e) A hearing in an administrative proceeding under this chapter shall be conducted in public unless the Commissioner for good cause consistent with this chapter determines that the hearing shall not be so conducted. (Code 1981, § 10-5-74, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-75. Register of applications for registration of securities; registration statements; notice filings; notices of claims; furnishing of rules, forms, orders, and records to the public.**

(a) The Commissioner shall maintain, or designate a person to maintain, a register of applications for registration of securities; registration statements; notice filings; applications for registration of broker-dealers, agents, investment advisers, and investment adviser representatives; notice filings by federal covered investment advisers that are or have been effective under this chapter or the predecessor Act; notices of claims of exemption from registration or notice filing requirements contained in a record; orders issued under this chapter or the predecessor Act; and interpretative opinions or no action determinations issued under this chapter.

(b) The Commissioner shall make all rules, forms, interpretative opinions, and orders available to the public.

(c) The Commissioner shall furnish a copy of a record that is a public record or a certification that the public record does not exist to a person that so requests. A rule adopted under this chapter may establish a reasonable charge for furnishing the record or certification. A copy of the record certified or a certificate by the Commissioner of a record's nonexistence is prima-facie evidence of a record or its nonexistence. (Code 1981, § 10-5-75, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-76. Public records; exceptions.**

(a) Except as otherwise provided in subsection (b) of this Code section, records obtained by the Commissioner or filed under this chapter, includ-

ing a record contained in or filed with a registration statement, application, notice filing, or report, are public records and are available for public examination.

(b) The following information and documents do not constitute public information under subsection (a) of this Code section and shall be confidential:

(1) Information or documents obtained by the Commissioner in connection with an investigation under Code Section 10-5-21;

(2) Information or documents filed with the Commissioner in connection with a registration statement or exemption filing under this chapter which constitute trade secrets or commercial or financial information of a person for which that person is entitled to and has asserted a claim of confidentiality or privilege authorized by law;

(3) Any document or record specifically designated as confidential in accordance with this chapter; and

(4) Any document, record, or information designated as confidential by federal statute, rule, or regulation. (Code 1981, § 10-5-76, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-77. Intergovernmental cooperation, coordination, and consultation; sharing of records and information.**

(a) The Commissioner shall, in his or her discretion, cooperate, coordinate, consult, and, subject to Code Section 10-5-76, share records and information with the securities administrator of another state, Canada, a Canadian province or territory, a foreign jurisdiction, the Securities and Exchange Commission, the United States Department of Justice, the Commodity Futures Trading Commission, the Federal Trade Commission, the Securities Investor Protection Corporation, a self-regulatory organization, a national or international organization of securities administrators, a federal or state banking or insurance regulator, or a governmental law enforcement agency to effectuate greater uniformity in securities matters among the federal government, self-regulatory organizations, states, and foreign governments.

(b) In cooperating, coordinating, consulting, and sharing records and information under this Code section and in acting by rule, order, or waiver under this chapter, the Commissioner shall, in his or her discretion, take into consideration in carrying out the public interest the following general policies:

(1) Maximizing effectiveness of regulation for the protection of investors;

(2) Maximizing uniformity in federal and state regulatory standards; and



(3) Minimizing burdens on the business of capital formation, without adversely affecting essentials of investor protection.

(c) The cooperation, coordination, consultation, and sharing of records and information authorized by this Code section includes:

(1) Establishing or employing one or more designees as a central depository for registration and notice filings under this chapter and for records required or allowed to be maintained under this chapter;

(2) Developing and maintaining uniform forms;

(3) Conducting a joint examination or investigation;

(4) Holding a joint administrative hearing;

(5) Instituting and prosecuting a joint civil or administrative proceeding;

(6) Sharing and exchanging personnel;

(7) Coordinating registrations under Code Sections 10-5-20 and Code Section 10-5-30 through 10-5-33 and exemptions under Code Section 10-5-12;

(8) Sharing and exchanging records, subject to Code Section 10-5-76;

(9) Formulating rules, statements of policy, guidelines, forms, and interpretative opinions and releases;

(10) Formulating common systems and procedures;

(11) Notifying the public of proposed rules, forms, statements of policy, and guidelines;

(12) Attending conferences and other meetings among securities administrators, which may include representatives of governmental and private sector organizations involved in capital formation, deemed necessary or appropriate to promote or achieve uniformity; and

(13) Developing and maintaining a uniform exemption from registration for small issuers and taking other steps to reduce the burden of raising investment capital by small businesses. (Code 1981, § 10-5-77, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-78. Rules and orders issued under this chapter subject to judicial review.**

(a) A final order issued by the Commissioner under this chapter is subject to judicial review in accordance with Chapter 13 of Title 50, the “Georgia Administrative Procedure Act.”

(b) A rule adopted under this chapter is subject to judicial review in accordance with Chapter 13 of Title 50, the “Georgia Administrative

Procedure Act.” (Code 1981, § 10-5-78, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**10-5-79. Applicability of chapter to certain offers to purchase or sell.**

(a) Code Sections 10-5-20 and 10-5-21, subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, and Code Sections 10-5-42, 10-5-55, 10-5-58, and 10-5-59 do not apply to a person that sells or offers to sell a security unless the offer to sell or the sale is made in this state or the offer to purchase or the purchase is made and accepted in this state.

(b) Subsection (a) of Code Section 10-5-30, subsection (a) of Code Section 10-5-31, subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, and Code Sections 10-5-42, 10-5-55, 10-5-58, and 10-5-59 do not apply to a person that purchases or offers to purchase a security unless the offer to purchase or the purchase is made in this state or the offer to sell or the sale is made and accepted in this state.

(c) For the purpose of this Code section, an offer to sell or to purchase a security is made in this state, whether or not either party is then present in this state, if the offer:

(1) Originates from within this state; or

(2) Is directed by the offeror to a place in this state and received at the place to which it is directed.

(d) For the purpose of this Code section, an offer to purchase or to sell is accepted in this state, whether or not either party is then present in this state, if the acceptance:

(1) Is communicated to the offeror in this state and the offeree reasonably believes the offeror to be present in this state and the acceptance is received at the place in this state to which it is directed; and

(2) Has not previously been communicated to the offeror, orally or in a record, outside this state.

(e) An offer to sell or to purchase is not made in this state when a publisher circulates or there is circulated on the publisher's behalf in this state a bona fide newspaper or other publication of general, regular, and paid circulation that is not published in this state or that is published in this state but has had more than two-thirds of its circulation outside this state during the previous 12 months or when a radio or television program or other electronic communication originating outside this state is received in this state. A radio or television program or other electronic communication is considered as having originated in this state if either the broadcast studio or the originating source of transmission is located in this state, unless:

(1) The program or communication is syndicated and distributed from outside this state for redistribution to the general public in this state;

(2) The program or communication is supplied by a radio, television, or other electronic network with the electronic signal originating from outside this state for redistribution to the general public in this state;

(3) The program or communication is an electronic communication that originates outside this state and is captured for redistribution to the general public in this state by a community antenna or cable, radio, cable television, or other electronic system; or

(4) The program or communication consists of an electronic communication that originates in this state but is not intended for distribution to the general public in this state.

(f) Subsection (a) of Code Section 10-5-32, subsection (a) of Code Section 10-5-33, subsection (a) of Code Section 10-5-34, and Code Sections 10-5-51, 10-5-54, and 10-5-55 apply to a person if the person engages in an act, practice, or course of business instrumental in effecting prohibited or actionable conduct in this state, whether or not either party is then present in this state. (Code 1981, § 10-5-79, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

#### **10-5-80. Consent to service of process.**

(a) A consent to service of process complying with this Code section and required by this chapter must be signed and filed in the form required by a rule or order under this chapter. A consent appointing the Commissioner the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative under this chapter or a rule adopted or order issued under this chapter after the consent is filed has the same force and validity as if the service were made personally on the person filing the consent. A person that has filed a consent complying with this subsection in connection with a previous application for registration or notice filing need not file an additional consent.

(b) If a person, including a nonresident of this state, engages in an act, practice, or course of business prohibited or made actionable by this chapter or a rule adopted or order issued under this chapter and the person has not filed a consent to service of process under subsection (a) of this Code section, the act, practice, or course of business constitutes the appointment of the Commissioner as the person's agent for service of process in a noncriminal action or proceeding against the person or the person's successor or personal representative.



(c) Service under subsection (a) or (b) of this Code section may be made by providing a copy of the process to the office of the Commissioner, but it is not effective unless:

(1) The plaintiff, which may be the Commissioner, promptly sends notice of the service and a copy of the process, return receipt requested, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address or takes other reasonable steps to give notice; and

(2) The plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the Commissioner in a proceeding before the Commissioner, allows.

(d) Service pursuant to subsection (c) of this Code section may be used in a proceeding before the Commissioner or by the Commissioner in a civil action in which the Commissioner is the moving party.

(e) If process is served under subsection (c) of this Code section, the court, or the Commissioner in a proceeding before the Commissioner, shall order continuances as are necessary or appropriate to afford the defendant or respondent reasonable opportunity to defend. (Code 1981, § 10-5-80, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

## ARTICLE 7

### APPLICABILITY OF PREDECESSOR PROVISIONS

#### **10-5-90. Predecessor Act governs actions pending and registrations, orders, and rules in effect on July 1, 2009.**

(a) The predecessor Act exclusively governs all actions or proceedings that are pending on July 1, 2009, or may be instituted on the basis of conduct occurring before July 1, 2009, but a civil action may not be maintained to enforce any liability under the predecessor Act unless instituted within any period of limitation that applied when the cause of action accrued or within five years after July 1, 2009, whichever is earlier.

(b) All effective registrations under the predecessor Act, all administrative orders relating to the registrations, rules, statements of policy, interpretative opinions, declaratory rulings, no action determinations, and conditions imposed on the registrations under the predecessor Act remain in effect while they would have remained in effect if this chapter had not been enacted. They are considered to have been filed, issued, or imposed under this chapter but are exclusively governed by the predecessor Act.

(c) The predecessor Act exclusively applies to an offer or sale made within one year after July 1, 2009, pursuant to an offering made in good

faith before July 1, 2009, on the basis of an exemption available under the predecessor Act. (Code 1981, § 10-5-90, enacted by Ga. L. 2008, p. 381, § 1/SB 358.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, “July 1, 2009” was substituted for “the effective date of this chapter” in subsections (a) and (c) and a comma was inserted following “July 1, 2009” in subsections (a) and (c).

## CHAPTER 5A

COMMODITIES AND COMMODITY CONTRACTS AND  
OPTIONS

Article 1		Sec.	
General Provisions			
Sec.		10-5A-21.	Actions by Commissioner if chapter, rule, or order violated.
10-5A-1.	Definitions.	10-5A-22.	Legal or equitable remedies; special remedies.
10-5A-2.	Prohibited activities concerning purchase or sale of commodities.	10-5A-23.	Venue for civil and criminal actions.
10-5A-3.	Exempt purchasers and sellers.	10-5A-24.	Commissioner of Securities; employees; compensation and expenses; assistant commissioner; prohibited use of information; confidential information.
10-5A-4.	Exempt transactions and contracts; rules and regulations.	10-5A-25.	Cooperation with agencies, administrators, and organizations.
10-5A-5.	Conditions for acting as commodity merchant; designation of board of trade.	10-5A-26.	Rules and regulations.
10-5A-6.	Fraudulent or deceitful acts or willful misappropriation prohibited.	10-5A-27.	Applicability of Code Sections 10-5A-2, 10-5A-5, and 10-5A-6.
10-5A-7.	Liability for acts or omissions of employees, officers, or agents.	10-5A-28.	Administrative proceedings.
10-5A-8.	Applicability of securities law.	10-5A-29.	Judicial review of Commissioner's orders.
10-5A-9.	Construction of chapter.	10-5A-30.	Burden of proving exemptions.
Article 2		10-5A-31.	Criminal penalties for violating chapter; institution of criminal proceedings.
Enforcement			
10-5A-20.	Investigations.		

**Cross references.** — Contracts of sale for future delivery of cotton, grain, stocks, or other commodities, § 13-9-1 et seq.

**Administrative rules and regulations.** —

Commodities, Official Compilation of the Rules and Regulations of the State of Georgia, Chapter 590-4-9.

## ARTICLE 1

## GENERAL PROVISIONS

## 10-5A-1. Definitions.

As used in this chapter, the term:

(1) "Board of trade" means any person or group of persons engaged in buying or selling any commodity or receiving the same for sale on consignment, whether such person or group of persons is characterized as a board of trade, exchange, or other form of marketplace.

(2) "Commissioner" means the Commissioner of Securities.



(3) “Commodity” means, except as otherwise specified by the Commissioner by rule, regulation, or order, any agricultural, grain, or livestock product or by-product, any metal or mineral (including a precious metal set forth in paragraph (12) of this Code section), any gem or gemstone (whether characterized as precious, semiprecious, or otherwise), any fuel (whether liquid, gaseous, or otherwise), any foreign currency, all other goods, articles, products, or items of any kind or any other “commodity” as defined in the Commodity Exchange Act or Commodity Futures Trading Commission rule, provided that the term commodity shall not include (A) a numismatic coin whose fair market value is at least 15 percent higher than the value of the metal it contains, (B) real property or any timber, agricultural, or livestock product grown or raised on real property and offered or sold by the owner or lessee of such real property, or (C) any work of art offered or sold by art dealers, at public auction, or through a private sale by the owner thereof.

(4) “Commodity contract” means any account, agreement, or contract for the purchase or sale, primarily for speculation or investment purposes and not for use or consumption by the offeree or purchaser, of one or more commodities, whether for immediate or subsequent delivery or whether or not delivery is intended by the parties, and whether characterized as a cash contract, deferred shipment or deferred delivery contract, forward contract, futures contract, installment or margin contract, leverage contract, or otherwise. Any commodity contract offered or sold, in the absence of evidence to the contrary, shall be presumed to be offered or sold for speculation or investment purposes. A commodity contract shall not include any contract or agreement which requires, and under which the purchaser receives, physical delivery of the total amount of each commodity to be purchased under the contract or agreement within 29 calendar days from the date of payment in good funds of any portion of the purchase price.

(5) “Commodity Exchange Act” means the act of Congress codified at 7 U.S.C. Section 1, et seq., known as the Commodity Exchange Act, as amended to July 1, 1988, and all subsequent amendments, additions, or other revisions thereto.

(6) “Commodity Futures Trading Commission” means the independent regulatory agency designated by Congress to administer the Commodity Exchange Act.

(7) “Commodity Futures Trading Commission rule” means any rule, regulation, or order of the Commodity Futures Trading Commission in effect on July 1, 1988, and all subsequent amendments, additions, or other revisions thereto.

(8) “Commodity merchant” means any of the following, as defined or described in the Commodity Exchange Act or by Commodity Futures Trading Commission rule:

- (A) Futures commission merchant;
- (B) Commodity pool operator;
- (C) Commodity trading adviser;
- (D) Introducing broker;
- (E) Leverage transaction merchant;
- (F) An associated person of any of the foregoing;
- (G) Floor broker; and

(H) Any other person (other than a futures association) required to register with the Commodity Futures Trading Commission.

(9) "Commodity option" means any account, agreement, or contract giving a party thereto the right but not the obligation to purchase or sell one or more commodities or one or more commodity contracts, or both, whether characterized as an option, privilege, indemnity, bid, offer, put, call, advance guaranty, decline guaranty, or otherwise, but shall not include an option traded on a national securities exchange registered with the United States Securities and Exchange Commission.

(10) "Financial institution" means a bank, savings institution, or trust company organized under, or supervised pursuant to, the laws of the United States or of any state.

(11) "Person" means an individual, a corporation, a partnership, an association, a joint-stock company, a trust where the interests of the beneficiaries are evidenced by a security, an unincorporated organization, a government, or a political subdivision of a government, but shall not include a contract market designated by the Commodity Futures Trading Commission or any clearing-house thereof or a national securities exchange registered with the Securities and Exchange Commission (or any employee, officer, or director of such contract market, clearing-house, or exchange acting solely in that capacity).

(12) "Precious metal" means the following in either coin, bullion, or other form:

- (A) Silver;
- (B) Gold;
- (C) Platinum;
- (D) Palladium;
- (E) Copper; and

(F) Such other items as the Commissioner may specify by rule, regulation, or order. (Code 1981, § 10-5A-1, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 2000, p. 136, § 10.)

**10-5A-2. Prohibited activities concerning purchase or sale of commodities.**

Except as otherwise provided in Code Section 10-5A-3 or 10-5A-4, no person shall solicit the purchase or sale of or offer to sell or purchase any commodity under any commodity contract or under any commodity option or offer to enter into as seller or purchaser any commodity contract or any commodity option. (Code 1981, § 10-5A-2, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-3. Exempt purchasers and sellers.**

The prohibitions in Code Section 10-5A-2 shall not apply to any transaction offered by and in which any of the following persons or any employee, officer, or director thereof acting solely in that capacity is the purchaser or seller:

(1) A person registered with the Commodity Futures Trading Commission as a futures commission merchant or as a leverage transaction merchant whose activities require such registration;

(2) A person registered with the Securities and Exchange Commission as a broker-dealer whose activities require such registration;

(3) A person affiliated with, and whose obligations and liabilities under the transaction are guaranteed by, a person referred to in paragraph (1) or (2) of this Code section;

(4) A person who is a member of a contract market designated by the Commodity Futures Trading Commission or any clearing-house thereof;

(5) A financial institution;

(6) A person registered under the laws of this state as a securities broker-dealer whose activities require such registration; or

(7) A person engaged in business as a bullion or precious metals dealer having and maintaining a net worth of at least \$500,000.00, provided that such person has filed with the Commissioner a sworn statement, in form and substance satisfactory to the Commissioner, that such person meets the minimum net worth requirement and that such person will notify the Commissioner immediately in the event its net worth falls below \$500,000.00.

The exemption provided by this Code section shall not apply to any transaction or activity which is prohibited by the Commodity Exchange Act or Commodity Futures Trading Commission rule. (Code 1981, § 10-5A-3, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-4. Exempt transactions and contracts; rules and regulations.**

(a) The prohibitions in Code Section 10-5A-2 shall not apply to the following:



(1) An account, agreement, or transaction within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted under the Commodity Exchange Act;

(2) A commodity contract or the purchase of one or more precious metals which requires, and under which the purchaser receives within seven calendar days from the date of payment in good funds of any portion of the purchase price, physical delivery of the quantity of the precious metals purchased by such payment, provided that, for purposes of this paragraph, physical delivery shall be deemed to have occurred if, within such seven-day period, such quantity of precious metals purchased by such payment is delivered (whether in specifically segregated or fungible bulk form) into the possession of a depository (other than the seller) which is either (A) a financial institution, (B) a depository the warehouse receipts of which are recognized for delivery purposes for any commodity on a contract market designated by the Commodity Futures Trading Commission, (C) a storage facility licensed or regulated by the United States or any agency thereof, or (D) a depository designated by the Commissioner, and such depository (or other person which itself qualifies as a depository) issues and the purchaser receives a certificate, document of title, confirmation, or other instrument evidencing that such quantity of precious metals has been delivered to the depository and is being and will continue to be held by the depository on the purchaser's behalf, free and clear of all liens and encumbrances, other than liens of the purchaser, tax liens, liens agreed to by the purchaser, or liens of the depository for fees and expenses, which have previously been disclosed to the purchaser;

(3) A commodity contract solely between persons engaged in producing, processing, using commercially, or handling as merchants each commodity subject thereto or any by-product thereof; or

(4) A commodity contract under which the offeree or the purchaser is a person referred to in Code Section 10-5A-3, an insurance company, or an investment company as defined in the Investment Company Act of 1940.

(b) The Commissioner may issue rules, regulations, or orders prescribing the terms and conditions of all transactions and contracts covered by the provisions of this chapter which are not within the exclusive jurisdiction of the Commodity Futures Trading Commission as granted by the Commodity Exchange Act, exempting any person or transaction from any provision of this chapter conditionally or unconditionally, and otherwise implementing the provisions of this chapter for the protection of purchasers and sellers of commodities. (Code 1981, § 10-5A-4, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-5. Conditions for acting as commodity merchant; designation of board of trade.**

(a) No person shall engage in a trade or business or otherwise act as a commodity merchant unless such person:

(1) Is registered or temporarily licensed with the Commodity Futures Trading Commission for each activity constituting such person as a commodity merchant and such registration or temporary license shall not have expired or been suspended or revoked; or

(2) Is exempt from such registration by virtue of the Commodity Exchange Act or of a Commodity Futures Trading Commission rule.

(b) No board of trade shall trade or provide a place for the trading of any commodity contract or commodity option required to be traded on or subject to the rules of a contract market designated by the Commodity Futures Trading Commission unless such board of trade has been so designated for such commodity contract or commodity option and such designation shall not have been vacated, suspended, or revoked. (Code 1981, § 10-5A-5, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-6. Fraudulent or deceitful acts or willful misappropriation prohibited.**

No person shall directly or indirectly:

(1) Cheat or defraud, or attempt to cheat or defraud, any other person or employ any device, scheme, or artifice to defraud any other person;

(2) Willfully make any false report, enter any false record, or make any untrue statement of a material fact or fail to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading;

(3) Engage in any transaction, act, practice, or course of business, including, without limitation, any form of advertising or solicitation, which operates or would operate as a fraud or deceit upon any person; or

(4) Willfully misappropriate or convert the funds, security, or property of any other person in connection with the solicitation of a purchase or sale of, the offer to sell, the offer to purchase, the offer to enter into, or the entry into of any commodity contract or commodity option subject to the provisions of Code Section 10-5A-2, Code Section 10-5A-3, or paragraph (2) or (4) of subsection (a) of Code Section 10-5A-4. (Code 1981, § 10-5A-6, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-7. Liability for acts or omissions of employees, officers, or agents.**

(a) The act, omission, or failure of any official, agent, or other person acting for any individual, association, partnership, corporation, or trust

within the scope of his employment or office shall be deemed the act, omission, or failure of such individual, association, partnership, corporation, or trust, as well as of such official, agent, or other person.

(b) Every person who directly or indirectly controls another person liable under any provision of this chapter, every partner, officer, or director of such other person, every person occupying a similar status or performing similar functions, and every employee of such other person who materially aids in the violation is also liable jointly and severally with and to the same extent as such other person, unless the person who is also liable by virtue of this subsection sustains the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. (Code 1981, § 10-5A-7, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-8. Applicability of securities law.**

Nothing in this chapter shall impair, derogate, or otherwise affect the authority or powers of the Commissioner under Chapter 5 of this title, known as the “Georgia Uniform Securities Act of 2008,” or the application of any provision of such chapter to any person or transaction subject to such chapter. (Code 1981, § 10-5A-8, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted “‘Georgia Uniform Securities Act of 2008,’” for “‘Georgia Securities Act of 1973,’” in this Code section.

#### **10-5A-9. Construction of chapter.**

This chapter may be construed and implemented to effectuate its general purpose to protect investors, to prevent and prosecute illegal and fraudulent schemes involving commodity contracts, and to maximize coordination with federal laws and the laws of other states and the administration and enforcement thereof. This chapter is not intended to create any rights or remedies upon which actions may be brought by private persons against persons who violate the provisions of this chapter. (Code 1981, § 10-5A-9, enacted by Ga. L. 1988, p. 1636, § 1.)

### **ARTICLE 2**

### **ENFORCEMENT**

#### **10-5A-20. Investigations.**

(a) The Commissioner at his discretion:

(1) May make such public or private investigations within or outside of this state as he deems necessary to determine whether any person has



violated or is about to violate this chapter or any rule, regulation, or order under this chapter or to aid in the enforcement of this chapter or in the prescribing of rules and regulations under this chapter;

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Commissioner determines, as to all the facts and circumstances concerning the matter to be investigated; and

(3) May publish information concerning any violation of this chapter or any rule, regulation, or order under this chapter.

(b)(1) For the purpose of conducting any investigation as provided in this Code section, the Commissioner shall have the power to administer oaths, to call any party to testify under oath at such investigations, to require the attendance of witnesses, to require the production of books, records, and papers, and to take the depositions of witnesses; and for such purposes the Commissioner is authorized to issue a subpoena for any witness or a subpoena for the production of documentary evidence. Such subpoenas may be served by registered or certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Commissioner or shall be directed for service to the sheriff of the county where such witness resides or is found or where the person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Commissioner in the same manner that other expenses of the Commissioner are paid.

(2) The Commissioner may issue and apply to enforce subpoenas in this state at the request of a securities agency or commissioner of another state if the activities constituting an alleged violation for which the information is sought would be a violation of this chapter if the activities had occurred in this state.

(c) In case of refusal to obey a subpoena issued under any Code section of this chapter to any person, a superior court of appropriate jurisdiction, upon application by the Commissioner, may issue to the person any order requiring him to appear before the court to show cause why he should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

(d) In the case of any investigation conducted under this Code section, the Commissioner may hold hearings or he may appoint an investigative agent to conduct the hearings who shall have the same powers and authority in conducting the hearings as are granted to the Commissioner in this Code section. The agent shall possess such qualifications as the Commissioner may require. A transcript of the testimony and evidence and objections resulting from such hearings shall be taken unless waived in writing by all parties present at the hearings. Copies of the transcript shall

be available to all parties present at the hearing upon payment of the reasonable expense of reproducing the transcript. All recommendations of the investigative agent shall be advisory only and shall not have the effect of an order of the Commissioner.

(e) In any case where a hearing is conducted by an investigative agent, he shall submit to the Commissioner a written report, including the transcript of the testimony in evidence if requested by the Commissioner, the findings of the hearing, and a recommendation of the action to be taken by the Commissioner. The recommendation of the agent shall be approved, modified, or disapproved by the Commissioner. The Commissioner may direct an investigative agent to take additional testimony or permit introduction of further documentary evidence.

(f) In addition to any other hearings and investigations which the Commissioner is authorized or required to hold by this chapter, the Commissioner is also authorized to hold general investigative hearings on his own motion with respect to any matter under this chapter. A general investigative hearing as provided for in this subsection may be conducted by any person designated by the Commissioner for that purpose and may, but need not, be transcribed by the Commissioner or by any other interested party. No formal action may be taken as a result of such investigative hearing; but the Commissioner may take such action as he deems appropriate, based on the information developed in the hearing and on any other information which he may have.

(g) The Commissioner may disclose information obtained in connection with an investigation under this Code section to the extent provided in this Code section and if disclosure is for the purpose of a civil, administrative, or criminal investigation or proceeding by a securities agency or law enforcement agency and the receiving agency represents that, under the applicable law, protections exist to preserve the integrity, confidentiality, and security of the information. (Code 1981, § 10-5A-20, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### RESEARCH REFERENCES

**ALR.** — Investigative authority of administrative agencies in state regulation of securities, 58 ALR5th 293.

#### 10-5A-21. Actions by Commissioner if chapter, rule, or order violated.

(a) If the Commissioner believes, whether or not based upon an investigation conducted under Code Section 10-5A-20, that any person has

engaged or is about to engage in any act or practice constituting a violation of any provision of this chapter or any rule or order issued under this chapter, the Commissioner may:

(1) Issue a cease and desist order;

(2) Issue an order imposing a civil penalty in an amount which may not exceed \$10,000.00 for any single violation or \$100,000.00 for multiple violations in a single proceeding or a series of related proceedings; or

(3) Initiate any of the actions specified in subsection (b) of this Code section.

(b) The Commissioner may institute any of the following actions in the appropriate courts of this state or in the appropriate courts of another state, in addition to any legal or equitable remedies otherwise available:

(1) A declaratory judgment;

(2) An action for a prohibitory or mandatory injunction to enjoin the violation of and to ensure compliance with this chapter or any rule or order of the Commissioner;

(3) An action for disgorgement; or

(4) An action for appointment of a receiver or conservator for the defendant or the defendant's assets. (Code 1981, § 10-5A-21, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-22. Legal or equitable remedies; special remedies.**

(a)(1) Upon a proper showing by the Commissioner that a person has violated, or is about to violate, any provision of this chapter or any rule or order of the Commissioner, a superior court of appropriate jurisdiction may grant appropriate legal or equitable remedies.

(2) Upon a showing of a violation of this chapter or a rule or order of the Commissioner, the court, in addition to traditional legal and equitable remedies, including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(A) Imposition of a civil penalty in an amount which may not exceed \$10,000.00 for any single violation or \$100,000.00 for multiple violations in a single proceeding or a series of related proceedings;

(B) Disgorgement;

(C) Declaratory judgment;

(D) Restitution to investors wishing restitution; and



(E) Appointment of a receiver or conservator for the defendant or the defendant's assets.

(3) Appropriate remedies when the defendant is shown only about to violate this chapter or a rule or order of the Commissioner shall be limited to:

- (A) A temporary restraining order;
- (B) A temporary or permanent injunction;
- (C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver or conservator for the defendant or the defendant's assets.

(b) The court shall not require the Commissioner to post a bond in any official action under this chapter.

(c)(1) Upon a proper showing by the commissioner or securities or commodity agency of another state that a person other than a government or governmental agency or instrumentality has violated, or is about to violate, any provision of the commodity act of that state or any rule or order of the commissioner or securities or commodity agency of that state, a superior court of appropriate jurisdiction may grant appropriate legal and equitable remedies.

(2) Upon a showing of a violation of the securities or commodity act of a foreign state or a rule or order of the commissioner or securities or commodity agency of the foreign state, the court, in addition to traditional legal or equitable remedies including temporary restraining orders, permanent or temporary prohibitory or mandatory injunctions, and writs of prohibition or mandamus, may grant the following special remedies:

(A) Disgorgement; and

(B) Appointment of a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets located in this state.

(3) Appropriate remedies when the defendant is shown only about to violate the securities or commodity act of the foreign state or a rule or order of the commissioner or securities or commodity agency of the foreign state shall be limited to:

- (A) A temporary restraining order;
- (B) A temporary or permanent injunction;
- (C) A writ of prohibition or mandamus; or

(D) An order appointing a receiver, conservator, or ancillary receiver or conservator for the defendant or the defendant's assets

located in this state. (Code 1981, § 10-5A-22, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-23. Venue for civil and criminal actions.**

For the purposes of venue for any civil or criminal action under this chapter, any violation of this chapter or of any rule, regulation, or order promulgated under this chapter shall be considered to have been committed in any county in which any act was performed in furtherance of the transaction which violated this chapter, in the county of any violator's principal place of business in this state, in the county of the issuer's principal place of business in this state, and in any county in which any violator had control or possession of any proceeds of the violation or of any books, records, documents, or other material or objects which were used in furtherance of the violation. (Code 1981, § 10-5A-23, enacted by Ga. L. 1988, p. 1636, § 1.)

**10-5A-24. Commissioner of Securities; employees; compensation and expenses; assistant commissioner; prohibited use of information; confidential information.**

(a) This chapter shall be administered by the office of the Secretary of State who is designated Commissioner of Securities.

(b) The Commissioner shall have authority to employ examiners, clerks, stenographers, and other employees as the administration of that portion of this chapter vested in him may require. The Commissioner shall also have authority to appoint and employ investigators who shall have, in any case that there is reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(c) The Commissioner and any persons employed by him shall be paid, in addition to their regular compensation, the transportation, board, lodging, and other travel expenses necessary and actually incurred by each of them in the performance of their duties under this chapter.

(d) The Commissioner shall appoint, with the approval of the Governor, a person as assistant commissioner and delegate such of his powers and duties under this chapter to such assistant commissioner as he desires.

(e) Neither the Commissioner nor any employees of the Commissioner shall use any information which is filed with or obtained by the Commissioner which is not public information for personal gain or benefit, nor shall the Commissioner or any employees of the Commissioner conduct any securities or commodity dealings whatsoever based upon any such information, even though public, if there has not been a sufficient period of time for the securities or commodity markets to assimilate such information.

(f)(1) Except as provided in paragraph (2) of this subsection, all information collected, assembled, or maintained by the Commissioner is public information and is available for examination by the public.

(2) The following are exceptions to paragraph (1) of this subsection and are deemed to be confidential:

(A) Information obtained in private investigations pursuant to Code Section 10-5A-20;

(B) Information designated as confidential by any rule, regulation, or order of the Commissioner; and

(C) Information obtained from federal agencies which may not be disclosed under federal law.

(3) The Commissioner in his discretion may disclose any information made confidential under subparagraph (A) of paragraph (2) of this subsection to persons identified in subsection (a) of Code Section 10-5A-25.

(4) No provision of this chapter either creates or derogates any privilege which exists at common law, by statute, or otherwise when any documentary or other evidence is sought under a subpoena directed to the Commissioner or any employee of the Commissioner. (Code 1981, § 10-5A-24, enacted by Ga. L. 1988, p. 1636, § 1; Ga. L. 1989, p. 14, § 10.)

#### **10-5A-25. Cooperation with agencies, administrators, and organizations.**

(a) To encourage uniform application and interpretation of this chapter and securities regulation and enforcement in general, the Commissioner and the employees of the Commissioner may cooperate, including bearing the expense of the cooperation, with the securities agencies or administrator of another jurisdiction, Canadian province or territory, or such other agencies administering laws similar to this chapter, the Commodity Futures Trading Commission, the Securities and Exchange Commission, any self-regulatory organization established under the Commodity Exchange Act or the Securities Exchange Act of 1934, any national or international organization of commodities or securities officials or agencies, and any governmental law enforcement agency.

(b) The cooperation authorized by subsection (a) of this Code section shall include, but need not be limited to, the following:

- (1) Making joint examinations or investigations;
- (2) Holding joint administrative hearings;
- (3) Filing and prosecuting joint litigation;
- (4) Sharing and exchanging personnel;



- (5) Sharing and exchanging information and documents;
- (6) Formulating and adopting mutual regulations, statements of policy, guidelines, proposed statutory changes, and releases; and
- (7) Issuing and enforcing subpoenas at the request of the agency administering laws similar to this chapter in another jurisdiction, the securities agency of another jurisdiction, the Commodity Futures Trading Commission, or the Securities and Exchange Commission if the information sought would also be subject to lawful subpoena for conduct occurring in this state. (Code 1981, § 10-5A-25, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-26. Rules and regulations.**

The Commissioner shall have the power to make such rules and regulations from time to time as he may deem necessary and proper for the enforcement of this chapter. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 10-5A-26, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-27. Applicability of Code Sections 10-5A-2, 10-5A-5, and 10-5A-6.**

(a) Code Sections 10-5A-2, 10-5A-5, and 10-5A-6 apply to persons who offer to sell or solicit a purchase when:

- (1) An offer to sell or solicitation of a purchase is made in this state; or
- (2) An offer to sell or solicitation of a purchase is made and accepted in this state.

(b) Code Sections 10-5A-2, 10-5A-5, and 10-5A-6 apply to persons who offer to buy or solicit a sale when:

- (1) An offer to buy or solicitation of a sale is made in this state; or
- (2) An offer to buy or solicitation of a sale is made and accepted in this state.

(c) For the purpose of this Code section, an offer to sell or to buy or a solicitation of a purchase or sale is made in this state, whether or not either party is then present in this state, when the offer or solicitation:

- (1) Originates from this state; or
- (2) Is directed by the offeror or solicitor to this state and received at the place to which it is directed or at any post office in this state in the case of a mailed offer or solicitation.

(d) For the purpose of this Code section, an offer to buy or to sell or solicitation of a sale or purchase is accepted in this state when acceptance:

(1) Is communicated to the offeror or solicitor in this state; and

(2) Has not previously been communicated to the offeror or solicitor, orally or in writing, outside this state; and acceptance is communicated to the offeror in this state, whether or not either party is then present in this state, when the offeree directs it to the offeror or solicitor in this state, reasonably believing the offeror or solicitor to be in this state and it is received at the place to which it is directed or at any post office in this state in the case of a mailed acceptance.

(e) An offer to sell or to buy or solicitation of a purchase or sale is not made in this state when:

(1) The publisher circulates or there is circulated on his behalf in this state any bona fide newspaper or other publication of general, regular, and paid circulation which is not published in this state, or which is published in this state but has had more than two-thirds of its circulation outside this state during the past 12 months; or

(2) A radio or television program originating outside this state is received in this state. (Code 1981, § 10-5A-27, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-28. Administrative proceedings.**

(a) The Commissioner shall commence an administrative proceeding under this chapter by entering either a notice of intent to do a contemplated act or a summary order. The notice of intent or summary order may be entered without notice, without opportunity for hearing, and need not be supported by findings of fact or conclusions of law, but must be in writing.

(b) Upon entry of a notice of intent or summary order, the Commissioner shall promptly notify all interested parties that the notice or summary order has been entered and the reasons therefor. If the proceeding is pursuant to a notice of intent, the Commissioner shall inform all interested parties of the date, time, and place set for the hearing on the notice. If the proceeding is pursuant to a summary order, the Commissioner shall inform all interested parties that they have 30 business days from the entry of the order to file a written request for a hearing on the matter with the Commissioner and that the hearing will be scheduled to commence within 30 business days after the receipt of the written request.

(c) If the proceeding is pursuant to a summary order, the Commissioner, whether or not a written request for a hearing is received from any interested party, may set the matter down for hearing on the Commissioner's own motion.

(d) If no hearing is requested and none is ordered by the Commissioner, the summary order will automatically become a final order after 30 business days.

(e) If a hearing is requested or ordered, the Commissioner, after notice of, and opportunity for, hearing to all interested persons, may modify or vacate the order or extend it until final determination.

(f) No final order or order after hearing may be returned without:

- (1) Appropriate notice to all interested persons;
- (2) Opportunity for hearing by all interested persons; and
- (3) Entry of written findings of fact and conclusions of law.

Every hearing in an administrative proceeding under this chapter shall be public unless the Commissioner grants a request joined in by all the respondents that the hearing be conducted privately. (Code 1981, § 10-5A-28, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-29. Judicial review of Commissioner's orders.**

(a) Any person aggrieved by a final order of the Commissioner may obtain a review of the order in a superior court of appropriate jurisdiction by filing in court, within 60 days after the entry of the order, a written petition praying that the order be modified or set aside in whole or in part. A copy of the petition for review shall be served upon the Commissioner.

(b) Upon the filing of a petition for review, except where the taking of additional evidence is ordered by the court pursuant to subsection (e) or (f) of this Code section, the court shall have exclusive jurisdiction of the matter, and the Commissioner may not modify or set aside the order, in whole or in part.

(c) The filing of a petition for review under subsection (a) of this Code section does not, unless specifically ordered by the court, operate as a stay of the Commissioner's order, and the Commissioner may enforce or ask the court to enforce the order pending the outcome of the review proceedings.

(d) Upon receipt of the petition for review, the Commissioner shall certify and file in the court a copy of the order and the transcript or record of the evidence upon which it was based. If the order became final by operation of law under subsection (d) of Code Section 10-5A-28, the Commissioner shall certify and file in court the summary order and evidence of its service upon the parties to it and an affidavit certifying that no hearing has been held and that the order became final pursuant to subsection (d) of Code Section 10-5A-28.

(e) If either the aggrieved party or the Commissioner applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that there were reasonable grounds for failure to adduce the evidence in the hearing before the Commissioner or other good cause, the court may order the additional evidence to be taken by the Commissioner under such conditions as the court considers proper.



(f) If new evidence is ordered taken by the court, the Commissioner may modify the findings and order by reason of the additional evidence and shall file in the court the additional evidence together with any modified or new findings or order.

(g) The court shall review the petition based upon the original record before the Commissioner as amended under subsections (e) and (f) of this Code section. The findings of the Commissioner as to the facts, if supported by competent, material, and substantive evidence, are conclusive. Based upon this review, the court may affirm, modify, enforce, or set aside the order, in whole or in part. (Code 1981, § 10-5A-29, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-30. Burden of proving exemptions.**

It shall not be necessary to prove the negative as to any of the exemptions of this chapter in any complaint, information, indictment, writ, or proceeding brought under this chapter; and the burden of proof of any such exemption shall be upon the party claiming the same. (Code 1981, § 10-5A-30, enacted by Ga. L. 1988, p. 1636, § 1.)

#### **10-5A-31. Criminal penalties for violating chapter; institution of criminal proceedings.**

(a) Any person who willfully violates any provision of this chapter shall be guilty of a felony and, upon conviction, shall be fined not more than \$50,000.00 or imprisoned for not more than ten years, or both, for each violation.

(b) The Commissioner may refer such evidence as is available concerning violations of this chapter or any rule or order of the Commissioner to the Attorney General or the proper district attorney, who may, with or without such a reference from the Commissioner, institute the appropriate criminal proceedings under this chapter. (Code 1981, § 10-5A-31, enacted by Ga. L. 1988, p. 1636, § 1.)

CHAPTER 5B

DECEPTIVE, FRAUDULENT, OR ABUSIVE TELEMARKETING

Sec.	Sec.
10-5B-1. Legislative findings and intent.	10-5B-6. Criminal and civil penalties; right to punish under other laws not limited.
10-5B-2. Definitions.	10-5B-7. Remedies, duties, prohibitions, and penalties not exclusive; construction with other provisions of the Code.
10-5B-3. Rules to prohibit deceptive, fraudulent, or abusive telemarketing activities authorized.	10-5B-8. When offer to sell or buy is made in state.
10-5B-4. Required and prohibited telephone conduct and activities; liability.	
10-5B-5. Applicability to persons subject to other provisions of the Code.	

**Cross references.** — Prohibited telemarketing activities, §§ 10-1-393.5, 10-1-393.6. Penalties for violation of this chapter, § 16-8-12. Telecommunications Marketing Act of 1998, § 46-5-180 et seq.

RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state statute or law pertaining to telephone solicitation, 44 ALR5th 619. Constitutional right to jury trial in cause of action under state unfair or deceptive trade practices law, 54 ALR5th 631.

10-5B-1. Legislative findings and intent.

- (a) The General Assembly finds that a problem is posed in this state by the increasing use of the telephone in a fraudulent or abusive manner as a means of solicitation in certain currently regulated commercial businesses and professions and that the power and reach of the telephone as a medium for such conduct increases the risk to the legitimate economy of the state.
- (b) The General Assembly declares that the intent of this chapter is to impose sanctions against the fraudulent use of the telephone in certain currently regulated commercial businesses and professions. This chapter shall be construed to further that intent. (Code 1981, § 10-5B-1, enacted by Ga. L. 1994, p. 536, § 1.)

**Law reviews.** — For review of 1996 commerce and trade legislation, see 13 Ga. St. U. L. Rev. 33 (1996).

10-5B-2. Definitions.

- (a) As used in this chapter, the term:
- (1) “Charitable contribution” means the promise or grant of any

money or property of any kind or value to be used for any charitable purpose, as that term is defined in Code Section 43-17-2.

(2) "Control," "controlling," "controlled by," or "under common control with" means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person, whether through the ownership of voting securities, by contract, or otherwise.

(3) "Executive officer" means the chief executive officer, the president, the principal financial officer, the principal operating officer, each vice president with responsibility involving policy-making functions for a significant aspect of a person's business, the secretary, the treasurer, or any other person performing similar functions with respect to any organization, whether incorporated or unincorporated.

(4) "Person" means an individual, a corporation, a partnership, a limited liability company, an association, a joint-stock company, a trust, or any unincorporated organization.

(5) "Secretary of State" means the Secretary of State of the State of Georgia.

(6) "Telephone soliciting business" means a sole proprietorship, partnership, limited liability company, corporation, or other association of individuals engaged in a common effort to solicit sales regulated under this chapter.

(7) "Telephone solicitor" or "solicitor" means a person, partnership, limited liability company, corporation, or other entity that makes or places telephone calls for the purpose of selling or solicitation of sales as defined in paragraph (8) of this subsection over the telephone, whether the call originates in the State of Georgia or is received in the State of Georgia.

(8) "Telephonic sale," "sell telephonically," "telephonic selling," "telephonic offer for sale," or "telephonic solicitation of sale," and "telemarketing" means a sale or solicitation of goods or services, a sale or offer to sell a security as defined in paragraph (31) of Code Section 10-5-2, or a solicitation of a charitable contribution, in which:

(A) The seller solicits the sale or charitable sale or contribution over the telephone;

(B) The purchaser's agreement to purchase or contribute is made over the telephone; and

(C) In the case of a sale of goods or services only, the purchaser, over the telephone, pays for or agrees to commit to payment for goods or services prior to or upon receipt by the purchaser of the goods and services.



(b) The rules of statutory construction contained in Chapter 3 of Title 1 shall apply to the interpretation of this chapter. (Code 1981, § 10-5B-2, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1998, p. 643, § 3; Ga. L. 2008, p. 381, § 6/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted “paragraph (31)” for “paragraph (26) of subsection (a)” in the introductory language of paragraph (a)(8).

**Editor’s notes.** — Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, pro-

vides that the amendment to this Code section is applicable to acts and offenses committed on or after July 1, 1998.

**Law reviews.** — For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U. L. Rev. 9 (1998).

**10-5B-3. Rules to prohibit deceptive, fraudulent, or abusive telemarketing activities authorized.**

(a) The Secretary of State shall be authorized to promulgate rules to prohibit deceptive or fraudulent telemarketing activities and other abusive telemarketing activities by persons subject to the provisions of Chapter 5 of this title, the “Georgia Uniform Securities Act of 2008”; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the “Georgia Charitable Solicitations Act of 1988.”

(b) Any rules promulgated by the Secretary of State pursuant to subsection (a) of this Code section may include but not be limited to:

- (1) A definition of deceptive telemarketing activities;
- (2) A list of criteria that are symptomatic of deceptive telemarketing as distinguished from ordinary telemarketing business practices;
- (3) A requirement that telemarketers may not undertake a pattern of unsolicited telephone calls which the reasonable consumer would consider coercive or abusive of such consumer’s right to privacy;
- (4) A requirement that goods or services offered by telemarketing be shipped or provided within a specified period and that, if the goods or services are not shipped or provided within such period, a refund shall be required; and
- (5) Authority for a person who orders any goods or services through telemarketing to cancel the order within a specified period.

(c) No rules promulgated pursuant to this Code section shall in any way limit the scope or application of Part 2 of Article 15 of Chapter 1 of this title, the “Fair Business Practices Act of 1975.” (Code 1981, § 10-5B-3, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2008, p. 381, § 10/SB 358.)

The 2008 amendment, effective July 1, 2009, substituted “‘Georgia Uniform Securities Act of 2008’” for “‘Georgia Securities Act of 1973’” in the middle of subsection (a).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, a comma was deleted following “2008” in subsection (a).

#### **10-5B-4. Required and prohibited telephone conduct and activities; liability.**

(a) It shall be unlawful for any person who is jurisdictionally subject to the provisions of Chapter 5 of this title, the “Georgia Uniform Securities Act of 2008”; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the “Georgia Charitable Solicitations Act of 1988,” and who makes any telephonic offer to sell or telephonic sale in this state:

(1) To fail to promptly state clearly the name of the business on whose behalf the call is being made before any sales solicitation can begin and provide a telephone number or address at which the business can be contacted and shall not by electronics block their name and phone number from being identified by caller ID;

(2) To violate any rule, regulation, or order promulgated or issued by the Secretary of State under this chapter;

(3) In connection with a telephonic sale, selling telephonically, or telephonic solicitation of sale in or from this state, to employ a device, scheme, or artifice to defraud;

(4) In connection with a telephonic sale, selling telephonically, or telephonic solicitation of sale in or from this state, to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon a person;

(5) Knowingly to cause to be made, in any document filed with the Secretary of State or in any proceeding under this chapter, any statement which is, at the time it is made and in light of the circumstances under which it is made, false or misleading in any material respect; or

(6) In connection with a telephonic solicitation of a monetary charitable contribution, to use the services of any person as a courier or otherwise to obtain personally receipt or possession of a monetary contribution from a residence.

(b) Every person who directly or indirectly controls a person culpable under subsection (a) of this Code section, every general partner, executive officer, or director of such person culpable under subsection (a) of this

Code section, every person occupying a similar status or performing similar functions, and every telephone soliciting business or telephone solicitor who participates in any material way in the sale or solicitation of sale is culpable to the same extent as the person whose culpability arises under subsection (a) of this Code section unless the person whose culpability arises under this subsection sustains the burden of proof that he or she did not know and, in the exercise of reasonable care, could not have known of the existence of the facts by reason of which culpability is alleged to exist. (Code 1981, § 10-5B-4, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1998, p. 643, § 4; Ga. L. 2000, p. 1200, § 1; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted “‘Georgia Uniform Securities Act of 2008’” for “‘Georgia Securities Act of 1973’” near the beginning of subsection (a).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, a semicolon was substituted for a period at the end of paragraph (a)(1).

Pursuant to Code Section 28-9-5, in 2008,

a comma was deleted following “2008” in the introductory language of subsection (a).

**Editor’s notes.** — Ga. L. 1998, p. 643, § 6, not codified by the General Assembly, provides that the amendment to this Code section is applicable to acts and offenses committed on or after July 1, 1998.

**Law reviews.** — For review of 1998 legislation relating to commerce and trade, see 15 Ga. St. U. L. Rev. 9 (1998).

#### 10-5B-5. Applicability to persons subject to other provisions of the Code.

(a) With respect to any person who is jurisdictionally subject to the provisions of Chapter 5 of this title, the “Georgia Uniform Securities Act of 2008,” the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 5 of this title were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 5 of this title who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 5 of this title in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 5 of this title were incorporated into and made a part of this chapter.

(b) With respect to any person who is jurisdictionally subject to the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options, the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 5A of this title were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 5A of this title who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 5A of this title in the same manner, by the



same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 5A of this title were incorporated into and made a part of this chapter.

(c) With respect to any person who is jurisdictionally subject to the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors, the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 14 of Title 43 were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 14 of Title 43 who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 14 of Title 43 in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 14 of Title 43 were incorporated into and made a part of this chapter.

(d) With respect to any person who is jurisdictionally subject to the provisions of Chapter 17 of Title 43, known as the “Georgia Charitable Solicitations Act of 1988,” the Secretary of State shall prevent any person from violating a rule promulgated under Code Section 10-5B-3 in the same manner, by the same means, and with the same jurisdiction, powers, and duties as though all applicable terms and provisions of Chapter 17 of Title 43 were incorporated into and made a part of this chapter. Except as otherwise provided in this chapter, any person so jurisdictionally subject to the provisions of Chapter 17 of Title 43 who violates such rule shall be subject to the penalties and entitled to the privileges and immunities provided in Chapter 17 of Title 43 in the same manner, by the same means, and with the same jurisdiction, power, and duties as though all applicable terms and provisions of Chapter 17 of Title 43 were incorporated into and made a part of this chapter. (Code 1981, § 10-5B-5, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted “‘Georgia Uniform Securities Act of 2008,’” for “‘Georgia Securities Act of 1973,’” in the first sentence of subsection (a).

#### **10-5B-6. Criminal and civil penalties; right to punish under other laws not limited.**

(a) Any person who shall willfully violate any provision of this chapter shall be guilty of a felony and, upon conviction thereof, shall be punished as described under subparagraph (a)(5)(A) of Code Section 16-8-12.

(b) Any person who suffers injury or damages as a result of a violation of this chapter may bring an action and may recover under Code Section 10-1-399, relating to private rights of action.

(c) Any person who intentionally targets an elder or disabled person, as defined in Article 31 of Chapter 1 of this title, in a violation of this chapter shall be subject to double the applicable civil and criminal penalties for such violation or offense.

(d) Nothing in this chapter shall limit any statutory or common-law right of the state to punish any person for violation of any law. (Code 1981, § 10-5B-6, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 1996, p. 231, § 3; Ga. L. 2004, p. 631, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1996, a misspelling of the word “defined” in subsection (c) was corrected.

**10-5B-7. Remedies, duties, prohibitions, and penalties not exclusive; construction with other provisions of the Code.**

(a) The remedies, duties, prohibitions, and penalties of this chapter are not exclusive and are in addition to all other causes of action, remedies, and penalties provided by law.

(b) Nothing in this chapter shall amend, alter, or repeal any of the provisions of Chapter 5 of this title, the “Georgia Uniform Securities Act of 2008”; the provisions of Chapter 5A of this title, relating to commodities and commodity contracts and options; the provisions of Chapter 14 of Title 43, relating to electrical contractors, plumbers, conditioned air contractors, low-voltage contractors, and utility contractors; or the provisions of Chapter 17 of Title 43, the “Georgia Charitable Solicitations Act of 1988.” (Code 1981, § 10-5B-7, enacted by Ga. L. 1994, p. 536, § 1; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment,** effective July 1, 2009, substituted “‘Georgia Uniform Securities Act of 2008’” for “‘Georgia Securities Act of 1973’” in subsection (b).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2008, a comma was deleted following “2008” in subsection (b).

**10-5B-8. When offer to sell or buy is made in state.**

For purposes of this chapter, an offer to sell or to buy is made in this state, whether or not either party is then present in this state, when the offer:

(1) Originates from this state; or

(2) Is directed by the offeror to this state and received at the place to which it is directed. (Code 1981, § 10-5B-8, enacted by Ga. L. 1994, p. 536, § 1.)

## CHAPTER 6

## AGENCY

## Article 1

## Sec.

**Creation and Nature of Relationship**

- Sec.  
 10-6-1. When agency relationship arises.  
 10-6-2. Formality necessary to create agency.  
 10-6-3. Who may be agent.  
 10-6-4. Fiduciaries may convey by attorneys in fact.  
 10-6-5. What may be done by agent; delegation of agent's authority.  
 10-6-6. Conditional power of attorney.

10-6-35.

10-6-36.

10-6-37.

10-6-38.

## Article 2

**Relations Between Principal and Agent**

- 10-6-20. Rights under agency for illegal purpose.  
 10-6-21. Extent of agent's authority; liability for exceeding, violating, or disregarding instructions.  
 10-6-22. Diligence required of agent.  
 10-6-23. Agent may follow instructions from one of several principals.  
 10-6-24. Agent not to buy or sell for himself.  
 10-6-25. Agent must account for profit from principal's property.  
 10-6-26. Estoppel of agent to dispute principal's title.  
 10-6-27. Right of principal to follow money deposited by agent.  
 10-6-28. When agent depositing principal's money not liable for bank failure.  
 10-6-29. Mingling goods of principal and agent.  
 10-6-30. Agents and fiduciaries to keep accounts; effect of neglect.  
 10-6-31. When agent entitled to commission and expenses.  
 10-6-32. Owner's right to sell property placed with broker; broker's right to commissions.  
 10-6-33. Revocation of agency — When and how done; damages for unreasonable revocation.  
 10-6-34. Revocation of agency — Effect of

10-6-39.

death or disability on pledge of stock with power of attorney.

Revocation of agency — Effect of death on power of attorney by member of armed forces, seaman, or person on war service.

Revocation of agency — Effect of incompetency or incapacity of principal on power of attorney.

Revocation of agency — Action for wrongful discharge of agent before termination of contract.

Revocation of agency — Subsequent earnings in mitigation of damages on improper dismissal of agent.

Liability of principal for injuries by other agents.

## Article 3

**Rights and Liabilities of Principal to Third Persons**

- 10-6-50. Scope of agent's authority; effect of private instructions; dealing with special agent.  
 10-6-51. Principal bound by acts within scope of authority; no right to ratify in part.  
 10-6-52. Ratification relates back to agent's act; how act ratified; no revocation of ratification.  
 10-6-53. Form in which agent acts immaterial.  
 10-6-54. When undisclosed principal liable on contract.  
 10-6-55. Effect of seller giving credit to agent.  
 10-6-56. When principal bound by agent's representations or concealment.  
 10-6-57. Payment to agent not producing obligation made at debtor's risk; proving agent's authority.  
 10-6-58. Notice to agent.  
 10-6-59. Principal not bound by agent conspiring with third person.  
 10-6-60. Principal bound for neglect and fraud of agent.



- Sec.  
10-6-61. When principal liable for agent's willful trespass.  
10-6-62. When principal to benefit from agent's contract; defenses against undisclosed principal.  
10-6-63. When principal may recover money or goods illegally or mistakenly paid or wrongfully transferred by agent.  
10-6-64. Agent may be witness; credibility; admissibility of agent's declarations.

Article 4

Rights and Liabilities of Agent as to Third Persons

- 10-6-80. Agent may prosecute legal remedies for principal; parol authority; liability if act repudiated.  
10-6-81. Recovery of money paid to or by agent by mistake.  
10-6-82. Agent's right of action on principal's contracts.  
10-6-83. Right of action by agent for interference with his possession.  
10-6-84. When agent exceeding authority may enforce contract.  
10-6-85. Individual liability of agent by undertaking, when exceeding authority, and for tort; negligence of underservant.  
10-6-86. Liability of person signing instrument as agent or fiduciary.  
10-6-87. When agent responsible for credit given; question for jury.

- Sec.  
10-6-88. When public agents not liable on public contract.  
10-6-89. Contract for nonexisting principal void; right of action against purported agent.

Article 5

Agents Receiving Moneys for Third Persons

- 10-6-100. Bond to be posted by agent in business of receiving cash for payment to third persons; exceptions.  
10-6-101. Right to restitution from bond; agent's civil or criminal liability to patron not affected.  
10-6-102. Penalties for failure to post bond.

Article 6

Overseers

- 10-6-120. Overseer's duties and powers.  
10-6-121. Parol contract between employer and overseer.

Article 7

Financial Power of Attorney

- 10-6-140. Statutory form not exclusive method of creating financial power of attorney.  
10-6-141. Explanation for principals.  
10-6-142. Statutory form for financial power of attorney.

**Cross references.** — Registered agents of corporations, § 14-2-501 et seq. Rights, duties, and liabilities arising out of partnership status, § 14-8-40 et seq. Equitable principles relating to powers of appointment, sale, and other powers, § 23-2-110 et seq.

**Law reviews.** — For annual survey of cases concerning business associations, see 39 Mercer L. Rev. 53 (1987).

RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Fiduciary's Breach of Investment Duties, 1 POF2d 467.  
Existence of Joint Venture, 12 POF2d 295.  
Expansion of Agent's Authority by Necessity, 14 POF2d 483.

Principal's Repudiation of Agent's Unauthorized Act, 37 POF2d 739.  
Vicarious Liability Under Doctrine of Ostensible or Apparent Agency, 6 POF3d 457.  
Real Estate Broker's Misrepresentation or

Nondisclosure as to Condition or Value of Realty, 39 POF3d 309.

Real Estate Seller's Claims for Relief for Fraudulent-Concealment of Identity of True Purchaser of Realty, 63 POF3d 257.

**ALR.** — Validity and application of regulation prohibiting licensed real-estate broker

from negotiating sale or lease with owner known to have exclusive listing agreement with another broker, 17 ALR4th 763.

Real-estate broker's rights and liabilities as affected by failure to disclose agreement to loan purchase money to purchaser, 17 ALR4th 788.

## ARTICLE 1

### CREATION AND NATURE OF RELATIONSHIP

**Cross references.** — Confidential nature of relationship between principal and agent, § 23-2-58.

#### 10-6-1. When agency relationship arises.

The relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf. (Orig. Code 1863, § 2157; Code 1868, § 2152; Code 1873, § 2178; Code 1882, § 2178; Civil Code 1895, § 2997; Civil Code 1910, § 3569; Code 1933, § 4-101.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### AGENCY BY RATIFICATION

#### OPERATION OF AUTOMOBILE

#### PROCEDURE

1. PLEADING
2. EVIDENCE
3. INSTRUCTIONS
4. QUESTIONS OF LAW AND FACT

### General Consideration

**"Agency".** — "Agency" is the relationship which results from the manifestation of consent by one person to another that the other shall act on one's behalf and subject to one's control, and consent by the other so to act. *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950); *Aetna Ins. Co. v. Glens Falls Ins. Co.*, 453 F.2d 687 (5th Cir. 1972); *Flournoy v. City Fin. of Columbus, Inc.*, 679 F.2d 821 (11th Cir. 1982).

The word "agency" may refer to that relation created by express or implied contract or by law, whereby one party delegates the transaction of some lawful business with more or less discretionary power to another, who undertakes to manage the affair and to

render an account thereof. *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950).

**Consent essential for liability for other's act.** — The relationship of master and servant cannot be imposed upon a person without the person's consent, express or implied; hence, the defendant was free to select the defendant's own servant, and was responsible for the acts of the defendant's servant within the scope of the defendant's employment, but the defendant was not responsible for the act of an assistant permitted, without the defendant's authority, to act for the defendant. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

**No liability beyond scope of agency.** — Beyond the scope of agency, a principal is

not bound by the acts of the agent. *Abercrombie v. Ford Motor Co.*, 81 Ga. App. 690, 59 S.E.2d 664, rev'd on other grounds, 207 Ga. 464, 62 S.E.2d 209 (1950).

**Agency relationship may arise by implication** as well as by express authority. *Greenbaum v. Brooks*, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

An agent or servant is frequently employed by contract or express agreement, but this is not necessary to establish the relation, which may arise by implication as well as expressly. *Griffin v. Russell*, 144 Ga. 275, 87 S.E. 10, 1916F L.R.A. 216, 1917D Ann. Cas. 994 (1915).

**Confidential relationship rising to agency.** — A confidential relationship between employer and employee may rise to agency dimensions where a showing is made of a relationship which in fact justifies the reposing of confidence in one party by another. *Remediation Servs., Inc. v. Georgia-Pacific Corp.*, 209 Ga. App. 427, 433 S.E.2d 631 (1993).

**Law of agency is not confined to business transactions.** *Hubert v. Harpe*, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935).

**Manual service.** — "Agency" relates to business transactions, while the work of a servant relates to manual service. *Headrick v. Fordham*, 154 Ga. App. 415, 268 S.E.2d 753 (1980).

**Contractual relationships.** — The relationship between a gas station and the company that leased property and sold gas to the station was a purely contractual one between two independent businesses, not an agency or joint venture. *Wells v. Vi-Mac, Inc.*, 226 Ga. App. 261, 486 S.E.2d 400 (1997).

**Control by employer determines agency relationship.** — The test to be applied in determining whether the relationship of the parties constitutes an agency is whether the contract gives, or the employer assumes, the right to control the time and manner of executing the work, as distinguished from the right merely to require results in conformity to the contract. *Greenbaum v. Brooks*, 110 Ga. App. 661, 139 S.E.2d 432 (1964); *McMullan v. Georgia Girl Fashions, Inc.*, 180 Ga. App. 228, 348 S.E.2d 748 (1986).

**Agent creates obligations on behalf of principal.** — An employee performs work for the master, but an agent, within the

ambit of the employee's authority, represents the employee's principal in some business dealing and is vested with authority, real or ostensible, to create obligations on behalf of the employee's principal, bringing third parties into contractual relations with the principal. *Lagerstrom v. Beers Constr. Co.*, 157 Ga. App. 396, 277 S.E.2d 765 (1981).

**Apparent authority** to do act is created as to a third person when the statements or conduct of the alleged principal reasonably cause the third person to believe that the principal consents to have the act done on the principal's behalf by the purported agent. *Hinely v. Barrow*, 169 Ga. App. 529, 313 S.E.2d 739 (1984).

**No principal/agent relation exists if employee has no delegated authority** to act for the business except to pay bills in the absence of the owner and if the employee has no authority to purchase, to contract, to hire or fire, or even supervise other personnel. *Commercial Union Ins. Co. v. Taylor*, 169 Ga. App. 177, 312 S.E.2d 177 (1983).

**Dual agent.** — The acts of an individual in procuring liability insurance for a company, of which the individual was the chairman, and issuing liability insurance policies on behalf of an insurer of which the individual was the president, had been occurring and recurring for more than 30 years with the knowledge and consent of all parties, and made the individual a dual agent. The individual's misconduct in procuring a policy which did not cover certain acts of employees could not be imputed to either of the principals, who were not actually at fault. *Edwards-Warren Tire Co. v. Cole, Sanford & Whitmire*, 188 Ga. App. 395, 373 S.E.2d 83 (1988).

**Liability for subagent's acts.** — Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive the automobile on the business of the owner, is personally expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

**Liability when employment of subagent is ratified.** — If a servant who is employed to do certain work for a master employs another person to assist the master, the master is liable for the negligence of the assistant only when the servant had authority, express



**General Consideration (Cont'd)**

or implied, to employ the assistant, or when the act of employment is ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master, engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver is ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961).

**Independent contractor may also be agent;** thus, a person may be an independent contractor and at the same time act as an agent for a particular purpose. *National Home Life Assurance Co. v. Hawkins*, 151 Ga. App. 60, 258 S.E.2d 913 (1979).

**Existence of agency relationship must be determined from all facts and circumstances.** *Aetna Ins. Co. v. Glens Falls Ins. Co.*, 453 F.2d 687 (5th Cir. 1972).

**Contract of agency signed by both parties is not essential** to the creation of the principal-agent relationship. *Clyde Chester Realty Co. v. Stansell*, 151 Ga. App. 357, 259 S.E.2d 639 (1979).

**Payment of compensation is not necessary ingredient of principal and agent.** *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

**Payment of compensation does not alone create agency.** — If landowners entered into a contract of sale with a prospective purchaser, conditioned upon furnishing satisfactory title, designating a certain firm of brokers as the owners' agent, and stipulating that, in the event the sale was consummated, the purchaser would pay such brokers' commission, the mere fact that the purchaser undertook to pay such commission did not of itself alone create the relation of principal and agent between the purchaser and the brokers, under former Civil Code 1910, §§ 3569 and 3574. *Richardson v. DuPree*, 32 Ga. App. 3, 122 S.E. 707, cert. denied, 32 Ga. App. 807 (1924).

**Contracts of agency involve assuming legal rights and duties.** — Contracts of agency, to be cognizable in law, must, like other agreements, have reference to the assump-

tion of legal rights and duties, as opposed to engagements of a mere civic or social character, or of such other nature as to exclude monetary values. *Huckeby v. Smith*, 42 Ga. App. 719, 157 S.E. 234 (1931).

**Obligations imposed on agent as soon as agency created.** — At the very moment a property owner accepts the offer of a corporation engaged in the real estate business to sell the property, the latter becomes the owner's agent, and thereupon all the obligations of an agent to a principal become operative. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**Sales of securities.** — To hold an individual to be an agent who has participated or aided in making sales of securities, the court must find that the individual was so entangled in the actual sale of the security that the individual's activities were at least a substantial factor in the purchaser's decision to buy the security and that the individual's activities were either authorized or ratified by the issuer. *In re N. Am. Acceptance Corp. Sec. Cases*, 513 F. Supp. 608 (N.D. Ga. 1981).

**Creating agency under franchise agreement.** — A franchise agreement giving no control, or right of control, over the methods or details of doing the work of the franchisee does not create an agency relationship. *Holiday Inns, Inc. v. Newton*, 157 Ga. App. 436, 278 S.E.2d 85 (1981).

Where indicia of agency were missing from a franchise agreement, the trial court did not err in granting summary judgment to the franchisor in a suit for false imprisonment based on actions of the franchisee and the franchisee's employees. *McMullan v. Georgia Girl Fashions, Inc.*, 180 Ga. App. 228, 348 S.E.2d 748 (1986).

A franchise contract under which one operates a type of business on a royalty basis does not create an agency or a partnership relationship. *Whitco Produce Co. v. Bonanza Int'l, Inc.*, 154 Ga. App. 92, 267 S.E.2d 627 (1980).

**Ineffective agreement to modify sublease did not create agency relationship** between plaintiff (sublessee) and lessee whereby plaintiff had the right to exercise a lease renewal option as lessee's agent, since the agreement by the agreement's terms purported to grant plaintiff the same rights as held by lessee and did not purport to autho-

size plaintiff to assert those rights on behalf of the lessee. *Regional Pacesetters, Inc. v. Halpern Enters., Inc.*, 165 Ga. 777, 300 S.E.2d 180 (1983).

**Nurse is agent of hospital** rather than a patient's attending psychiatrist as the nurse works for the hospital and not a particular psychiatrist, taking only such orders from hospital psychiatrists as are indicated on a patient's chart. *Myers v. State*, 251 Ga. 883, 310 S.E.2d 504 (1984).

**Liability for child's tort.** — The relation of principal and agent must appear in order to create liability on the father for the tort of the minor child. *Lacey v. Forehand*, 27 Ga. App. 344, 108 S.E. 247 (1921).

**Principal/agency relation may exist between husband and wife** as to establishment of a boundary line. *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945).

**Services performed by spouse for another.** — Where a husband and wife are living together, the husband is entitled to the services of the wife, and any valuable services which she may render to another are rendered by the husband, by and through the instrumentality of the wife as his agent. *Cooper v. Cooper*, 59 Ga. App. 832, 2 S.E.2d 145 (1939).

Where an aged father comes to live in the home of his son, and, while living there, the father becomes ill and is cared for by the son's wife during his sickness, and his wants are ministered to by her, and the son and his wife are living together, the services thus rendered to the father are rendered by the son, through the agency of the wife. If the husband then agrees with his wife that she perform the services and shall herself be entitled to compensation therefor from the father, such agreement is in the nature only of an assignment by the husband to the wife of the husband's right of title and interest in any chose in action which he may have against the father to recover for the services rendered, which are rendered by the husband through the agency and instrumentality of the wife. Such an agreement, even if it confers on the wife the right to her earnings under the alleged contract, creates no contract where none existed and confers upon her no right which the husband did not possess to recover of the father's estate. *Cooper v. Cooper*, 59 Ga. App. 832, 2 S.E.2d 145 (1939).

**Husband permitted to manage wife's property.** — If a wife permitted her husband to manage and control her property or allowed him so to deal with it as to induce others to believe that it was his property or that he was acting as her authorized agent, such facts were sufficient to establish the agency in favor of persons who dealt with him in such belief, where she knew that her husband was so managing and controlling her property and made no objection thereto. *Aronoff v. Woodard*, 47 Ga. App. 725, 171 S.E. 404 (1933).

**Agency held created.** — A landlord's agent having authority generally to look after the landlord's farming business in a certain community, whose conduct in respect to the agent's dealings with one of the landlord's tenants will, in the language of the landlord, be "satisfactory" to the landlord, is an agent under this section, having such general authority that it may be inferred that the agent possesses authority to bind the landlord in the purchase of supplies such as fertilizer furnished to the tenant which is necessary in the farming operations. *Jolly v. Chattahoochee Fertilizer Co.*, 28 Ga. App. 194, 110 S.E. 639 (1922).

If a corporation receives funds from a bank with direction to place them on call loan for the bank and the corporation undertakes to place the funds on call loan, a fiduciary relation of principal and agent arises between the parties. *Bank of Dania v. Farmers' & Traders' Bank*, 169 Ga. 846, 151 S.E. 803 (1930).

Where, in order to secure an unpaid balance on the purchase price of an automobile, defendant executed a retention of title note to a third-party motor company, payable in installments in certain definite amounts on various consecutive dates, and, before the payment and maturity of any of the installments, the third-party motor company, without defendant's knowledge, transferred the note to the plaintiff bank, and defendant thereafter continued to pay to the motor company certain installments as they fell due, which payments the motor company transmitted to the bank, which accepted the same in payment of the installments due, such a course of dealing was sufficient to authorize the inference that the bank had constituted the motor company its secret agent in dealing with defendant to



**General Consideration** (Cont'd)

collect the installments as they fell due, despite the fact that defendant had found out from the bank that it held the note, the defendant asking the bank at that time if the motor company had remitted the payments to it and the bank informing the defendant that it had, and that defendant had continued to make payments to the motor company. *Powell v. Bank of Manchester*, 46 Ga. App. 264, 167 S.E. 343 (1933).

Where for some time alleged agent of defendant purchased agricultural products for defendant with drafts drawn upon the defendant, on which drafts plaintiff bank advanced to defendant's agent the cash, the defendant was bound by such acts of the agent and estopped to deny that such person was acting as the defendant's agent or set up that the defendant was not liable for the amount of plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

The evidence supported findings that a stepchild, who bought a salvage business from a stepparent, had a legal right to control its operation and the stepchild created a relation of principal and agent by telling the stepparent that the stepparent could continue as operator. *Vessell v. Walker*, 231 Ga. App. 713, 499 S.E.2d 688 (1998).

Pursuant to O.C.G.A. § 10-6-1, a verbal authorization from a decedent was sufficient to create a valid agency relationship between the decedent and a brother and a wife, so as to allow them to withdraw money for the decedent from the accounts on a periodic basis; the equal dignity rule did not apply in this case because the instruments at issue were not subject to the statute of frauds. *Rowland v. Rowland*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

Trial court properly determined that a police officer who did moonlighting as a security guard for an apartment complex was acting as an agent, pursuant to O.C.G.A. § 10-6-1, for the owners of the complex when the officer retrieved a rape kit and held it for a period of time, as there was no police purpose for having done so, nor was

there any purpose from a police standpoint to have the kit processed, as the police case was closed; the officer's order to have the rape kit destroyed, even though the rape victim's lawyer had asked that the evidence relevant to the rape be preserved, constituted spoliation of evidence that was attributable to the owners, and sanctions against them for that conduct were proper. *Bouve & Mohr, LLC v. Banks*, 274 Ga. App. 758, 618 S.E.2d 650 (2005).

**Agency held not created.** — By using intermediaries as channels of transmission for papers, relying upon the intermediaries inspection of property and examination of titles, made at the borrower's instance, and forwarding the money through the intermediaries also at the borrower's instance, the lender does not constitute such intermediaries as agents to make the loan and is not chargeable with the consequences of dealings between the intermediaries and the borrower, whether those dealings be public or private, known or unknown. *Davis v. Metropolitan Life Ins. Co.*, 196 Ga. 304, 26 S.E.2d 618 (1943).

Where, in an action by a landowner for the negligent burning of an outbuilding, pasture land, and personal property thereon, the evidence showed that the defendant's fiancé went to his property, which adjoined that of the plaintiff's, to clean up around the house and while so doing started a trash fire which she allowed to spread, causing the damage sued for, that she did this while the defendant was at work, and that the defendant had no notice of her actions until he was notified of the fire, the evidence was insufficient to show the relation of principal and agent between the defendant and his fiancé so as to charge the defendant with her negligence in the burning of the plaintiff's property, notwithstanding the fact that the defendant testified that though he did not know at that time that his fiancé was out at his place, had he known it, it would have been all right with him. *Basinger v. Huff*, 98 Ga. App. 288, 105 S.E.2d 362 (1958).

Chief underwriter of an insurance company who was authorized under a reinsurance treaty to cede a portion of insurance risks to reinsurers, who were, in the normal course of business, liable from the moment the reinsurance was ceded to the



reinsurers, was not an agent of the reinsurers, because the reinsurers had no right to regulate the underwriter's conduct, the reinsurers obligations would not have been affected by the underwriter's death, retirement, or replacement, and the reinsurers were liable under the treaty regardless of the identity of the underwriter. *Aetna Ins. Co. v. Glens Falls Ins. Co.*, 453 F.2d 687 (5th Cir. 1972).

Since the evidence simply showed that plaintiff was solicited by A as A's "working partner"; that plaintiff did not meet or converse with B before entering into an agreement with A to become a partner; that plaintiff gave A a check for "half dealership partnership investment"; and that plaintiff and A, as partners, signed a "Dealership Agreement" with B, there was no showing of an agency relationship between A and B. *McCulley v. Dunson*, 149 Ga. App. 551, 254 S.E.2d 877 (1979).

Leasing director who was an at-will employee of a real estate broker was not an agent of the broker because the director was not authorized to obligate the broker by entering into contracts on its behalf. *Atlanta Mkt. Ctr. Mgt. Co. v. McLane*, 269 Ga. 604, 503 S.E.2d 278 (1998), reversing *McLane v. Atlanta Mkt. Ctr. Mgt. Co.*, 225 Ga. App. 818, 486 S.E.2d 30 (1997).

A real estate broker was not acting as an agent for its real estate director, an at-will employee, in negotiations with a client regarding the payment of commissions where the director had not authorized the broker to create obligations on her behalf during the negotiations. *Atlanta Mkt. Ctr. Mgt. Co. v. McLane*, 269 Ga. 604, 503 S.E.2d 278 (1998), reversing *McLane v. Atlanta Mkt. Ctr. Mgt. Co.*, 225 Ga. App. 818, 486 S.E.2d 30 (1997).

No agency was created since there was no evidence showing that employees could create obligations on behalf of their employer or bring third parties into contractual relations with their employer. The employees were not agents owing a fiduciary duty to the employer. *Physician Specialists in Anesthesia, P.C. v. Wildmon*, 238 Ga. App. 730, 521 S.E.2d 358 (1999).

Where the homeowners contracted with a home builder independent of any dealing with the developer and the realtor, and said contract failed to contain any evidence that

an agency was established between the developer, realtor, and the homebuilder, the developer and realtor were entitled to a directed verdict on the homeowners' breach of contract and fraudulent conversion claims; further, since those two claims provided the only basis for a verdict, the homeowners were not entitled to recover litigation expenses. *Fountainhead Dev. Corp. v. Dailey*, 263 Ga. App. 677, 588 S.E.2d 768 (2003).

Because no evidence was presented that a lessee's child acted as an agent for the lessee when the lease on the rented premises was entered into, and the lessee never ratified the child's actions on the lease, the lessee was not liable for unpaid rents on the leased premises; as a result, since such was the basis for the lessor's counterclaim, an award of attorney's fees under O.C.G.A. § 13-6-11 was reversed. *Ellis v. Fuller*, 282 Ga. App. 307, 638 S.E.2d 433 (2006).

A mobile home dealer failed to show that a debtor which resold loans to a bank was acting as the bank's agent; actual authority had not been shown, as there was no evidence that the bank had the right to control the time, manner, and method of the debtor's work, and the facts that the debtor earned money from the loans it sold to the bank and that the bank required that the loans it purchased meet certain criteria did not show such control. *Satisfaction & Serv. Hous., Inc. v. SouthTrust Bank, Inc.*, 283 Ga. App. 711, 642 S.E.2d 364 (2007).

A mobile home dealer failed to show that a debtor which resold loans to a bank had apparent authority to act as the bank's agent; the dealer had not provided any evidence that the bank engaged in any conduct that caused the dealer to believe that the debtor was the bank's agent. *Satisfaction & Serv. Hous., Inc. v. SouthTrust Bank, Inc.*, 283 Ga. App. 711, 642 S.E.2d 364 (2007).

Because a decedent patient's husband did not have the actual or apparent authority to bind the decedent to an arbitration agreement, which was part of the documents the husband signed for the decedent to be cared for by a nursing home, the agreement was not enforceable against the decedent or the decedent's estate; thus, the trial court properly denied the nursing home's motion to compel arbitration of the wrongful death claims filed by the decedent's administrator.

**General Consideration (Cont'd)**

Ashburn Health Care Ctr., Inc. v. Poole, 286 Ga. App. 24, 648 S.E.2d 430 (2007), cert. denied, 2007 Ga. LEXIS 611 (Ga. 2007).

Because: (1) evidence demonstrating an agency relationship between the grantees and the grantor of a security deed was lacking, and (2) the mere lapse of time was insufficient to establish the affirmative defense of laches, partial summary judgment was properly entered in the trustee's favor on that claim based on mutual mistake as well as an order invalidating the foreclosure sale upon that deed. Thus, any testimony as to the intent of the parties upon entering into the security deed was immaterial. *Harvey v. Bank One, N.A.*, 290 Ga. App. 55, 658 S.E.2d 824 (2008).

**Cited in** *Burkhalter v. Ford Motor Co.*, 29 Ga. App. 592, 116 S.E. 333 (1923); *Stanford v. Smith*, 173 Ga. 165, 159 S.E. 666 (1931); *Long v. Dye*, 42 Ga. App. 726, 157 S.E. 359 (1931); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Flescher Knitting Mills v. Union Dry Goods Store*, 58 Ga. App. 659, 199 S.E. 646 (1938); *Jewell v. Martin*, 67 Ga. App. 295, 20 S.E.2d 93 (1942); *Groover v. Brandon*, 200 Ga. 153, 36 S.E.2d 84 (1945); *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *McDilda v. State*, 85 Ga. App. 348, 69 S.E.2d 627 (1952); *Light v. Smith*, 86 Ga. App. 591, 71 S.E.2d 844 (1952); *Long Tobacco Harvesting Co. v. Brannen*, 99 Ga. App. 541, 109 S.E.2d 90 (1959); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961); *NAACP v. Overstreet*, 221 Ga. 16, 142 S.E.2d 816 (1965); *Orkin Exterminating Co. v. Thornton*, 111 Ga. App. 636, 142 S.E.2d 422 (1965); *Bonner v. Cotton*, 223 Ga. 843, 159 S.E.2d 61 (1968); *Butler v. Moore*, 125 Ga. App. 435, 188 S.E.2d 142 (1972); *Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co.*, 128 Ga. App. 779, 197 S.E.2d 839 (1973); *Boyd v. State*, 133 Ga. App. 431, 211 S.E.2d 387 (1974); *Pendley v. Jessee*, 134 Ga. App. 138, 213 S.E.2d 496 (1975); *National Life Assurance Co. v. Massey-Ferguson Credit Corp.*, 136 Ga. App. 311, 220 S.E.2d 793 (1975); *Youngblood v. Mock*, 143 Ga. App. 320, 238 S.E.2d 250 (1977); *Patterson v.*

*Duron Paints of Ga., Inc.*, 144 Ga. App. 123, 240 S.E.2d 603 (1977); *Dollar v. First Bank*, 153 Ga. App. 789, 266 S.E.2d 566 (1980); *Krofft Dev. Corp. v. Quo Modo, Inc.*, 158 Ga. App. 403, 280 S.E.2d 368 (1981); *Stewart v. Georgia Mut. Ins. Co.*, 159 Ga. App. 91, 282 S.E.2d 728 (1981); *Howell v. Greene Real Estate Co.*, 162 Ga. App. 766, 292 S.E.2d 520 (1982); *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982); *Hutchens v. State*, 174 Ga. App. 507, 330 S.E.2d 436 (1985); *Crowe v. Fleming*, 749 F. Supp. 1135 (S.D. Ga. 1990); *Moore v. Harry Norman, Inc.*, 199 Ga. App. 233, 404 S.E.2d 793 (1991); *Transouthern Freight Sys. v. Astley*, 201 Ga. App. 521, 411 S.E.2d 501 (1991); *Gaskins v. Gaona*, 209 Ga. App. 322, 433 S.E.2d 408 (1993); *McDaniel v. Hensons', Inc.*, 229 Ga. App. 213, 493 S.E.2d 529 (1997); *Woodmen of the World v. Jordan*, 231 Ga. App. 517, 499 S.E.2d 900 (1998); *Augusta Surgical Ctr., Inc. v. Walton & Heard Office Venture*, 235 Ga. App. 283, 508 S.E.2d 666 (1998); *Rains v. Dolphin Mtg. Corp.*, 241 Ga. App. 611, 525 S.E.2d 370 (1999); *Southern Exposition Mgt. Co. v. Genmar Indus., Inc.*, 250 Ga. App. 702, 551 S.E.2d 830 (2001).

**Agency By Ratification**

**Ratification creates agency.** — One acts as agent for another whenever the principal ratifies the acts done on the principal's behalf. *Travelers Ins. Co. v. Ansley*, 111 Ga. App. 784, 143 S.E.2d 422 (1965).

**Unauthorized agent.** — The act of one holding oneself out as agent in consummating a sale for one's principal may be ratified by the principal, even if the agent was unauthorized in the first place to make the sale. *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

**Principal bound.** — An unauthorized act of an agent, when subsequently ratified, will bind the principal. *Penn Mut. Life Ins. Co. v. Blount*, 33 Ga. App. 642, 127 S.E. 892, cert. denied, 33 Ga. App. 829 (1925).

**Ratification of particular act is coextensive with act,** and only makes the person who performed the act a special agent pro hac vice. *Merchants' Bank v. Rawls*, 7 Ga. 191, 50 Am. Dec. 394 (1849).

**Acceptance of benefits flowing from acts of agent** is "implied ratification," whether



the principal intends to ratify the agency or not. *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976).

**Action against principal who benefitted from act.** — If the principal has obtained the benefits of a transaction in which a draft was given by the agent, the injured party may bring an action on the original transaction against the principal. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

**Knowledge of act required.** — The unauthorized act of an agent, done in the principal's behalf, cannot be ratified without actual knowledge of the act. *Penn Mut. Life Ins. Co. v. Blount*, 165 Ga. 193, 140 S.E. 496 (1927), answers conformed to, 37 Ga. App. 756, 142 S.E. 183 (1928).

**Knowledge of all material facts required.** — In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. *City of Atlanta v. Smith*, 84 Ga. App. 815, 67 S.E.2d 480 (1951).

**Ratification presumed unless act repudiated.** — If a principal is informed by an agent of what the agent has done, unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

By accepting the benefits of a pest treatment contract, by making payments on the contract, and by filing an earlier suit claiming breach of the contract, a customer and the customer's spouse ratified the contract even if the signature on the contract was irregular, and were bound by the contract's arbitration clause. *Lankford v. Orkin Exterminating Co.*, 266 Ga. App. 228, 597 S.E.2d 470 (2004).

**Mere act of pleading stranger's act as satisfaction** is of itself ratification. *Jordan v. Belvin*, 57 Ga. 719, 196 S.E. 132 (1938).

**Knowingly accepting notes to principal's order.** — Where certain foreign bills of exchange were drawn by the defendants as shipping agents and factors of the plaintiff, payable to the plaintiff's order, though not signed by the defendants as agents, but drawn so as to enable the plaintiff to receive the proceeds thereof, according to the usage and custom of the cotton trade, and the plaintiff received such bills, without objec-

tion and with full knowledge of such facts, it amounts to ratification, and the defendants are not individually liable to the principal as the drawers of the bills. *Jones v. J.W. Lathrop & Co.*, 44 Ga. 398 (1871).

**Expressing regret, offering to pay for damage, not ratification.** — Action of the defendant and his wife a few days after fire caused by her, in going to the plaintiff and expressing regret for the damage and offering to pay for it, was not such a ratification of wife's acts as would charge him with her negligence as his agent. *Basinger v. Huff*, 98 Ga. App. 288, 105 S.E.2d 362 (1958).

**Nightclub not liable for injuries inflicted by patron.** — The doctrine of ratification was inapplicable in an action for injuries at defendant's nightclub from actions of a patron, since the evidence showed that the unidentified patron acted in an individual capacity and not as one holding oneself out as acting in the name of or under the authority of defendant. *Ginn v. Renaldo, Inc.*, 183 Ga. App. 618, 359 S.E.2d 390 (1987).

**Knowledge, acquiescence, obtaining benefits was ratification of lease agreement.** — Company was liable for rent due on a lease that was assigned to the company's subsidiary, although permission had only been obtained to assign the lease directly to the company, under a piercing the corporate veil theory; it was found that the company ratified the original tenant's conduct in having the lease assigned to it, pursuant to O.C.G.A. § 10-6-1, where the company was aware of the tenant's assignment, acquiesced therein, and obtained the benefits from such assignment. *Multi-Media Holdings, Inc. v. Piedmont Ctr., 15 LLC*, 262 Ga. App. 283, 583 S.E.2d 262 (2003).

### Operation of Automobile

**Parent liable where child operates car with consent.** — Where a mother keeps an automobile to be used for the comfort and pleasure of her family, including her minor son as a member thereof, his driving the car for the comfort and pleasure of himself and his friends, allegedly with her knowledge and consent and as her agent and chauffeur, is her business or affair within the meaning of the rule of law that the master is liable for the negligence of his servant acting within the scope of his employment and in regard



**Operation of Automobile (Cont'd)**

to his master's business. *Griffin v. Russell*, 144 Ga. 275, 87 S.E. 10, 1916F L.R.A. 216, 1917D Ann. Cas. 994 (1915).

**Use of vehicle solely for owner's benefit.**

— It is not necessary to show a true master-servant relationship or the payment of compensation, but if the owner of a vehicle expressly procures another to do something solely for the owner's benefit, an agency relationship exists, regardless of whether the direction is couched as a request or as a demand, and regardless of whether the agent receives monetary compensation. *Walker Hall, Inc. v. Fincher*, 120 Ga. App. 193, 169 S.E.2d 745 (1969); *Reese v. Sanders*, 153 Ga. App. 654, 266 S.E.2d 313 (1980).

**Bailment where vehicle furnished as accommodation.** — If the furnishing of an automobile is within what may be said to be a "business" of the owner, one to whom the car is entrusted for such purpose is not a bailee, as in a case of lending, but is a servant or agent; if on the other hand, the car is furnished by the owner merely as an accommodation to the other, with no interest or concern in the purpose for which the other will use it, then its use, whether for recreation or otherwise, is not within the business of the owner, and the transaction is a mere bailment. *Hubert v. Harpe*, 181 Ga. 168, 182 S.E. 167, answer conformed to, 52 Ga. App. 262, 183 S.E. 98 (1935).

A "loaner" arrangement between car dealers and mechanics and their customers is a bailment, not an agency. *Stallings v. Sylvania Ford-Mercury, Inc.*, 242 Ga. App. 731, 533 S.E.2d 731 (2000).

**Family purpose doctrine.** — Where the evidence shows that the driver's operation of the car was not on appellee's behalf, agency principles other than the family purpose doctrine do not apply to establish that the driver was appellee's agent in driving the car. *Chambers v. Scarboro*, 149 Ga. App. 172, 253 S.E.2d 798 (1979).

**Hirer of rented automobile not owner's agent.** — If a person rents or hires an automobile from the automobile's owner under a contract by which the hirer or an employee, and none other, is to operate the automobile, and, after a stipulated period of time, return it to owner, and where it does

not appear that the hirer, when using the automobile pursuant to this contract, is on the business of the owner and therefore acting as the owner's agent, the relationship between the parties as established by the contract is not alone sufficient to establish the relationship of principal and agent between the owner of the automobile and the hirer or the latter's employee, when the hirer or the hirer's employee afterwards operates the automobile pursuant to the terms of the contract. *Cantrell v. Hertz Drivurself Stations*, 40 Ga. App. 840, 151 S.E. 694 (1930).

**Wife driving family car deemed husband's agent.** — Where a person maintained an automobile for use by his family, including his wife, and which was at the disposal of the wife to use at any time and was kept for that purpose, and where the wife, with the husband's consent, used the automobile for the purpose of going on a trip, the wife, in taking and operating the car while on the trip, did so as the authorized agent of the husband, and any negligence on her part in the operation of the automobile pursuant to the purpose for which she was using it was imputable to the husband. *Petway v. McLeod*, 47 Ga. App. 647, 171 S.E. 225 (1933).

**Procedure****1. Pleading**

**Allegation of agency tested by facts alleged.** — If the pleader in seeking to allege an agency relationship sets out the facts as the facts really exist or are deemed to exist, the allegations that the parties are principal and agent is a legal conclusion which must be tested by the facts as alleged. *Powell v. Kitchens*, 84 Ga. App. 701, 67 S.E.2d 203 (1951).

**Agency sufficiently alleged.** — A simple direct allegation that the operator of an automobile, in driving the defendant's family to a designated point in the defendant's automobile, was acting as the defendant's agent, is a sufficient allegation of agency. *Garnto v. Henson*, 88 Ga. App. 320, 76 S.E.2d 636 (1953).

Since it was alleged that at the defendant's special request an individual was using the defendant's vehicle for the purpose of looking after the needs of the defendant's aged

parents and the defendant's sister, two of whom were ill; that the individual had been spending several nights at their home and carrying them groceries and medicines; that the individual was at the time of a collision proceeding toward their home to attend to their needs during the night; that all of these acts were at the defendant's request and for the defendant's benefit; and that this was the purpose for which the car had been entrusted to the individual, which purpose the individual was actually attempting to effectuate at the time of collision, it could not be said as a matter of law that the plaintiff's pleading failed on its face to show an agency relationship. *Powell v. Kitchens*, 84 Ga. App. 701, 67 S.E.2d 203 (1951).

**Allegations not showing agency.** — See *Cantrell v. Hertz Driveurself Stations*, 40 Ga. App. 840, 151 S.E. 694 (1930).

## 2. Evidence

**Circumstantial evidence.** — Agency may be proved by circumstantial evidence alone. *Fordham v. Garrett-Schwartz Motor Co.*, 121 Ga. App. 237, 173 S.E.2d 450 (1970); *Bearlund v. Webb*, 127 Ga. App. 555, 194 S.E.2d 328 (1972).

A claim of agency may be proved, as any other fact, by circumstantial evidence. *Greenbaum v. Brooks*, 110 Ga. App. 661, 139 S.E.2d 432 (1964); *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980); *Collins v. Martin*, 157 Ga. App. 45, 276 S.E.2d 102 (1981).

Proof of agency may be made by showing circumstances, apparent relations, and the conduct of the parties. *Nichols v. Lindsey*, 45 Ga. App. 648, 165 S.E. 868 (1932); *Ross v. Durrence*, 181 Ga. 52, 181 S.E. 581 (1935); *Larkins v. Boyd*, 205 Ga. 69, 52 S.E.2d 307 (1949); *Southern Mills, Inc. v. Newton*, 91 Ga. App. 738, 87 S.E.2d 109 (1955); *Warnock v. Elliott*, 96 Ga. App. 778, 101 S.E.2d 591 (1957); *Greenbaum v. Brooks*, 110 Ga. App. 661, 139 S.E.2d 432 (1964); *Fordham v. Garrett-Schwartz Motor Co.*, 121 Ga. App. 237, 173 S.E.2d 450 (1970); *Bearlund v. Webb*, 127 Ga. App. 555, 194 S.E.2d 328 (1972); *Davidson v. Ramsby*, 133 Ga. App. 128, 210 S.E.2d 245 (1974); *Allstate Ins. Co. v. Christian Brokerage Co.*, 145 Ga. App. 126, 243 S.E.2d 281 (1978); *Clyde Chester Realty Co. v. Stansell*, 151 Ga. App. 357, 259 S.E.2d 639 (1979); *Hadden v.*

*Owens*, 154 Ga. App. 467, 268 S.E.2d 760 (1980); *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980); *Collins v. Martin*, 157 Ga. App. 45, 276 S.E.2d 102 (1981).

**Way to show agency.** — Proof of agency and of the nature of the agency may be made by showing circumstances, apparent relations, and the conduct of the parties; for the relation of principal and agent arises when one, by implication, authorizes another to act for that one. *Martin & Hicks v. Bridges & Jelks Co.*, 18 Ga. App. 24, 88 S.E. 747 (1916).

**Breach of fiduciary duty claim survived summary judgment because the plaintiff employer asserted that the defendant, a former employee, was the employer's agent** while employed as plant engineer. The undisputed evidence showed that the employee was intimately involved in the negotiations leading up to and the continuous administration of the contracts with a contractor; and not only was the employee responsible for bringing the contractor to the employer, the employee was charged with supervision and inspection of the contractor's contract work; the employee was authorized to prepare bid documentation and enter into contracts to carry out the employee's work, and the employee was also authorized to oversee contractors, inspect the contractor's work, and verify that the work was completed correctly. *GIW Indus. v. JerPeg Contr., Inc.*, 530 F. Supp. 2d 1323 (S.D. Ga. 2008).

**Declarations of alleged agent.** — The declarations of one alleged to be an agent or one assuming to be an agent would not, by themselves, be admissible to prove agency, yet when such declarations of the alleged agent are accompanied by other evidence as to the conduct of the person in the character of agent and an acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence as a part of the *res gestae* and as such may be considered in the establishment of the agency. *Lawhon v. Henshaw*, 63 Ga. App. 683, 11 S.E.2d 846 (1940).

Agency is a fact, and one who is in fact the agent of another is as competent to testify that one is such agent as the principal personally would be to testify to the fact of such agency; yet the fact of an agency cannot be proved by mere unsworn declarations of one assuming to be an agent. *Lawhon v.*



**Procedure (Cont'd)****2. Evidence (Cont'd)**

Henshaw, 63 Ga. App. 683, 11 S.E.2d 846 (1940).

Agency cannot be established by the declarations of the alleged agent alone. Greble v. Morgan, 69 Ga. App. 641, 26 S.E.2d 494 (1943); Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954); Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

Agency cannot be proved by declarations of alleged agent. Davis v. Metropolitan Life Ins. Co., 196 Ga. 304, 26 S.E.2d 618 (1943).

The declarations of a general agent made while in the employ of the defendant are admissible to prove agency. Carmichael v. Silvers, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

The fact of an agency may be established by proof of circumstances, apparent relations, the conduct of the parties, and the declarations of the alleged agent, though the declarations of the agent are inadmissible if standing alone; but they become admissible as a part of the *res gestae* of the transaction and as such may be considered in establishing the fact of agency. Brewer v. Southeastern Fid. Ins. Co., 147 Ga. App. 562, 249 S.E.2d 668 (1978).

Trial court did not err in precluding a creative designer, who was employed by a game promoter a supermarket hired, from testifying, in a breach of contract action brought by a vendor the designer hired, that the designer was an agent for the supermarket. Process Posters, Inc. v. Winn-Dixie Stores, Inc., 263 Ga. App. 246, 587 S.E.2d 211 (2003).

**Declarations admissible once agency established.** — Once agency is established, declarations and admissions of the person whose agency is shown, within the scope of one's authority, are admissible in evidence. Ross v. Durrence, 181 Ga. 52, 181 S.E. 581 (1935).

**Assertion or denial of agency by stranger.** — Bare assertion or denial of the existence of an agency relationship is a statement of fact when made by one of the purported parties to the relationship, but when made by an outsider, bare assertions are merely conclusions of law. Lewis v. Citizens & S. Nat'l Bank, 139 Ga. App. 855, 229 S.E.2d 765 (1976).

Assertion or denial of agency relationship constitutes factual statement when made by purported party to relationship, but such statements, when made by outsiders, constitute mere conclusions of law. Stone v. First Nat'l Bank, 159 Ga. App. 812, 285 S.E.2d 207 (1981).

**Agency cannot be established by general reputation** in the community as to such agency. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

**Conduct of principal and agent may be used** to rebut the denial of the existence of agency and for the purpose of impeaching the testimony and contentions of the principal and agent as to the existence of the agency or the scope of the powers of the agent. Warnock v. Elliott, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

**Only slight evidence needed of husband's agency.** — While proof of the relationship of husband and wife, and that work was done and material furnished to improve real estate belonging to the wife, without more, is not sufficient evidence to establish the fact that she is an undisclosed principal and the husband merely her agent, so as to render her liable for contracts made by him with third persons, yet only slight evidence of the husband's agency is required under the law to charge the wife with being the principal. Gibbs v. Carolina Portland Cement Co., 50 Ga. App. 229, 177 S.E. 760 (1934).

**Burden of proof.** — If existence of agency is relied upon, burden of proof rests with party asserting relationship. Carter v. Kim, 157 Ga. App. 418, 277 S.E.2d 776 (1981).

**Breach of duty shown.** — In a breach of contract suit brought by a taxpayer against the tax service hired to handle real property assessments regarding an office building, a trial court ruling in favor of the tax service for tax year 2002 was reversed since the taxpayer established that the tax service breached a duty to the taxpayer by failing to protect the taxpayer from an upward reassessment of the taxpayer's property, pursuant to O.C.G.A. § 48-5-299(c). However, because the taxpayer failed to show any damage or loss for tax year 2003, the trial court's ruling in favor of the tax service for that year was upheld. AT&T Corp. v. Property Tax Servs., 288 Ga. App. 679, 655 S.E.2d 295 (2007).

Professional basketball player was not lia-



ble to inexperienced businessmen who invested and lost money by hosting sports event-related parties with two men claiming to act as the player's agents because, under O.C.G.A. § 10-6-1, the businessmen failed to show that the "agents" had express or implied authority to act on the player's behalf. The un rebutted evidence showed that the player had never met the businessmen prior to being deposed and had no knowledge of the transaction. *J'Carpc, LLC v. Wilkins*, 545 F. Supp. 2d 1330 (N.D. Ga. 2008).

In a breach of contract suit involving an employment contract, the trial court properly entered a judgment in favor of the former employee after a bench trial as there was sufficient evidence to support the conclusion that even though the person who signed the employment contract was not authorized to execute the employment contract on behalf of the employer, the employer ratified the agreement by failing to ever object to the agreement. In addition, the employer paid the former employee at least two times directly. *A & S Group, Inc. v. Murray*, 291 Ga. App. 331, 661 S.E.2d 701 (2008).

**No breach of duty shown.** — Trial court properly granted summary judgment to a former employee in the former employer's suit asserting breach of contract and breach of the duty of loyalty as the record established that the former employee did not inform the former employer's customers of the resignation from employment, nor did the former employee solicit any business from the former employer's customers, until after the resignation took place. *Hanson Staple Co. v. Eckelberry*, Ga. App. , S.E.2d , 2009 Ga. App. LEXIS 245 (Mar. 10, 2009).

**Evidence held insufficient.** — In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because the only evidence showing any authority to act as an agent for the sellers was based on hearsay, and not on a writing, and no exception applied, two of the sellers were entitled to a directed verdict against the investor pursuant to O.C.G.A. § 13-5-30(4). *Dunn v. Venture Bldg. Group, Inc.*, 283 Ga. App. 500, 642 S.E.2d 156 (2007).

**Evidence held sufficient** to establish agency relationship between freight for-

warder and another common carrier. *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 297 S.E.2d 740 (1982).

### 3. Instructions

**Giving charge under section held proper.** — There being evidence sufficient to warrant the jury in finding that the alleged agent had express authority from the plaintiff to collect the note sued upon, and also that the latter had ratified partial collections thereon made by the former, the court did not err in giving the charge to the jury under this section. *National Bank v. Burt*, 98 Ga. 380, 25 S.E. 502 (1896).

**Correct charge as to execution of instrument.** — While, where a person authorizes another to execute a written instrument for the person, in the person's presence, it is not necessary, in order to constitute the act of the person actually signing the instrument the act and deed of the person authorizing him to do so, that the person so authorizing should touch the pen, a charge by the court that where a person authorizes another in the person's presence to sign the instrument for the person and does touch the pen and make the person's mark, the act of the party making the signature is the act and deed of the person so authorizing, states a correct proposition of law. *East Point Lumber Co. v. Chandler*, 46 Ga. App. 361, 167 S.E. 787 (1933).

### 4. Questions of Law and Fact

**Nonsuit may be granted when question of agency is one of law** for the court. *Warnock v. Elliott*, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

**Jury questions if evidence shows agency.** — If there is any evidence tending to establish the agency, the questions should be submitted to a jury. *Warnock v. Elliott*, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

Questions regarding existence of agency and extent of agent's authority are generally for trier of fact. *Renfroe v. Warren-Hawkins Am. Legion Post No. 523*, 157 Ga. App. 614, 278 S.E.2d 414 (1981).

The issue of the relationship between an insurance agent and an insurance applicant must be reserved for jury determination, even though the insurance agent was not an

**Procedure (Cont'd)****4. Questions of Law and Fact (Cont'd)**

agent of an insurer. *Stewart v. Boykin*, 165 Ga. App. 868, 303 S.E.2d 50 (1983).

**No jury question if evidence shows agency beyond dispute.** — If the evidence for both the plaintiff and the defendant showed be-

yond dispute that a certain individual was an agent of the defendant when the defendant assaulted the plaintiff, the court erred in giving charge that the jury should determine whether the defendant was an agent or an independent contractor. *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

**OPINIONS OF THE ATTORNEY GENERAL**

**Department of Administrative Services.** — Department of Administrative Services is state manager for administrative aspects of workers' compensation program and, as

such, is an agent for each individual department or instrumentality in its relations with State Board of Workers' Compensation. 1980 Op. Att'y Gen. No. 80-55.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 15, 16, 176 et seq.

**Am. Jur. Proof of Facts.** — Establishing Agency by the Circumstances in Real Estate Transactions, 45 POF3d 453.

**C.J.S.** — 2A C.J.S., Agency, §§ 32, 51.

**ALR.** — Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 ALR 906.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission, 9 ALR 1235.

One doing work under a cost plus contract as an independent contractor or a servant or an agent, 55 ALR 291.

Regulations, rules, customs, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 ALR 592.

Lessee as agent of lessor within contemplation of mechanic's lien laws, 79 ALR 962; 163 ALR 992.

Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 ALR 915.

Right of one who deals with another as principal to set up latter's apparent authority as agent, 95 ALR 1319.

Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 96 ALR 1233.

Liability of bank for losses incurred on loans or investments made on recommendation of its officers or employees, 113 ALR 246.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

When agency for sale of goods deemed exclusive agency, in the absence of express provision in that regard, 126 ALR 1233.

What amounts to ratification by owner of unauthorized employment by broker or agent of subagent to procure a sale or purchase of property, 136 ALR 1418.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Advertising agency as agent of advertising medium or of advertiser, 53 ALR 1139.

Liability of partners or partnership for libel, 88 ALR2d 474.

Continuation of agency beyond contract period as extending contract for like period, 6 ALR3d 1352.

Hospital's liability for negligence in connection with preparation, storage, or dispensing of drug or medicine, 9 ALR3d 579.

Doctrine of apparent authority as applied to agent of municipality, 77 ALR3d 925.

## 10-6-2. Formality necessary to create agency.

Where the exercise or performance of an agency is by written instrument, the agency shall also be created by written instrument; provided, however, unless a contrary intent is expressly set forth therein, any written instrument creating an agency regardless of the formality of its execution shall conclusively be deemed to authorize the execution of instruments with the formalities necessary or appropriate to accomplish the purposes for which the agency was granted. A corporation may create an agent in its usual mode of transacting business and without its corporate seal. Any deed or other instrument executed under seal pursuant to an agency created by an act not under seal, if not otherwise required to be under seal for its validity, shall be binding upon the principal and valid as if an unsealed instrument. (Orig. Code 1863, § 2160; Code 1868, § 2156; Code 1873, § 2182; Code 1882, § 2182; Civil Code 1895, § 3002; Civil Code 1910, § 3574; Code 1933, § 4-105; Ga. L. 1991, p. 410, § 1; Ga. L. 1993, p. 457, § 1.)

**Law reviews.** — For article surveying recent legislative and judicial developments in

Georgia's real property laws, see 31 Mercer L. Rev. 187 (1979).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
REAL ESTATE TRANSACTIONS  
CORPORATE AGENTS

#### General Consideration

**Editor's notes.** — Some of the cases cited below were decided prior to the 1991 amendment, which added the last sentence.

**Power to execute instrument under seal must be conferred by instrument under seal.** Pollard & Co. v. Gibbs, 55 Ga. 45 (1875); McCalla v. American Freehold Land Mtg. Co., 90 Ga. 113, 15 S.E. 687 (1892); Overman v. Atkinson, 102 Ga. 750, 29 S.E. 758 (1897); Hayes v. City of Atlanta, 1 Ga. App. 25, 57 S.E. 1087 (1907); Neely & Co. v. Stevens, 138 Ga. 305, 75 S.E. 159 (1912); Harris v. Woodard, 144 Ga. 211, 86 S.E. 1097 (1915).

**Changing promissory note into sealed instrument.** — The changing of an ordinary promissory note into a sealed instrument is the making of a sealed instrument, and the authority to make this radical change in the paper must be evidenced in the same way that authority to make a sealed instrument in the first instance would have to be shown. Thomason v. Wilson, 127 Ga. 141, 56 S.E. 302 (1906).

**Section not limited to execution of instruments under seal.** — There is nothing in this section which confines it to agencies created for the execution of instruments under seal. It lays down a broad and sweeping rule for the creation of all agencies. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48 (1927).

**Authority to execute contract required to be in writing must be in writing.** Nalley v. Whitaker, 102 Ga. App. 230, 115 S.E.2d 790 (1960).

If the law prescribes that the act can be executed by the principal only by writing, then the act creating the agency must be executed with the same formality; that is, the agency must be created by writing. Byrd v. Piha, 165 Ga. 397, 141 S.E. 48 (1927); Terry v. Kean, 180 Ga. 627, 180 S.E. 135 (1935); Union Camp Corp. v. Dyal, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

The proper construction of this section is that agencies for the execution of agreements which are required to be made by principals to be in writing must be created by



**General Consideration (Cont'd)**

written authority; otherwise the purpose of the statute of frauds, which is to prevent frauds and perjuries, would be virtually done away with. *Byrd v. Piha*, 165 Ga. 397, 141 S.E. 48 (1927), disapproving, *Brandon v. Pritchett*, 126 Ga. 286, 55 S.E. 241, 7 Ann. Cas. 1093 (1906); *Terry v. Kean*, 180 Ga. 627, 180 S.E. 135 (1935); *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968). But see *Hirsh & Co. v. Beverly*, 125 Ga. 657, 54 S.E. 678 (1906) (authority to sell mules and apply proceeds); *Wesley v. Boyd*, 10 Ga. App. 9, 72 S.E. 514 (1911); *McNamara v. Georgia Cotton Co.*, 10 Ga. App. 669, 73 S.E. 1092 (1912) (authority to purchase cotton); *Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co.*, 128 Ga. App. 779, 197 S.E.2d 839 (1973) (guaranty by agent authorized or principal estopped to deny authority).

A lease of land for seven years being required to be in writing, if the agent signs for the principal, the agent's authority must be in writing. *Baxley Hdwe. Co. v. Morris*, 165 Ga. 359, 140 S.E. 869 (1927), commented on in 1 Ga. L. Rev. No. 3, p. 51 (1927).

This section applies if a contract which is required to be in writing under the statute of frauds is executed by another as a disclosed agent for the person intended to be bound, and in such case the authority of the principal to the agent to so sign must also be in writing. *Spiegel v. Hays*, 103 Ga. App. 293, 119 S.E.2d 123 (1961).

If the owner of personal property orally authorizes an agent to lease it to another for a period of three months and orally authorizes the agent to give to the sublessee an option to buy, the option price being more than \$50.00, the option so given by the agent is not binding on the owner in the absence of facts sufficient to work an estoppel or show ratification of a completed sale; and, accordingly, if such authority rested in parol, and before the option was exercised by the third person, the owner notified the agent that the giving of such an option was without the owner's authority, repudiated the contract in the contract's entirety, and instructed the agent to retract the agent's proposal, and the agent proceeded to sell the property under the option as the agent's

own, the agent was guilty of a conversion and was liable in trover for the property. *Collier v. Wilson-Weesner-Wilkinson Co.*, 58 Ga. App. 44, 197 S.E. 516 (1938) (decided under former statute of frauds provision as to contracts for sale of goods, repealed by Ga. L. 1962, p. 156, which also enacted § 11-2-201).

Authority of attorney-in-fact to issue a guardianship bond could not be mere apparent authority, but was required to be shown by a writing, i.e., a power of attorney from the insurance company named in the bond. *Continental Ins. Co. v. Gazaway*, 216 Ga. App. 125, 453 S.E.2d 91 (1994).

**If agent must have written authority, the agent cannot be orally vested** with apparent authority, any more than the agent can be orally vested with a real one. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

**Mere effort to ratify orally will not suffice.**

— Authority to execute a contract required by the statute of frauds to be in writing must also be in writing, and a mere effort to ratify orally will not suffice. *Hubert Realty Co. v. Bland*, 79 Ga. App. 321, 53 S.E.2d 691 (1949).

**Principal may confer authority on agent merely by course of conduct** holding out that person as an agent which induces others to rely on the statements of that agent. *Ampex Credit Corp. v. Bateman*, 554 F.2d 750 (5th Cir. 1977).

**Estoppel to deny agency.** — While a written instrument may have been executed by an agent not having any authority in writing to do so or not having been ratified by an act of comparable dignity, the principal may nevertheless be estopped by the principal's acts from denying the authority of the principal's agent. *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968).

The authority of an agent to lease the land of another must ordinarily be in writing, but the jury might find oral authority sufficient if the principal was estopped by the principal's later conduct from raising the issue. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

The authority of an agent in a particular instance need not be proved by an express contract; it may be established by the princi-

pal's conduct and course of dealing, and if one holds out another as one's agent, and by one's course of dealing indicates that the agent has certain authority, and thus induces another to deal with one's agent as such, one is estopped to deny that the agent has any authority which, as reasonably deducible from the conduct of the parties, the agent apparently has. *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968). See notes to § 10-6-50.

**Failure to ascertain if written authority exists deemed negligence.** — One who enters into a 15-year-lease with an agent is charged with notice that the agent's authority to execute the lease is required by law to be in writing and is under a duty to inquire and ascertain whether such written authority exists and what the limits of the authority are, and such person is guilty of negligence in failing to make such an inquiry. *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (1960); *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

**Failure to ascertain if authority exists bars recovery from agent.** — One who enters into a 15-year lease with an agent without making due inquiry into the agent's authority is precluded from recovering damages from the agent either on the ground that the agent contractually misrepresented the fact that the agent had authority, either expressly or impliedly, or on the ground that the agent fraudulently misrepresented that the agent had authority to execute the lease as agent. *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (1960).

**Power of attorney held valid.** — Regardless of wife's failure to follow instructions and have husband's signature of the power of attorney properly witnessed, the power of attorney itself was technically valid as regards acts which themselves required no greater formality. *Wheless v. Gelzer*, 780 F. Supp. 1373 (N.D. Ga. 1991).

**Not applicable if statute of frauds does not apply.** — Verbal authorization from a decedent was sufficient to create a valid agency relationship between the decedent and a brother and a wife, so as to allow them to withdraw money for the decedent from the accounts on a periodic basis; the equal dignity rule outlined in O.C.G.A. § 10-6-2 did not apply in this case because the instru-

ments at issue were not subject to the statute of frauds. *Rowland v. Rowland*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 30296 (N.D. Ga. Nov. 16, 2005).

**Only principal proper party to raise issue.**

— Construction company's claim that a grocery store owner's representative who signed a contract which contained an agreement to arbitrate lacked the power to sign under the Equal Dignity Rule, pursuant to O.C.G.A. § 10-6-2, as the authority to sign the agreement and the agreement itself, had to be in writing under O.C.G.A. § 9-9-3, lacked merit, as the contract clearly provided that the representative was acting on behalf of the owner, and further, the company was not the proper party to dispute the agent's authority under O.C.G.A. § 10-6-2; rather, that statute was for the principal's use to dispute an agent's authority to act on the principal's behalf. *Barron Reed Constr. v. 430, LLC*, 275 Ga. App. 884, 622 S.E.2d 83 (2005).

**Cited in** *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935); *Johnson v. Johnson*, 184 Ga. 783, 193 S.E. 345 (1937); *Blanchard & Calhoun Realty Co. v. Comer*, 185 Ga. 448, 195 S.E. 420 (1938); *Cartledge v. Trust Co.*, 186 Ga. 718, 198 S.E. 741 (1938); *Meeks v. Adams La. Co.*, 49 F. Supp. 489 (S.D. Ga. 1943); *Head v. Waldrup*, 197 Ga. 500, 29 S.E.2d 561 (1944); *Holland v. Riverside Park Estates*, 214 Ga. 244, 104 S.E.2d 83 (1958); *Harris v. Barnes*, 100 Ga. App. 412, 111 S.E.2d 147 (1959); *Atlantic Nat'l Bank v. Edmund*, 108 Ga. App. 63, 132 S.E.2d 103 (1963); *Phoenix Air Conditioning Co. v. Towne House Developers, Inc.*, 124 Ga. App. 782, 186 S.E.2d 429 (1971); *Citizens & S. Bank v. Bailey*, 144 Ga. App. 550, 241 S.E.2d 443 (1978); *Mynatt v. Tom Washburn & Assocs.*, 161 Ga. App. 168, 288 S.E.2d 122 (1982); *Holt v. International Indem. Co.*, 171 Ga. App. 817, 321 S.E.2d 374 (1984); *Walker v. Williams*, 177 Ga. App. 830, 341 S.E.2d 487 (1986); *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997); *Augusta Surgical Ctr., Inc. v. Walton & Heard Office Venture*, 235 Ga. App. 283, 508 S.E.2d 666 (1998).

**Real Estate Transactions**

**Authority to execute long-term lease in writing.** — Contracts creating the relation of landlord and tenant, for any time exceeding



**Real Estate Transactions (Cont'd)**

one year, must be in writing; and when executed by an agent, the authority of the agent to execute the contract must likewise be in writing. *Byrd v. Piha*, 165 Ga. 397, 141 S.E. 48 (1927).

One seeking to hold the principal liable for the undertaking of an agent on a lease for over a year must show that the agent had written authority to act for the principal. *Garden of Eden, Inc. v. Eastern Sav. Bank*, 244 Ga. 63, 257 S.E.2d 897 (1979).

**Authority to execute mortgage must be in writing.** *Duke v. Culpepper*, 72 Ga. 842 (1884).

**Authority to execute contract for sale.** — Under this section, the authority of an agent to execute a contract or memorandum for the sale of real estate or for the lease thereof for a period longer than one year must be evidenced by writing. *Terry v. Kean*, 180 Ga. 627, 180 S.E. 135 (1935); *Deal v. Dickson*, 232 Ga. 885, 209 S.E.2d 214 (1974); *Turnipseed v. Jaje*, 267 Ga. 320, 477 S.E.2d 101 (1996).

A third party seeking to compel a principal to deed real property alleged to have been acquired by written instrument with the agent must show written authority held by the agent empowering the agent to act. *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938).

Written authority to the agent must be shown to support the agent's sale or lease of the principal's lands. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

A contract to sell land, as distinguished from authority to execute a deed to land, is not binding upon a principal if there is no written authority given the agent and the contract to sell is oral. *Jones v. Sheppard*, 231 Ga. 223, 200 S.E.2d 877 (1973).

This section requires that the agent's power to sell land must be in writing, absent later ratification of the agent's acts or estoppel of the agent's principal to deny the agent's authority. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

Where the plaintiffs' rights in a suit for breach of contract to sell real estate must stand or fall on the contract set up by it and

there was no evidence that the plaintiff-husband had authority in writing to execute the contract, nor that it was ratified in writing, nor that the defendant buyer had notice thereof and by the buyer's subsequent conduct was estopped to deny the validity of the same, the evidence demanded a verdict for the defendant. *Hubert Realty Co. v. Bland*, 79 Ga. App. 321, 53 S.E.2d 691 (1949).

In an action premised on allegations of a breach of a land sales contract between a group of sellers and an investor, because the only evidence showing any authority to act as an agent for the sellers was based on hearsay, and not on a writing, and no exception applied, two of the sellers were entitled to a directed verdict against the investor pursuant to O.C.G.A. § 13-5-30(4). *Dunn v. Venture Bldg. Group, Inc.*, 283 Ga. App. 500, 642 S.E.2d 156 (2007).

**Unauthorized conveyance of land cannot be ratified except by writing under seal.** *McCalla v. American Freehold Land Mtg. Co.*, 90 Ga. 113, 15 S.E. 687 (1892).

**No witnesses needed for authority to sell mortgaged property.** — A contract whereby mortgagor is authorized to convey mortgaged property by agreement between the mortgagor and the mortgagee is not a power of attorney to the mortgagor to sell land of which the title is in the mortgagee, but only the consent of the lienholder to the release of the lien in case a sale is made, and it is not required by the laws of Georgia to be executed before two witnesses under former Code 1882, § 2690. *Woodward v. Jewell*, 140 U.S. 247, 11 S. Ct. 784, 35 L. Ed. 478 (1891).

**Agent cannot execute contract containing provision requiring principal's execution.** — A proposed lease agreement negotiated by various representatives of landlord and tenant through conversations and exchanged correspondence did not constitute a binding, written agreement in view of a clause in the agreement providing that the lease would become effective "only upon execution and delivery by Landlord and Tenant." *20/20 Vision Ctr., Inc. v. Hudgens*, 256 Ga. 129, 345 S.E.2d 330 (1986).

**Partnership to own real estate.** — Partnership formed for the purpose of acquiring interest in tracts of land must be executed in writing. *Shivers v. Sexton*, 164 Ga. App. 490, 296 S.E.2d 749 (1982).



**Spouse of seller as promisor.** — Fact that promisor was seller's husband did not negate the need for a written authorization to convey or promise to convey any interest in seller's land. Since promisor had no written authorization and buyers never asked for one, agency was not established as a matter of law. *East Piedmont 120 Assocs. v. Sheppard*, 209 Ga. App. 664, 434 S.E.2d 101 (1993).

### Corporate Agents

**Common law changed.** — The sentence of this section relative to corporations changes the common-law rule. *Brandon v. Pritchett*, 126 Ga. 286, 55 S.E. 241, 7 Ann. Cas. 1093 (1906), disapproved on another point, *Byrd v. Piha*, 165 Ga. 397, 141 S.E. 48 (1927).

**Corporations recognized as unique entities.** — In codifying the "equal dignity" rule, the legislature apparently recognized that corporations are unique legal entities which must at all times act through corporate agents. *Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc.*, 243 Ga. 114, 252 S.E.2d 604 (1979).

The creation of corporate agents is excepted from the "equal dignity" rule codified in O.C.G.A. § 10-6-2, which permits corporations to create such agents in their "usual mode of transacting business." *Travel Centre, Ltd. v. Starr-Mathews Agency, Inc.*, 179 Ga. App. 406, 346 S.E.2d 840 (1986).

The legislature excepted the creation of corporate agents from the "equal dignity" rule and permitted corporations to create such agents in their usual mode of transacting business, i.e., shareholder action in the adoption of charters, bylaws, resolutions, and similar conduct vesting corporate agents with authority to act. *Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc.*, 243 Ga. 114, 252 S.E.2d 604 (1979).

**No sealed authority needed to execute sealed instrument.** — When empowered by corporate authority, corporate agents are

not required to have sealed authorization to enable the agents to execute sealed instruments on behalf of the corporation. *Whiteway Neon-Ad, Inc. v. Opportunities Industrialization Ctr. of Atlanta, Inc.*, 243 Ga. 114, 252 S.E.2d 604 (1979); *Dundon v. Forehand*, 152 Ga. App. 749, 263 S.E.2d 687 (1979).

**No written authority needed for written settlement with debtor.** — Where a corporation claimed that one who had been its agent in certain transactions was indebted to it in a certain sum and sent another agent to close up its account with the agent, and the second agent took a note evidencing the amount of the indebtedness, it was competent for the agent thus authorized (there being a dispute between the agent and the debtor as to the actual amount of the debt, the debtor claiming that the debtor had evidence to show that a certain item of indebtedness should not be included in the note) to stipulate in writing, under this section, that if this evidence should be discovered, the debtor could use the evidence as against the note given; and it was not necessary to show that the authority to execute such a written agreement was itself in writing. *Home Fertilizer & Chem. Co. v. Strickland*, 145 Ga. 197, 88 S.E. 820 (1916).

**No written authority needed to fill in blanks on insurance policy for insurer.** — Under this section and the insurance laws, it is not essential to the validity of a policy of insurance, which was actually signed by the president and secretary of the company by which it purported to have been issued, that the person who, in behalf of the company, after the policy had been so signed and placed in one's hands, filled blanks therein so as to make it a complete contract, and who then delivered the contract to the insured, should have been clothed with written authority either to fill such blanks or make the delivery. *Smith v. Farmers Mut. Ins. Ass'n*, 111 Ga. 737, 36 S.E. 957 (1900). (See O.C.G.A. §§ 33-24-1(1), 33-24-13, 32-24-18).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 70, 71, 179.

**C.J.S.** — 2A C.J.S., Agency, § 36 et seq.

**ALR.** — Applicability to corporate officers

and employees of statute requiring agent's authority to be in writing, 1 ALR 1132.

Liability of bank for losses incurred on loans or investments made on recommenda-

tion of its officers or employees, 113 ALR 246.

Recording laws as applied to power of attorney under which deed or mortgage is executed, 114 ALR 660.

Construction and application of statute which enables real estate broker to recover

commissions on oral contract with owner who has been served with written notice of the terms thereof, 148 ALR 676.

Advertising agency as agent of advertising medium or of advertiser, 53 ALR2d 1139.

Doctrine of apparent authority as applied to agent of municipality, 77 ALR3d 925.

### 10-6-3. Who may be agent.

Any person who is of sound mind may be appointed an agent; so a principal shall be bound by the acts of his infant agent. (Orig. Code 1863, § 2159; Code 1868, § 2155; Code 1873, § 2181; Code 1882, § 2181; Civil Code 1895, § 3001; Civil Code 1910, § 3573; Code 1933, § 4-102.)

## JUDICIAL DECISIONS

**Insane persons are generally declared incompetent to be agents.** Central of Ga. Ry. v. Hall, 124 Ga. 322, 52 S.E. 679, 110 Am. St. R. 170, 4 L.R.A. (n.s.) 898, 4 Ann. Cas. 128 (1905).

**Bank or lending institution may act as agent for another.** Heard v. Decatur Fed. Sav. & Loan Ass'n, 157 Ga. App. 130, 276 S.E.2d 253 (1980).

**Attorney at law is agent of highest rank for**

**client.** Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.), 15 Bankr. 232 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982).

**Cited in** Puckett v. Reese, 203 Ga. 716, 48 S.E.2d 297 (1948); Butler v. Moore, 125 Ga. App. 435, 188 S.E.2d 142 (1972); Pendley v. Jessee, 134 Ga. App. 138, 213 S.E.2d 496 (1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 12 et seq.

**C.J.S.** — 2A C.J.S., Agency, §§ 24, 26.

**ALR.** — Infant's appointment of agent, and acts of agent thereunder, as void or voidable, 31 ALR 1001.

### 10-6-4. Fiduciaries may convey by attorneys in fact.

Executors, administrators, guardians, conservators, and trustees are authorized to sell and convey property by attorneys in fact in all cases where they may lawfully sell and convey in person. (Ga. L. 1855-56, p. 148, § 11; Code 1868, § 2154; Code 1873, § 2180; Code 1882, § 2180; Civil Code 1895, § 3000; Civil Code 1910, § 3572; Code 1933, § 4-104; Ga. L. 2006, p. 805, § 1/SB 534.)

**The 2006 amendment,** effective July 1, 2006, inserted "conservators" in this Code section.

## JUDICIAL DECISIONS

**Written authority needed to sell land.** — It would seem that since this section was en-

acted, if an executor or administrator desires to sell the land of the estate by an agent, the

agency must be created in writing since that is the usual mode of appointing attorneys in fact. *Scales v. Chambers*, 113 Ga. 920, 39 S.E. 396 (1901).

**Mere crier employed by administrator does not control sale** but is simply the mouthpiece of the latter, and is in no sense the agent or attorney in fact of the administrator under this section, and cannot, over

protest, complete the sale. *Scales v. Chambers*, 113 Ga. 920, 39 S.E. 396 (1901).

**Power presumed properly exercised.** — Under this section, if a testator gave the testator's executors power to sell property, such power will be held to have been properly exercised, in the absence of proof to the contrary. *Webster v. Black*, 142 Ga. 806, 83 S.E. 941 (1914).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 21, 120 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 202 et seq.

**ALR.** — Liability of receiver in his official capacity for torts or negligence of receiver-ship employees, 10 ALR 1055.

Disposition of all or residue of testator's property, without referring to power of ap-

pointment, as constituting sufficient manifestation of intention to exercise power, in absence of statute, 15 ALR3d 346.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 ALR3d 1191.

### 10-6-5. What may be done by agent; delegation of agent's authority.

Whatever one may do himself may be done by an agent, except such personal trusts in which special confidence is placed on the skill, discretion, or judgment of the person called in to act; so an agent may not delegate his authority to another unless specially empowered to do so. (Orig. Code 1863, § 2158; Code 1868, § 2153; Code 1873, § 2179; Code 1882, § 2179; Civil Code 1895, § 2999; Civil Code 1910, § 3571; Code 1933, § 4-103.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### DELEGATION OF AUTHORITY

#### General Consideration

**Scope of authority.** — There is conferred upon an agent no greater power than that possessed by the principal. *Tippins v. Cobb County Parking Auth.*, 213 Ga. 685, 100 S.E.2d 893 (1957).

**Agent for sale of personalty** has authority only to sell. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

**Agent may enter credit binding payee.** — If payee of a note could make an entry of credit and that act would bind the payee, the payee could under this section make it by an agent and be bound thereby. *Green v. Juhan*, 66 Ga. 531 (1881).

**Waiver of prepayment of insurance premi-**

**ums.** — An insurance company by the company's proper officers may waive a condition requiring prepayment of the premium, and whatever the company might do itself it would be permitted to do by an agent. *Penn Mut. Life Ins. Co. v. Blount*, 33 Ga. App. 642, 127 S.E. 892, cert. denied, 33 Ga. App. 829 (1925).

**Principal may be bound by agent's admission.** — An admission made through an agent, during the existence and in pursuance of the agent's power, was no less evidence against the principal than if made by the principal in person, under former Civil Code 1910, §§ 3571 and 5779. *William-Hester Marble Co. v. Walton*, 22 Ga. App. 433, 96 S.E. 269 (1918).



**General Consideration (Cont'd)**

**Wife may appoint husband her general agent.** — A married woman may enter into any contract by an agent that the law will permit her to make in person, and she may appoint her husband as her general agent and in such case will be bound by an agreement made in her behalf by the husband acting within the scope of his authority, to the same extent as if the agreement were made by the wife by and for herself independently of such agent. *Hutcheson v. May*, 40 Ga. App. 746, 151 S.E. 657 (1930).

**Husband may bind wife by contract to purchase execution against husband.** — Where a married woman entered into a contract for the purpose of an execution against her husband and executed notes therefor, she could not repudiate the transaction upon the ground that the agreement was an undertaking by her to pay the debt of her husband, and the fact that in all negotiations prior to the final making of the contract the wife was represented by the husband, and that she did not in fact understand the true consideration of the agreement, would not operate to relieve her from liability, where the true intent and purpose was not to bind her for the debt of her husband, but to make a bona fide purchase of the execution and the husband in so representing his wife was acting within the scope of his authority as her agent. *Hutcheson v. May*, 40 Ga. App. 746, 151 S.E. 657 (1930).

After a husband, after conveying lands to another to secure a debt, made a second conveyance of the same lands to his wife to secure an additional debt and, while both of these conveyances were outstanding, entered upon the lands and manufactured lumber from timber standing thereon, the husband was not without an apparent interest in the lumber; and where a judgment creditor caused an execution against the husband to be levied upon such lumber as the husband's property, the wife, in order to obtain a release of the property and to protect her interest therein, could purchase the execution; and a contract made by her for that purpose, if free from fraud or undue influence, would be binding upon her. *Hutcheson v. May*, 40 Ga. App. 746, 151 S.E. 657 (1930).

**Transfer of securities to agent.** — The power of attorney conveyed by husband to wife expressly conveyed upon wife the authority to effect the transfer of securities from him to her. *Wheless v. Gelzer*, 780 F. Supp. 1373 (N.D. Ga. 1991).

**When debtor files bankruptcy, control over property passes to court.** — Possession of property of debtor by agent for debtor presents no question of jurisdiction over property by bankruptcy court, because upon filing of bankruptcy petition, control which debtor possessed over debtor's property in hands of debtor's agent passes to bankruptcy court and title thereto passes to bankruptcy court and the court's trustee. *Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.)*, 15 Bankr. 232 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982).

**Cited in** *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Huggins v. Atlanta Tile & Marble Co.*, 98 Ga. App. 597, 106 S.E.2d 191 (1958); *Dairyland Ins. Co. v. Gay*, 193 Ga. App. 65, 386 S.E.2d 909 (1989).

**Delegation of Authority**

**Restriction states common law.** — The inhibition against an agent delegating an agent's power as contained in this section is only declaratory of the common law and is but another form of expression for the maxim "delegata potestas non potest delegari." *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S.E. 1074 (1909).

**"Personal trusts" arise out of fiduciary relation.** — The "personal trusts" referred to in this section are those arising out of a fiduciary relation, such as the relation between principal and agent and the like. *Council v. Teal*, 122 Ga. 61, 49 S.E. 806 (1905).

**To contract to drill artesian well does not involve any personal trust, any more than to contract to dig a ditch or to erect a building, and in the absence of a stipulation to the contrary, the contractor may perform the contract obligations through agents, being accountable, of course, for the manner in which the agents prosecute the work.** *Council v. Teal*, 122 Ga. 61, 49 S.E. 806 (1905).

**Test as to whether contract involves relation of personal confidence** is whether the party conferring the rights must necessarily

have intended the rights to be exercised only by the individual upon whom the rights were actually conferred. *Adair v. Smith*, 23 Ga. App. 290, 98 S.E. 224 (1919).

**Parties may agree contract not personal in nature.** — Even though the subject matter of a contract might of itself in a sense indicate that it was intended to be personal in the contract's nature, the parties thereto can nevertheless by the express terms of the agreement manifest a different purpose and intent. *Adair v. Smith*, 23 Ga. App. 290, 98 S.E. 224 (1919).

**Section strictly applied as to public officers.** — No agent may delegate authority unless the agent is specially empowered to do so, and, for reasons that are entirely obvious, this rule is usually given a very strict, if not a literal, application in case of public officers. *Deariso v. Mobley*, 38 Ga. App. 313, 143 S.E. 915, cert. denied, 38 Ga. App. 816 (1928).

Defendant's claim that an investigator employed by the district attorney was bound by the ethical and legal standards that prohibited the district attorney from testifying before the grand jury was rejected as an agent could not delegate the agent's authority unless specifically empowered to do so and as the discretionary powers conferred upon public agents could not be delegated without authorization; further, an unlicensed individual could not practice law and a witness could not testify to hearsay other than in specified cases. *Hall v. State*, 273 Ga. App. 203, 614 S.E.2d 844 (2005).

**Section prevents assignment of position.** — An agreement between the state and R, whereby R was appointed special tax investigator and was to receive commission on such back ad valorem taxes due the state as should be collected through R's efforts, could not have been assigned. *Roberts v. Allen*, 31 Ga. App. 660, 122 S.E. 86, cert. denied, 31 Ga. App. 812 (1924).

**Assignability of choses in action.** — Former Civil Code 1910, § 3571 is a recognized exception to the rule stated in former Civil Code 1910, §§ 3653 through 3655, namely, that all choses in action arising upon contract and involving property rights may be assigned. *Adair v. Smith*, 23 Ga. App. 290, 98 S.E. 224 (1919).

**Employment of workmen.** — This section has no application to the contractual rela-

tion existing between the parties to an agreement under the terms of which one of them obligates oneself to accomplish a given task, not alone or in person, but through workmen in one's employ. *Council v. Teal*, 122 Ga. 61, 49 S.E. 806 (1905).

**Insurance company agent may employ clerks.** — An agent of an insurance company, fully authorized to make out and issue policies of insurance, has power to employ clerks in the ordinary business of the agency. *Springfield Fire & Marine Ins. Co. v. Price*, 132 Ga. 687, 64 S.E. 1074 (1909).

**Subagents for telegraph operators.** — The rule laid down in the case of *Central of Ga. Ry. v. Price*, 106 Ga. 176, 32 S.E. 77, 71 Am. St. R. 246, 43 L.R.A. 402 (1898), deciding under this section that a conductor would have no authority to employ a subagent to act for the railroad company in caring for a passenger, would certainly apply equally to a telegraph operator in the service of such company. *Western & Atl. R.R. v. Jackson*, 21 Ga. App. 50, 93 S.E. 547 (1917).

**Station agent may not delegate authority to employ servants** to an inferior agent, since it involves discretion and judgment. *Mathis v. Western & Atl. R.R.*, 35 Ga. App. 672, 134 S.E. 793 (1926) (railroad not liable for death of person employed by inferior agent).

**Agent may not by indirection delegate authority to operate farms** to another, unless specially empowered to do so, under this section. *Hargrove v. Armour Fertilizer Works*, 31 Ga. App. 465, 120 S.E. 800 (1923).

**Authority to sell article.** — An agent, whose authority is limited to the sale of an article, may not delegate this authority to another, without being empowered so to do. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

**If authority exceeded, no title passes.** — If an agent who is authorized to sell trucks but not authorized to delegate such authority to another undertakes to exceed one's authority by delivering a truck to an automobile dealer to sell, the agent was acting without his authority and no title to the truck passed. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

**Owner not estopped by having given possession to agent.** — A purchaser of personal property from one who is not the true owner acquires no title against the true owner by



**Delegation of Authority (Cont'd)**

reason of the bona fides of purchase, when one purchased from one who is an utter stranger to the title and who can convey no title, except where there may be some statute otherwise, or where the true owner, upon some principle of estoppel, would be precluded from asserting title. However, the mere permission by the owner for the agent to have possession of the truck would not be such an act as would estop the owner. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

**Relationship of master and servant cannot be imposed upon person without consent**, express or implied; hence, the defendant was free to select the defendant's own servant and was responsible for the acts of the defendant's servant within the scope of the defendant's employment, but the defendant was not responsible for the act of an assistant permitted without authority to act for the defendant. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

**Liability of principal for acts of subagent.** — If a servant, who is employed to do certain work for a master, employs another person to assist the servant, the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the assistant or when the act of employment is ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive it on the business of the owner, is personally expressly or impliedly authorized to appoint a sub-agent for that purpose, the owner will not be liable for the negligence of the latter. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master, engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver be ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961).

**Family purpose doctrine.** — A parent who keeps and maintains an automobile for the use, comfort, pleasure, and convenience of the family is responsible for injuries resulting from the negligence of a third person whom the family member permits to drive, if the family member remains in the automobile and retains control, authority, and direction over the automobile, and if the automobile is being used in furtherance of the purposes of a family car. This liability created by the family car doctrine is applicable notwithstanding the fact that the parent has expressly instructed the family member not to permit third persons to drive the car. *Phillips v. Dixon*, 236 Ga. 271, 223 S.E.2d 678 (1976).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 2, 155, 157.

**C.J.S.** — 2A C.J.S., Agency, §§ 129, 230, 253.

**ALR.** — Authority of agent to assent to account stated, 2 ALR 71.

Validity of rule or stipulation making messenger in employment of telegraph company agent of sender in taking message to office for transmission, 9 ALR 1235.

Validity of factor's pledge of his principal's property, 14 ALR 423.

Liability of undisclosed principal on sealed contract, 32 ALR 162.

Death as revoking power of attorney to transfer corporate stock, 40 ALR 1004.

Character as holder in due course of

concern which takes paper from its dealers or agents, 61 ALR 694.

Implied or ostensible authority of officer, agent, or employee to engage medical services, 71 ALR 638.

Authority of claim agent as regards terms or condition of settlement, 87 ALR 1277.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 ALR 895.

Power of sale as including power to mortgage, 92 ALR 882.

Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 ALR 389.

Authority of agent to endorse and transfer commercial paper, 37 ALR2d 453.



Authority of agent to borrow money for principal, 55 ALR2d 1215.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 ALR3d 843.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Tort liability of public schools and institutions of higher learning for accidents associated with transportation of students, 23 ALR5th 1.

### 10-6-6. Conditional power of attorney.

(a) As used in this Code section, the term "conditional power of attorney" means a written power of attorney stating that it becomes effective at a specified future time or on the occurrence of a specified event or contingency, including, but not limited to, the subsequent incapacity of the principal.

(b) In a conditional power of attorney, the principal may designate one or more persons who, by a written declaration under penalty of false swearing, have the power to determine conclusively that the specified event or contingency has occurred. The principal may designate the attorney in fact or another person to perform this function, either alone or jointly with other persons.

(c) A power of attorney containing the designation described in subsection (b) of this Code section becomes effective when the person or persons designated in the power of attorney execute a written declaration under penalty of false swearing that the specified event or contingency has occurred; and any person may act in reliance on the written declaration without liability to the principal or to any other person, regardless of whether the specified event or contingency has actually occurred.

(d) This Code section shall apply to a power of attorney whether executed before, on, or after July 1, 1993, if the power of attorney contains the designation described in subsection (b) of this Code section.

(e) Subsections (b) and (c) of this Code section do not provide the exclusive method by which a power of attorney may be limited to take effect upon the occurrence of a specified event or contingency. (Code 1981, § 10-6-6, enacted by Ga. L. 1993, p. 1052, § 1.)

**Law reviews.** — For note on 1993 enactment of this Code section, see 10 Ga. St. U.L. Rev. 31 (1993).

## ARTICLE 2

## RELATIONS BETWEEN PRINCIPAL AND AGENT

**Cross references.** — Indemnification of corporate directors and officers, § 14-2-850 et seq.

## RESEARCH REFERENCES

**ALR.** — Validity of factor's pledge of his principal's property, 14 ALR 423.

Liability of third person for aiding agent or employee in breach of duty to principal or employer, 45 ALR 1481.

Validity of contract negotiated by agent acting for both parties, 48 ALR 917.

Liability of agent for acts or omissions of subagent, 61 ALR 277.

Regulations, rules, custom, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 ALR 592.

Right as between two principals of common agent who misappropriates funds of one of them in order to make good misappropriation of funds of other, 86 ALR 537.

Ratification by customer of stockbroker's wrongful purchase or sale of securities on his account, or failure to comply with instructions, 87 ALR 794.

Agent's liability to principal on account of

money or property received on latter's account, as affected by his restoration of same to, or his application thereof for benefit of, third person, 98 ALR 1429.

Right of one other than principal to repudiate transaction because of common agency unknown to principal, 147 ALR 772.

Availability of equitable remedy of accounting between principal and agent, 3 ALR2d 1310.

Rights of parties under oral agreement to buy or bid in land for another, 27 ALR2d 1285.

Abstracter's duty and liability to employer respecting matters to be included in abstract, 28 ALR2d 891.

Power of real-estate broker to execute contract of sale in behalf of principal, 43 ALR2d 1014.

Duty of real-estate broker to disclose identity of purchaser or lessee, 2 ALR3d 1119.

## 10-6-20. Rights under agency for illegal purpose.

No rights shall arise to either party out of an agency created for an illegal purpose. (Orig. Code 1863, § 2169; Code 1868, § 2165; Code 1873, § 2191; Code 1882, § 2191; Civil Code 1895, § 3018; Civil Code 1910, § 3590; Code 1933, § 4-201.)

## JUDICIAL DECISIONS

**Scope of agent's power.** — There is conferred upon agent no greater power than that possessed by principal. *Tippins v. Cobb County Parking Auth.*, 213 Ga. 685, 100 S.E.2d 893 (1957).

There was no merit to a homeowner's argument that a restrictive covenant barring "For Sale" signs in a subdivision did not apply to the homeowner's real estate agent; under O.C.G.A. §§ 10-6-20 and 10-6-25, an agent could do no more than a principal.

*Godley Park Homeowners Ass'n v. Bowen*, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

**Principal may recover future money deposited with agent for speculation**, as the action is not one to enforce an illegal contract, but to recover money in the hands of an agent belonging to the principal. *Clark, Harrison & Co. v. Brown*, 77 Ga. 606, 4 Am. St. R. 98 (1886).

**Cited in** *Iteld v. Karp*, 85 Ga. App. 835, 70 S.E.2d 378 (1952).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 18.

**ALR.** — Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 ALR 906.

Right to recover money which the plaintiff placed in the hands of an agent, to be used for gambling purposes, 3 ALR 1635.

Illegality of transaction or proposed transaction as affecting right of real estate broker to commission for promoting it, 85 ALR 274.

## 10-6-21. Extent of agent's authority; liability for exceeding, violating, or disregarding instructions.

The agent shall act within the authority granted to him, reasonably interpreted; if he shall exceed or violate his instructions, he does it at his own risk, the principal having the privilege of affirming or dissenting, as his interest may dictate. In cases where the power is coupled with an interest in the agent, unreasonable instructions, detrimental to the agent's interest, may be disregarded. (Orig. Code 1863, § 2162; Code 1868, § 2158; Code 1873, § 2184; Code 1882, § 2184; Civil Code 1895, § 3004; Civil Code 1910, § 3576; Code 1933, § 4-202.)

**Cross references.** — Authority of attorney to act on behalf of client, § 15-19-5 et seq.

**Law reviews.** — For article, "Theories of Stockbroker and Brokerage Firm Liability,"

see 9 Ga. St. B.J. 12 (2004). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## POWER COUPLED WITH INTEREST

## WHEN PRINCIPAL BOUND BY AGENT'S ACT

## 1. GENERALLY

## 2. ACT OF SUBAGENT APPOINTED BY AGENT

## General Consideration

**Agent must follow principal's instructions.**

— When the directions to an agent are clear and well defined, it is the agent's duty to follow the directions faithfully, provided this may be lawfully done; although the agent is, in the absence of instructions, bound to follow the established usage or mode of dealing, yet no custom or usage will authorize a departure from positive instructions; the instructions of the principal make the law by which the agent is governed. *J. Day & Co. v. Crawford*, 13 Ga. 508 (1853); *McLendon v. Wilson, Callaway & Co.*, 52 Ga. 41 (1874); *Hatcher & Baldwin v. Comer &*

*Co.*, 73 Ga. 418 (1884); *Central of Ga. Ry. v. Felton*, 110 Ga. 597, 36 S.E. 93 (1900).

**Specific instructions control general authority.** — If specific instructions as to a particular matter have been given, the agent is charged with strict compliance with such instructions, no matter how broad the general powers as agent may otherwise have been. *Lovejoy v. Lamar*, 20 Ga. App. 499, 93 S.E. 153 (1917).

**Power of attorney did not create fiduciary relationship.** — Limited power of attorney given by insured to an insurance premium finance company authorizing the company to cancel policies and perform certain other duties related thereto did not create a fidu-



**General Consideration (Cont'd)**

ciary relationship between the insured and the company. *Gill Plumbing Co. v. Imperial Premium Fin., Inc.*, 213 Ga. App. 754, 445 S.E.2d 840 (1994).

**Violation or nonperformance breaches contract and fiduciary obligations.** — Violation or nonperformance of instructions may be considered as a breach of two obligations — the consensual obligation set forth in the contract of agency itself and the fiduciary obligation of obedience to the principal's instructions raised by the agency relationship. *Cutcliffe v. Chesnut*, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

**Conversion.** — If personal property has been by the property's owner delivered to an agent with power of attorney in the agent to sell the property and convey title, and a limitation on the terms of sale is placed on the agent, and the agent sells the property in violation of these terms, neither the agent nor a subagent, who sells the property for the agent is guilty of a conversion of the property; and since title and right to possession pass out of the owner, the owner cannot recover in trover. *Noras v. McCord*, 59 Ga. App. 311, 200 S.E. 513 (1938).

**Rescission remedy for breach of contract obligations.** — Rescission of an agency agreement is an available remedy to the principal for the agent's breach or nonperformance of contractual obligations imposed by that agreement whenever and to whatever extent it is authorized by the law of contracts. *Cutcliffe v. Chesnut*, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

**Agent liable if injury results.** — If injury results to the principal from a failure of the agent to observe the principal's instructions, the agent is liable therefor to the principal. *J. Day & Co. v. Crawford*, 13 Ga. 508 (1853); *Central Ga. Bank v. Cleveland Nat'l Bank*, 59 Ga. 667 (1877); *Cason v. Heath*, 86 Ga. 438, 12 S.E. 678 (1890); *Georgia Southern & Florida Ry. v. Jossey*, 105 Ga. 271, 31 S.E. 179 (1898); *Cave v. Lougee & Zimmer*, 134 Ga. 135, 67 S.E. 667 (1910).

**Agent liable regardless of degree of care.** — If specific instructions are violated, the agent is responsible in damages for any loss which results from the violation regardless of the degree of care exercised. *Cutcliffe v. Chesnut*, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

**Intent to benefit principal.** — The primary obligation of an agent or factor, whose authority is limited by instructions, is to adhere faithfully to those instructions; for if the agent unnecessarily exceeds the agent's commission or risks the agent's principal's effects without authority, the agent renders oneself responsible to the principal for the consequences of the agent's act; and if loss ensues, it furnishes no defense to the agent that the agent intended the benefit of the principal. *Cutcliffe v. Chesnut*, 122 Ga. App. 195, 176 S.E.2d 607 (1970).

**Agent not liable if principal ratifies or fails to disapprove.** — If an agent deviated from instructions, and forthwith informed the agent's principal, and the principal, with full knowledge of the facts, either ratifies the act, in terms, or fails, within a reasonable time, to disapprove, the agent is not liable for the deviation from the agent's instructions. *Bray & Bro. v. Gunn*, 53 Ga. 144 (1874).

**Agent not liable if no actual damage.** — If an agent, such as a cotton factor, who has been instructed by the cotton factor's principal to sell cotton belonging to the latter immediately and for the best price obtainable, fails to sell the cotton and thereby violates the contract with the principal, no actual damage is suffered by the principal where the cotton has not decreased in value from the time when the agent in the due exercise of the agent's commission should have sold the cotton and the time when the principal learned of the agent's violation of the agreement to sell and should have affirmed or disapproved of the agent's conduct in failing to sell. *Vinson v. Kinney & Co.*, 30 Ga. App. 731, 119 S.E. 217 (1923).

**No liability if agents' act in accordance with general custom of trade.** — If cotton factors sued customers for advances made on cotton consigned to the cotton factors for sale, the customers could not set off damages because of a sale of the cotton for a lower price than the cotton factors had instructed it sold for, where, in accordance with the general custom and usage of the trade at the place of sale, the cotton was sold after the customers had failed to comply with repeated notices from the factors to deposit with them more margins and where, in the opinion of the factors, the cotton was not a sufficient security for the balance due them. *Leffler Co. v. Pearson & Son*, 17 Ga. App. 57, 86 S.E. 256 (1915).

**Questions of fact.** — Questions of the existence and extent of an agent's authority are generally for the triers of fact. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980); *American Global Dev. Group, Inc. v. Sasser & Weatherford, Inc.*, 249 Ga. App. 479, 548 S.E.2d 465 (2001).

**Burden of proving specific instructions.** — If the contention of the principal is not that the agent exceeded the scope of the agent's general authority, but that the agent violated specific instructions as to a particular matter, the burden is upon the principal to show that such instructions were given. *Lovejoy v. Lamar*, 20 Ga. App. 499, 93 S.E. 153 (1917).

**Cited in** *Benton v. Roberts*, 35 Ga. App. 749, 134 S.E. 846 (1926); *Benton v. Roberts*, 49 Ga. App. 760, 176 S.E. 804 (1934); *Long Tobacco Harvesting Co. v. Brannen*, 99 Ga. App. 541, 109 S.E.2d 90 (1959); *Owens v. White*, 103 Ga. App. 459, 119 S.E.2d 581 (1961); *Heard v. Decatur Fed. Sav. & Loan Ass'n*, 157 Ga. App. 130, 276 S.E.2d 253 (1980); *Bresnahan v. Lighthouse Mission, Inc.*, 230 Ga. App. 389, 496 S.E.2d 351 (1998).

### Power Coupled with Interest

**Agent may have interest.** — That an agent is not prohibited from having an interest is evident from former Code 1933, §§ 4-202 and 3575. *Pendley v. Jessee*, 134 Ga. App. 138, 213 S.E.2d 496 (1975).

**Agent who advances purchase price has interest.** — An agent to sell becomes an agent with an interest when the agent advances the amount of the purchase price of the goods sold. *Southern Trading Corp. v. Benchley Bros., Inc.*, 34 Ga. App. 625, 130 S.E. 691 (1925).

**Unreasonable instructions may be disregarded.** — Ordinarily, an agent must be guided wholly by the wishes or directions expressed by a principal, but in cases of an agency coupled with an interest, unreasonable instruction, detrimental to the agent's interests, may be disregarded. *Gordon & Co. v. Cobb*, 4 Ga. App. 49, 60 S.E. 821 (1908).

If an agency is coupled with an interest and the principal gives to the agent unreasonable instructions detrimental to the agent's interest, the agent may disregard the instructions and act for the agent, provided

the agent acts in good faith, and the principal would be bound thereby. *Southern Trading Corp. v. Benchley Bros., Inc.*, 34 Ga. App. 625, 130 S.E. 691 (1925).

**Bonded messenger.** — If an express company employed a messenger and required the messenger to give bond, which provided that the messenger should "well and truly perform all the duties required of me in any position . . . , and indemnify and save harmless the said company from all liability on account of my fault or neglect," as between the company and the messenger, the messenger's liability was that of an agent and depended on the messenger's diligence or negligence, and it was erroneous to charge the latter part of this section, as the power of this agent to act in this business was not coupled with any interest in the sense of this section. *Southern Express Co. v. Frink*, 67 Ga. 201 (1881).

### When Principal Bound by Agent's Act

#### 1. Generally

**Knowledge that agent exceeded authority.** — A principal is not bound by the acts of an agent when those acts are beyond the scope of the agent's authority and the person dealing with the agent knows thereof. *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935).

**Illegal acts.** — Unless a borrower shows affirmatively that one who loaned the borrower money at the highest legal rate assented to the exaction of a commission by the latter's agent, it cannot be said that the lender ever understood and agreed that the collateral agreement between the agent and the borrower should be considered and become a part of the contract of loan. The borrower has no right to assume that even a general agent has power to bind a principal by such an agreement; for, the same being illegal and prohibited by law, the borrower is put upon immediate notice that the agent is transcending the agent's general powers and going beyond the legal scope of the agency. *Burnett v. Lewis*, 40 Ga. App. 525, 150 S.E. 462 (1929).

**Ratification.** — The principal is not chargeable with knowledge as to acts of an agent beyond the scope of the latter's authority, nor in anywise bound thereby; but the principal must be shown by the party so



**When Principal Bound by Agent's****Act (Cont'd)****1. Generally (Cont'd)**

alleging to have either tacitly or expressly assented to or ratified such acts on the part of the agent, before they can be considered as having any binding effect. *Burnett v. Lewis*, 40 Ga. App. 525, 150 S.E. 462 (1929).

**Estoppel to deny liability.** — Although a principal is not bound by a sealed instrument signed by an agent without authority to execute the instrument under seal, yet, having allowed the opposite party to act upon the instrument in a way to be prejudiced and to one's detriment but to the benefit of the principal, the principal is estopped from denying the validity of the instrument, and the court erred in excluding the instrument from the evidence and in directing the verdict for the plaintiff. *Ferguson v. Carter*, 208 Ga. 143, 65 S.E.2d 600 (1951).

A purchaser of personal property from one who is not the true owner acquires no title against the true owner by reason of the bona fides of the purchase, when the purchaser purchased from one who is an utter stranger to the title and who can convey no title, except if there may be some statute otherwise, or if the true owner, upon some principle of estoppel, would be precluded from asserting title. However, the mere permission by the owner for the agent to have possession of the truck would not be such an act as would estop the owner. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

**Liability for tort of driver, injuring driver's guest.** — If agent, servant, or employee of defendant, while driving automobile in and about defendant's business and in performance of the services for which the agent was hired or which the agent contracted to perform for the agent's principal or master, invites a third person to ride with the agent as a guest and such third person is injured by reason of the negligence of the driver, no right of action arises in favor of such third person against the owner of the automobile for a tort committed by the driver as the owner's agent, servant, or employee. *Beard v. Oliver*, 52 Ga. App. 229, 182 S.E. 921 (1935).

**Examination of special agent's authority.**

— In the case of a special agency for a particular purpose, it is the duty of the one

dealing with the agent to examine the agent's authority. *Van Arsdale v. Joiner*, 44 Ga. 173 (1871).

**Broker is deemed special agent.** — Under former Code 1882, §§ 2184, 2194, 2196, a broker was a special agent and derived the broker's power and authority to bind a principal from the instruction given to the agent by a principal. *Clark Nunnally v. Cumming & Co.*, 77 Ga. 64, 4 Am. St. R. 72 (1886).

**Power to borrow must be express.** — It was held under former Civil Code 1895, §§ 3004 and 3021, which laid down the rule as to how the principal was bound by the acts of an agent, that authority to borrow money was among the most dangerous powers which a principal can confer upon an agent and must be created by express terms or be necessarily implied from the very nature actually created. *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S.E. 316 (1903).

**Agency to sell does not necessarily carry with it authority to collect.** — The agent must act within the authority granted the agent, and persons dealing with any agent appointed for a particular purpose are bound to inquire as to the extent of the agent's authority. *Miles v. Smith*, 37 Ga. App. 619, 141 S.E. 314 (1928).

**Power to make restricted endorsement does not authorize general endorsement in blank.** *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S.E. 316 (1903). See § 11-3-207.

**Agent's authority limited by policy ends with cancellation thereof.** — If authority of agent is limited by terms of group insurance policy and such policy is cancelled, such agent is without authority to continue such cancelled policy in force, unless such continuation is accepted and agreed to by the officers of the company empowered so to do or there has been an acceptance by the company of payments of premiums made for such purpose, and such agent is without authority to constitute the employer in group insurance policy the agent of the company to receive premiums for the employer. *Lancaster v. Travelers Ins. Co.*, 54 Ga. App. 718, 189 S.E. 79 (1936).

**2. Act of Subagent Appointed by Agent**

**Acts of unauthorized assistant.** — The relationship of master and servant cannot be imposed upon a person without the person's consent, express or implied; hence, the de-



feudant was free to select defendant's own servant and was responsible for the acts of the servant within the scope of employment, but the defendant was not responsible for the act of an assistant permitted without the defendant's authority to act for the defendant. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

**Driver appointed by agent.** — Unless a primary agent, expressly or impliedly authorized by the principal as owner of an automobile to drive it on the business of the owner, is himself expressly or impliedly authorized to appoint a subagent for that purpose, the owner will not be liable for the negligence of the latter. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

**Ratification of act of employment.** — If a servant, who is employed to do certain work for a master, employs another person to assist the servant, the master is liable for the negligence of the assistant only when the servant had authority, express or implied, to employ the assistant, or when the act of

employment is ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953).

If one who is employed to drive a motor vehicle, without the consent of and against specific instructions of the master engages a substitute driver, the master is not liable for the negligence of the substitute driver unless the act of the servant employing the substitute driver be ratified by the master. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961).

**Agent not authorized to delegate authority to sell.** — An agent for the sale of personal property has only the authority to sell. If an agent, who is authorized to sell trucks but not authorized to delegate such authority to another, undertakes to exceed the agent's authority by delivering a truck to an automobile dealer to sell, the agent was acting without authority and no title to the truck passed. *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 193, 203, 213, 214, 292, 293, 324.

**C.J.S.** — 2A C.J.S., Agency, §§ 272, 277.

**ALR.** — Liability on the contract of one who without authority assumes to contract for another, 60 ALR 1348.

Contract for development and sale of land as creating a power coupled with interest or supporting an equitable lien, 65 ALR 1080.

Implied or ostensible authority of officer, agent, or employee to engage medical services, 71 ALR 638.

Power to mortgage as authorizing insertion of power of sale in mortgage, 72 ALR 158.

Authority of claim agent as regards terms or condition of settlement, 87 ALR 1277.

Power of sale as including power to mortgage, 92 ALR 882.

Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 ALR 389.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or apparently authorized, to find a market, 105 ALR 718.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

Gross or net profits as the measure of liability of agent or employee who has engaged in transactions on his own account in violation of his duty to his principal, 126 ALR 1357.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Agent's disregard of principal's instructions where power coupled with an interest, 162 ALR 1182.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 ALR2d 1140.

Agent's authority to agree contemporaneously with sale to repurchase or resell or for return of personal property, 34 ALR2d 510.

Authority of agent to endorse and transfer commercial paper, 37 ALR2d 453.

Salesman's power to pledge employer's or principal's personal property, 49 ALR2d 1271.

Advertising agency as agent of advertising medium or of advertiser, 53 ALR2d 1139.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 ALR2d 6.

Truant or attendance officer's liability for assault and battery or false imprisonment, 62 ALR2d 1328.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 ALR3d 843.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

## 10-6-22. Diligence required of agent.

An agent for hire shall be bound to exercise, about the business of his principal, that ordinary care, skill, and diligence required of a bailee for hire. A voluntary agent, without hire or reward, shall be liable only for gross neglect. (Orig. Code 1863, § 2163; Code 1868, § 2159; Code 1873, § 2185; Code 1882, § 2185; Civil Code 1895, § 3009; Civil Code 1910, § 3581; Code 1933, § 4-203.)

## JUDICIAL DECISIONS

**Duty of diligence, loyalty, and absolute good faith implied.** — The law implies, as a part of the contract by which every agency arises, that the agent agrees to have and exercise towards the agent's principal diligence, loyalty, and absolute good faith. *Render & Hammett v. Hartford Fire Ins. Co.*, 33 Ga. App. 716, 127 S.E. 902 (1925); *Anderson v. Redwal Music Co.*, 122 Ga. App. 247, 176 S.E.2d 645 (1970).

**Partnership and all partners liable for breach.** — If the agent is a partnership, the partnership and all its members may be held liable for a violation of the duty of diligence, loyalty, and absolute good faith by any member, as for a breach of contract. *Render & Hammett v. Hartford Fire Ins. Co.*, 33 Ga. App. 716, 127 S.E. 902 (1925).

**Delay in notifying principal of service of**

**process.** — If the law authorizes service of process upon a principal by service upon the agent, it is the agent's duty, when service is so made, to exercise diligence to notify the principal, and in default thereof, the agent will be liable for such damage as the principal may sustain. *Render & Hammett v. Hartford Fire Ins. Co.*, 33 Ga. App. 716, 127 S.E. 902 (1925).

**Money stolen because of failure to exercise ordinary care.** — An agent would be liable if money was stolen as a result of the agent's failure to perform some duty with respect to the agent's handling and custody which rested on the agent independently of the instructions under which the agent was acting, if such failure on the agent's part, under the circumstances, amounted to a failure to exercise ordinary care. *Cave v.*

Lougee & Zimmer, 134 Ga. 135, 67 S.E. 667 (1910).

**One undertaking to procure insurance liable for fraud or negligence.** — If one undertakes to procure insurance for another and is guilty of fraud or negligence in the undertaking, one is liable for loss or damage to the limit of the agreed policy. *Anderson v. Redwal Music Co.*, 122 Ga. App. 247, 176 S.E.2d 645 (1970).

A cause of action will lie for breach of contract to procure insurance on behalf of another, and, irrespective of contractual duty, an action in tort may be based upon a misrepresentation that insurance coverage has been effected when no policy or binder has been issued. *Anderson v. Redwal Music Co.*, 122 Ga. App. 247, 176 S.E.2d 645 (1970).

**Creditor selling security must use ordinary diligence.** — If a bill of sale is given to secure debt and on maturity of the debt the creditor elects to exercise the right given therein to take possession of the security and to sell the security at private sale as the agent of the debtors, the creditor is acting as agent for the debtors in thus dealing with the security and must exercise ordinary diligence, such as persons of common prudence use in relation to their own affairs, in handling such security, having due regard to the rights of the debtors therein. *Goldin v. Federal Intermediate Credit Bank*, 50 Ga. App. 790, 179 S.E. 291 (1935).

**Gratuitous agent.** — Voluntary agent without reward is only liable for gross neglect in and about the business of the principal. *Armstrong, Cator & Co. v. Pease*, 66 Ga. 70 (1880).

A gratuitous agent owes the principal the duty to exercise slight diligence. *Simmerson v. Blanks*, 149 Ga. App. 478, 254 S.E.2d 716 (1979).

**Rule requiring mutuality of promises inapplicable to voluntary agent.** — The rule that where mutual promises furnish the only consideration for a contract the promises

must be mutually binding was inapplicable if the case was made to substantially rest on the theory that there was no valuable consideration for the agreement, but that the defendant agreed with the plaintiff to render certain services as the agent of the latter, and that the defendant was liable for gross neglect under this section as a voluntary agent. *Barber v. Roland*, 143 Ga. 432, 85 S.E. 321 (1915).

**Benefit held sufficient consideration to require ordinary care.** — If the jury is authorized to find that the defendant voluntarily solicited control of the plaintiff's money for the purpose of lending the money to defendant's own customers and that the defendant wanted the money for this purpose because of some benefit or advantage which would accrue personally to the defendant by reason of the agency, the evidence upon this question, though circumstantial, authorizes the inference that the contract of agency was supported by a consideration and bound the defendant to ordinary care about the business of the principal. *Benton v. Roberts*, 41 Ga. App. 189, 152 S.E. 141 (1930).

**Proper appraisal of agent's conduct encompasses knowledge** which the agent professes to possess. *Simmerson v. Blanks*, 149 Ga. App. 478, 254 S.E.2d 716 (1979) (gratuitous agent).

**Charge substantially in the language of section is sufficient.** *National Pencil Co. v. Pinkerton's Nat'l Detective Agency*, 19 Ga. App. 429, 91 S.E. 432 (1917).

**Evidence was sufficient to create an issue for jury determination** as to whether real estate agent negligently represented seller by failing to inform the seller that documents executed at closing granted the agent a security interest. *Welch v. Holley*, 191 Ga. App. 532, 382 S.E.2d 128 (1989).

**Cited in** *Benton v. Roberts*, 35 Ga. App. 749, 134 S.E. 846 (1926); *Stewart v. Boykin*, 165 Ga. App. 868, 303 S.E.2d 50 (1983); *Cabral v. White*, 181 Ga. App. 816, 354 S.E.2d 162 (1987); *Faulkner v. Hood*, 246 Ga. App. 714, 539 S.E.2d 886 (2000).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 210 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 280 et seq.

**ALR.** — Liability of agent for shrinkage or shortage in commodity purchased for principal, 8 ALR 1120.



Duty of factor, broker, or commission merchant with respect to care and protection of goods entrusted to him, 17 ALR 538.

Liability of real estate agent or broker to employer because of unfit character of purchaser or tenant procured by him, 60 ALR 1379.

Personal liability of agent in respect of funds received from third person and turned over to principal not entitled thereto, 82 ALR 307.

Advertising agency as agent of advertising medium or of advertiser, 53 ALR2d 1139.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 ALR2d 342.

Real-estate broker's liability to principal for accepting note, check, or property, rather than cash, as earnest money, 59 ALR2d 1455.

Right of principal to recover punitive damages for agent's or broker's breach of duty, 67 ALR2d 952.

Liability of real-estate broker to principal for negligence in carrying out agency, 94 ALR2d 468.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Liability of insurance agent or broker on ground of inadequacy of liability insurance coverage procured, 72 ALR3d 704; 60 ALR5th 165.

Liability of insurance agent or broker on ground of inadequacy of life, health, and accident insurance coverage procured, 72 ALR3d 735.

Liability of insurance agent or broker on ground of inadequacy of property insurance coverage procured, 72 ALR3d 747.

Liability of insurance agent or broker for placing insurance with insolvent carrier, 42 ALR5th 199.

### 10-6-23. Agent may follow instructions from one of several principals.

Where several persons shall appoint an agent to do an act for their joint benefit, the instructions of one, not inconsistent with the general directions, shall protect the agent in his act. (Orig. Code 1863, § 2167; Code 1868, § 2163; Code 1873, § 2189; Code 1882, § 2189; Civil Code 1895, § 3013; Civil Code 1910, § 3585; Code 1933, § 4-207.)

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 236, 239.

**C.J.S.** — 2A C.J.S., Agency, §§ 28, 259 et seq.

**ALR.** — Liability of member of unincorporated association for tortious acts of association's nonmember agent or employee, 62 ALR3d 1165.

### 10-6-24. Agent not to buy or sell for himself.

Without the express consent of the principal after a full knowledge of all the facts, an agent employed to sell may not himself be the purchaser; and an agent to buy may not himself be the seller. (Orig. Code 1863, § 2164; Code 1868, § 2160; Code 1873, § 2186; Code 1882, § 2186; Civil Code 1895, § 3010; Civil Code 1910, § 3582; Code 1933, § 4-204.)

**Law reviews.** — For article surveying important general legal principles of municipal and county government purchasing and

contracting in Georgia, see 16 Mercer L. Rev. 371 (1965).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

##### General Consideration

**Principles set forth in section are generally applicable** where the agent is acting or should be acting as such for the agent's principal in dealing with third persons. *Smith v. Pennington*, 192 Ga. 478, 15 S.E.2d 727 (1941).

**Sale by agent to self.** — As a general rule, one employed by an owner of property to sell the property as an agent is not authorized to sell the property to himself or herself alone or with others. *Mayor of Macon v. Huff*, 60 Ga. 133 (1878); *Mitchell v. Gifford & Co.*, 133 Ga. 823, 67 S.E. 197 (1910); *Peterson v. Appleby*, 31 Ga. App. 286, 120 S.E. 651 (1923).

**Transfer option to purchase by agent personally.** — Plaintiffs, a firm of brokers with whom the defendant had listed real estate for sale, were not entitled to recover a commission from the defendant for services in procuring a prospective purchaser, who obtained from the defendant an option for the purchase of the property and transferred the option to one of the plaintiffs. *Peterson v. Appleby*, 31 Ga. App. 286, 120 S.E. 651 (1923).

**Absence of principal's knowledge and consent.** — An agent or attorney employed to sell property cannot directly or indirectly become the purchaser without the principal's knowledge and consent. *Reeves v. Callaway*, 140 Ga. 101, 78 S.E. 717 (1913).

An agent who has been engaged to sell real estate for the owner may not, either directly or indirectly, purchase the real estate personally, without the express consent of the principal after a full knowledge of all the facts. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

An agent employed to sell may not purchase the principal's property without the express consent of the latter after a full disclosure of all the facts. *Youngblood v.*

*Mock*, 143 Ga. App. 320, 238 S.E.2d 250 (1977).

**Sale voidable.** — If an agent for the purpose of selling property of the principal purchases the property personally, either directly or through the instrumentality of a third person, the sale is voidable; it will always be set aside at the option of the principal; the amount of consideration, the absence of undue advantage, and other similar features are wholly immaterial; nothing will defeat the principal's right of remedy except the principal's own confirmation, after full knowledge of all the facts. Fraud on the part of the agent or injury to the principal is therefore unessential. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

**Subagents.** — A subagent's duties and obligations to the principal are of the same nature and extent as those of the agent, and a sale of the principal's real estate by the subagent to the subagent, without express consent of the principal with full knowledge of all the facts, will likewise be set aside at the option of the principal. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

**Trustees.** — Trustee could not buy at the trustee's own lawful sale. For a stronger reason, the trustee could not buy at a sale brought about by the trustee's own unlawful conduct. *Bourquin v. Bourquin*, 120 Ga. 115, 47 S.E. 639 (1904).

**Sales under which agent assumes all losses and takes all profits.** — An agent to sell is not, without the consent of the agent's principal, authorized to make sales in foreign markets under an arrangement whereby the agent should assume all risks and contingencies of loss and take all the profits, as this would amount to a sale by the agent to the agent, and one cannot lawfully do by indirection what one is positively forbidden to do. *Atlantic Turpentine & Pine Tar Co. v. Rosin & Turpentine Export Co.*, 247 F. 618 (S.D. Ga. 1918).

**General Consideration (Cont'd)**

**Good faith no defense.** — It is no defense for an agent and the agent's associate to show that the agent acted in good faith in selling to the agent in association with another and that the transaction was in fact for the best interest of the principal; the law does not inquire in such a case whether there is any fraud, but gives the principal the absolute right to repudiate the transaction because the law will not allow an agent to take a position which is so inconsistent with the agent's duty to the agent's principal. *Reeves v. Callaway*, 140 Ga. 101, 78 S.E. 717 (1913); *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**Agent must account for property purchased and proceeds.** — Where the principal executes, without reading them, written instruments which have been prepared by the agent in which the agent is named grantee, and the agent thereafter conveys to a third person a part of the property so conveyed to the agent and claims the rest of the property as purchaser under deeds executed by the principal, a court of equity will decree an implied trust upon the proceeds derived from the sale of the property to the third person and upon the property remaining in the agent and will enforce an accounting between the parties. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**First duty of an agent is that of loyalty to the trust;** the agent must not be in relations which are antagonistic to that of the agent's principal; the agent's duty and interest must not be allowed to conflict; the agent cannot deal in the business within the scope of the agent's agency for the agent's own benefit, nor is the agent permitted to compromise the agent's responsibilities by attempting to serve two masters having a contrary interest, unless it be that such contracts of dual agency are known to each of the principals. *Arthur v. Georgia Cotton Co.*, 22 Ga. App. 431, 96 S.E. 232 (1918); *Clyde Chester Realty Co. v. Stansell*, 151 Ga. App. 357, 259 S.E.2d 639 (1979).

**Agent cannot have any interest nor do any act adverse to the interest of the agent's principal** or incompatible with the applica-

tion of the agent's best skill, zeal, and diligence to the promotion of that interest. *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 179 S.E.2d 88 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137 (1971); *Clyde Chester Realty Co. v. Stansell*, 151 Ga. App. 357, 259 S.E.2d 639 (1979).

It is contrary to public policy for an agent, without the full knowledge and consent of a principal, to do any act or make any contract in carrying out the business of the agency, the effect of which will be to bring the personal interests of the agent in antagonism with those of the principal. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**No man can serve two masters.** — Former Civil Code 1895, §§ 3010, 3011 and 3014 followed the rule that "no man can serve two masters; for either he will hate the one, and love the other; or else he will hold to the one, and despise the other." *Gann v. Zettler*, 3 Ga. App. 589, 60 S.E. 283 (1908).

**Personal and representative interests must not conflict.** — The underlying thought is that an agent should not unite an agent's personal and representative characters in the same transaction; and equity will not permit an agent to be exposed to the temptation or brought into a situation where the agent's own personal interests conflict with the interests of the agent's principal and with the duties which the agent owes to the principal. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

**Principal can rely on agent's representations.** — When the relation of principal and agent arises, the utmost fidelity is imposed upon the agent; the principal can in law rely upon the agent's statements and representations without the necessity of establishing their genuineness. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**Right to presume papers tendered by agent will not give agent adverse interest.** — A principal has a right to presume that all papers tendered to the principal are as represented by the agent and not contracts under which the agent can derive an interest in opposition to the principal's own. *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).



**Decisions requiring party to read unless prevented by fraud are inapplicable.** — Cases holding to the effect that a party who can read must read and fraud which will relieve a party who can read must be such as prevents the party from reading have no application where a confidential and fiduciary relationship of principal and agent is involved. *Youngblood v. Mock*, 143 Ga. App. 320, 238 S.E.2d 250 (1977) (action by principal against agent for breach of fiduciary duty).

**Cited in** *Johnson v. Sherrer*, 197 Ga. 392, 29 S.E.2d 581 (1944); *Denham v. Shellman Grain Elevator, Inc.*, 123 Ga. App. 569, 181 S.E.2d 894 (1971); *Smith v. Blackshear*, 125 Ga. App. 775, 189 S.E.2d 99 (1972); *Associates Fin. Servs. Co. v. Johnson*, 128 Ga. App. 712, 197 S.E.2d 764 (1973); *Mynatt v. Tom Washburn & Assocs.*, 161 Ga. App. 168, 288 S.E.2d 122 (1982); *Vinson v. E.W. Buschman Co.*, 172 Ga. App. 306, 323 S.E.2d 204 (1984); *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984); *Ledbetter v. Ledbetter*, 222 Ga. App. 858, 476 S.E.2d 626 (1996).

### Application

**Agent making sale to corporation.** — A conveyance by an agent authorized to sell, being made to a corporation of which the agent is president and a stockholder, may be treated as void by the principal. *Whitley v. James*, 121 Ga. 521, 49 S.E. 600 (1904); *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**Partner of agent.** — Where realtor was acting as agent in the sale of property, neither the agent nor the agent's partner could become the purchaser of the property without the express consent of the plaintiffs after full knowledge of all the facts. *Kellett v. Boynton*, 87 Ga. App. 692, 75 S.E.2d 292 (1953).

**Listing of property at fixed or minimum price.** — The rule forbidding an agent or subagent from purchasing the principal's property, without the express consent and knowledge of the principal, is not made inapplicable because the property was listed for sale with the agency at a fixed or minimum price. *Dolvin Realty Co. v. Holley*, 203 Ga. 618, 48 S.E.2d 109 (1948).

**Indirect purchase through father-in-law.** — Testimony and documents relating to a sales contract wherein agent's father-in-law was named as the purchaser was admissible to show the initiation by the agent of an undisclosed effort on the agent's part to earn a secret personal profit on the eventual resale of the property by first attempting to purchase the property indirectly through the agent's father-in-law. *Johnson Realty, Inc. v. Hand*, 189 Ga. App. 706, 377 S.E.2d 176 (1988), cert. denied, 189 Ga. App. 912, 377 S.E.2d 176 (1989).

**Mayor may not rent from city.** — Mayor of a city while in office cannot contract with the city council to rent a city park. *Mayor of Macon v. Huff*, 60 Ga. 221 (1878).

**Court-approved investment in stock of trustee-bank.** — Money invested in the capital stock of a bank under order of court, when the bank was acting as trustee, was legal, as this was in no sense such a case as provided against in this section, and the principal had full knowledge of all the facts, and the sale had the specific authority of judicial sanction. *Haddock v. Planters' Bank*, 66 Ga. 496 (1881).

**Contractual power of sale in security deed authorizing purchase by grantee.** — Where a deed to secure a debt provides that the grantee may sell the property upon default and may bid and purchase at such sale, the power of sale is a power coupled with an interest and is absolute for the purposes therein mentioned, without any element of personal confidence in the grantee or limitation as to discretion. The power, being of such character by contract of the parties, is not inhibited by this section. *Smith v. Bukofzer*, 180 Ga. 209, 178 S.E. 641 (1935).

**Scope of attorney-client relationship.** — The relationship of attorney and client is fiduciary in character, but this does not extend beyond the subject matter for which the services of the lawyer have been retained. *Jerry Lipps, Inc. v. Postell*, 139 Ga. App. 595, 229 S.E.2d 78 (1976) (no breach of duty by attorneys).

**Insurance agent may not represent company and property owner.** — An agent of a fire insurance company, authorized to contract for insurance in its behalf, cannot, without the company's consent, become in the agent's individual character the agent of a property owner who desires to obtain

**Application** (Cont'd)

insurance in that company. *Ramspeck v. Pattillo*, 104 Ga. 772, 30 S.E. 962, 69 Am. St. R. 197, 42 L.R.A. 197 (1898).

**Real estate agent may not collect commissions from both parties.** — An agent who secretly undertakes to represent both parties to a transaction is not permitted to recover commissions from either of them. This rule

applies to real estate agents as well as others. *Williams v. Moore-Gaunt Co.*, 3 Ga. App. 756, 60 S.E. 372 (1908).

**Real estate agent may collect commissions from both parties if all have so agreed.** — When it is clearly understood by all the parties that one who is paid commissions to sell cotton is also to charge commissions from the buyer, the transaction is not illegal. *Talcott v. Chew*, 27 F. 273 (S.D. Ga. 1885).

**OPINIONS OF THE ATTORNEY GENERAL**

**Real estate broker may not retain the amount received above the net listing**, in excess of the broker's usual commission, unless the broker's contract with the seller so

provides, and may not conceal from the seller the amount received from the purchaser. 1945-47 Op. Att'y Gen. p. 510.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 229 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 263 et seq.

**ALR.** — Rights and remedies of principal where agent professes to sell principal's property without disclosing that he is the purchaser, 62 ALR 63.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

Rights and obligations of real estate broker employed to sell property as affected by option to purchase for himself, 164 ALR 1378.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 ALR2d 1140.

Liability of vendor's real estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 ALR2d 342.

**10-6-25. Agent must account for profit from principal's property.**

The agent shall not make a personal profit from his principal's property; for all such he is bound to account. (Orig. Code 1863, § 2165; Code 1868, § 2161; Code 1873, § 2187; Code 1882, § 2187; Civil Code 1895, § 3011; Civil Code 1910, § 3583; Code 1933, § 4-205.)

**Law reviews.** — For article surveying important general legal principles of municipal and county government purchasing and

contracting in Georgia, see 16 Mercer L. Rev. 371 (1965).

**JUDICIAL DECISIONS**

**Principles set forth in this section are generally applicable** where the agent is acting or should be acting as such for the agent's principal in dealing with third persons. *Smith v. Pennington*, 192 Ga. 478, 15 S.E.2d 727 (1941).

**Public agents.** — A public agent is in-

cluded under this section. *Mayor of Macon v. Huff*, 60 Ga. 221 (1878).

**Trustees.** — A trustee can never be allowed to derive a personal advantage from the use of the trustee's principal's property. *Rogers v. Dickey*, 117 Ga. 819, 45 S.E. 71 (1903).

**Duty of agent.** — *Arthur v. Georgia Cotton Co.*, 22 Ga. App. 431, 96 S.E. 232 (1918); *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 179 S.E.2d 88 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137 (1971).

Loyalty to the principal is the primary obligation of the agent. *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950).

Relationship of principal and agent is confidential and fiduciary and demands of the agent loyalty and good faith to the principal. *Kellett v. Boynton*, 87 Ga. App. 692, 75 S.E.2d 292 (1953).

Agent cannot have any interest or do any act adverse to the interest of the agent's principal or which is incompatible with the application of the agent's skill and diligence to the promotion of that interest. *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 179 S.E.2d 88 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137 (1971).

An agent must not put oneself in relations which are antagonistic to that of the agent's principal; the agent's duty and interest must not be allowed to conflict; the agent can not deal in the business within the scope of the agent's agency for the agent's own benefit. *Arthur v. Georgia Cotton Co.*, 22 Ga. App. 431, 96 S.E. 232 (1918).

Agent cannot engage in the business of the agent's principal for the agent's personal benefit and profit within the scope of the agency. *Franco v. Stein Steel & Supply Co.*, 227 Ga. 92, 179 S.E.2d 88 (1970), cert. denied, 402 U.S. 973, 91 S. Ct. 1661, 29 L. Ed. 2d 137 (1971).

The relation of principal and agent is a fiduciary one, and the agent may not make a profit for the agent out of the relationship, or out of knowledge obtained from the relationship, to the injury of the principal. *Larkins v. Boyd*, 205 Ga. 69, 52 S.E.2d 307 (1949).

If the fiduciary relationship of principal and agent existed between the petitioner and the defendant, the defendant could not make advantage or profit for the defendant out of the relationship to the injury of the defendant's principal. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

**Scope of agent's power.** — There was no merit to a homeowner's argument that a restrictive covenant barring "For Sale" signs in a subdivision did not apply to the

homeowner's real estate agent; under O.C.G.A. §§ 10-6-20 and 10-6-25, an agent could do no more than a principal. *Godley Park Homeowners Ass'n v. Bowen*, 286 Ga. App. 21, 649 S.E.2d 308 (2007).

**Gift or purchase from principal closely scrutinized.** — It is for the common security of mankind that gifts procured by agents, and purchases made by the agents, from the agent's principals, should be scrutinized with a close and vigilant suspicion. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

**Breach of faith requirement is fraud in itself.** — The relationship of principal and agent, being confidential and fiduciary in character, demands of the agent the utmost loyalty and good faith to the agent's principal, and any breach of this good faith whereby the principal suffers any disadvantage and the agent reaps any benefit is a fraud of such nature as to preclude the agent from taking or retaining the benefit, and also from claiming the agent's commissions. *Peevy v. Wilkes*, 48 Ga. App. 114, 172 S.E. 108 (1933); *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

**Principal need not show actual or moral fraud.** — Under former Civil Code 1910, §§ 3582, 3583 and 4628, an agent to buy and resell property for the agent's principals cannot lawfully make a secret profit from the transaction; nor is it necessary to the application of this rule that the principal must show actual or moral fraud. *Ausley v. Cummings*, 145 Ga. 750, 89 S.E. 1071 (1916).

**Contract obtained by violation is void.** — A contract, no matter how solemnly expressed, obtained by an agent from the agent's principal through a violation of the loyalty and good faith imposed by the confidential relation, is void and is not enforceable in law or in equity. *Peevy v. Wilkes*, 48 Ga. App. 114, 172 S.E. 108 (1933).

**Agent is trustee as to any advantage obtained.** — Relation of principal and agent is a fiduciary one, and the latter cannot make advantage and profit for oneself out of the relationship, or out of knowledge thus obtained, to the injury of one's principal; and the agency being established, the agent will be held to be a trustee as to any profits, advantages, rights, or privileges under any contract made and obtained within the



scope and by reason of such agency. *Peevy v. Wilkes*, 48 Ga. App. 114, 172 S.E. 108 (1933).

Relation of principal and agent is a fiduciary one, and if the agent obtains any advantage or profit out of the relationship to the injury of the principal, one becomes a trustee. *Smith v. Merck*, 206 Ga. 361, 57 S.E.2d 326 (1950).

**Good faith no defense.** — It is no defense for an agent and the agent's associate to show that the agent acted in good faith in selling to the agent in association with another and that the transaction was in fact for the best interest of the principal; the law does not inquire in such a case whether there is any fraud, but gives the principal the absolute right to repudiate the transaction, because it will not allow an agent to take a position which is so inconsistent with the agent's duty to the agent's principal. *Reeves v. Callaway*, 140 Ga. 101, 78 S.E. 717 (1913); *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936), later appeal, 183 Ga. 783, 190 S.E. 19 (1937).

**Principal may rely on agent's representations.** — Because of their fiduciary relationship, a principal is justified in relying upon the representations of the principal's agent and in failing to read and know the contents of the various deeds signed by the principal. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

The numerous decisions to the effect that a party who can read, must read, and that fraud which will relieve a party who can read must be such as prevents one from reading, apply to situations where the parties are dealing with each other at arms length and

have no application to a situation where the confidential and fiduciary relation of principal and agent is involved. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

**Power of attorney.** — Where the clear and unambiguous purpose of the power of attorney is to serve and benefit only the grantor of the power, there is no authorization for the agent to use such powers on the agent's own behalf, i.e., to secure a personal loan for the agent. *First Nat'l Bank v. Cooper*, 252 Ga. 215, 312 S.E.2d 607 (1984).

**Duty terminates upon termination of agency.** — Principles of agency will not sustain grant of an injunction prohibiting competition after agency relationship is terminated. *Pope v. Kem Mfg. Corp.*, 249 Ga. 868, 295 S.E.2d 290 (1982).

**Agent taking over principal's position with company deemed disloyal.** — An agent can do nothing more disloyal to the agent's principal than contacting the agent's principal's employer and taking over the latter's position with the company. *Koch v. Cochran*, 251 Ga. 559, 307 S.E.2d 918 (1983).

**Cited in** *Allen v. Southern Ins. Sec. Corp.*, 54 Ga. App. 316, 187 S.E. 714 (1936); *Thomas v. State*, 87 Ga. App. 765, 75 S.E.2d 193 (1953); *Smith v. Blackshear*, 125 Ga. App. 775, 189 S.E.2d 99 (1972); *Vinson v. E.W. Buschman Co.*, 172 Ga. App. 306, 323 S.E.2d 204 (1984); *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984); *Jennette v. National Community Dev. Servs., Inc.*, 239 Ga. App. 221, 520 S.E.2d 231 (1999); *Seals v. Hygrade Distrib. & Delivery Sys., Inc.*, 249 Ga. App. 574, 549 S.E.2d 412 (2001).

## OPINIONS OF THE ATTORNEY GENERAL

**Real estate broker may not retain the amount received above the net listing**, in excess of the broker's usual commission, unless the broker's contract with the seller so

provides, and may not conceal from the seller the amount received from the purchaser. 1945-47 Op. Att'y Gen. p. 510.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 223, 226, 227, 251, 252.

**C.J.S.** — 2A C.J.S., Agency, §§ 292, 293.

**ALR.** — Right of agent to offset his own claim against collection made for principal, 2 ALR 132.

Right to recover against employee or his

bond for money or property, the fruits of an employment involving a violation of law, 2 ALR 906.

Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 ALR 464.

Duty of principal to discover and notify

third persons of wrongful disposal of property by agent not assuming to act for principal, 35 ALR 325.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

Salesman's power to pledge employer's or principal's personal property, 49 ALR2d 1271.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 ALR2d 342.

## 10-6-26. Estoppel of agent to dispute principal's title.

An agent may not dispute his principal's title, except in such cases where legal proceedings, at the instance of others, shall have been commenced against him. (Orig. Code 1863, § 2166; Code 1868, § 2162; Code 1873, § 2188; Code 1882, § 2188; Civil Code 1895, § 3012; Civil Code 1910, § 3584; Code 1933, § 4-206.)

### JUDICIAL DECISIONS

**Agent cannot dispute principal's title.** — One who undertakes to act as the agent of another cannot dispute the right or title of the agent's principal in and to the subject of the agency. *Morgan v. Morgan*, 160 Ga. 472, 128 S.E. 674 (1925).

**Agent may not attack transfer to principal.** — If there was an agreement between J and B that the latter should hold a certificate to secure a debt due B by J, and if J, for the purpose of securing such debt, delivered the certificate to B and the latter delivered the certificate to L for safekeeping, L could not defeat a recovery of the certificate by B on the ground that there was no written assignment of the certificate by J to B. *Loveless v. Bridges*, 136 Ga. 338, 71 S.E. 166 (1911).

**Denial of authority to sign principal's name.** — If a person signs the name of another to a note, purportedly as a joint obligor, one will be estopped to assert, in an action thereon by an innocent holder for value, that one did not have the authority to sign the name of such other party to the note. *Williams v. Atlanta Nat'l Bank*, 31 Ga. App. 212, 120 S.E. 658 (1923).

**Denial that agent holds money as county agent by showing money was borrowed without authority.** — If the authorities in charge of the finances of a county borrowed money for county purposes without authority of law, and the money thus unlawfully borrowed was received by the county treasurer as county funds and kept with the lawful money of the county, one was estopped from deny-

ing that one held this borrowed money by virtue of one's office as treasurer, and was liable for the same upon one's official bond. *Mason v. Commissioners of Rds. & Revenues*, 104 Ga. 35, 30 S.E. 513 (1898).

**Agent's declarations are not admissible to disparage principal's title.** — The declarations of an agent, who is in possession of realty merely to manage and care for the realty, are not admissible in evidence against the principal to disparage the principal's title. *Sweeney v. Sweeney*, 119 Ga. 76, 46 S.E. 76, 100 Am. St. R. 159 (1903).

**Principal's title may be defense to sub-agent.** — While an agent cannot dispute one's principal's title except in certain instances, yet if one is in possession of cattle merely by virtue of an employment by an officer of the corporation, one would not because of these facts be estopped from defending upon the ground that the title was in the company. *Paschal v. Godley*, 34 Ga. App. 321, 129 S.E. 565 (1925).

**Agent may restore note to principal despite another's demand.** — One in possession of a promissory note as agent for another is not cut off from restoring the note to one's principal though a demand upon one for the note has been made by another claimant. *Wando Phosphate Co. v. Parker*, 93 Ga. 414, 21 S.E. 53 (1893).

**Dispute as to possession between principal and agent.** — When dispute arises as to right of agent or principal to possession of property in hands of agent, title to that

property must, of necessity, be decided. *Scroggins v. Powell, Goldstein, Frazer & Murphy (In re Kaleidoscope, Inc.)*, 15 Bankr. 232 (Bankr. N.D. Ga. 1981), rev'd on other grounds, 25 Bankr. 729 (N.D. Ga. 1982).

**Cited** in *Dunlop Tire & Rubber Co. v.*

*White*, 45 Ga. App. 268, 164 S.E. 414 (1932); *Courts v. Jones*, 61 Ga. App. 874, 8 S.E.2d 178 (1940); *Light v. Smith*, 86 Ga. App. 591, 71 S.E.2d 844 (1952); *Babb v. Kersh*, 92 Ga. App. 346, 88 S.E. 432 (1955); *Giddens Constr. Co. v. Fickling & Walker Co.*, 188 Ga. App. 558, 373 S.E.2d 792 (1988).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 217.

**C.J.S.** — 2A C.J.S., Agency, § 243.

**ALR.** — Liability of one who signs com-

mercial paper in blank to be used for his own benefit where it is wrongfully used by an agent or employee, 43 ALR 198.

#### 10-6-27. Right of principal to follow money deposited by agent.

A principal may follow his money deposited by an agent in the latter's name and recover the same wherever found, unless the rights of innocent third persons shall have intervened. (Civil Code 1895, § 3005; Civil Code 1910, § 3577; Code 1933, § 4-208.)

**History of Code section.** — This Code section is derived from the decision in *Spain v. W.H. Beach & Son*, 52 Ga. 494 (1874).

#### JUDICIAL DECISIONS

**Cited** in *Oslin v. State*, 161 Ga. 967, 132 S.E. 542 (1926).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 217 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 284.

**ALR.** — Liability of receiver in his official capacity for torts or negligence of receiver-ship employees, 10 ALR 1055.

Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary, as charging bank with notice of misap-

propriation, 57 ALR 925; 64 ALR 1404; 106 ALR 836; 115 ALR 648.

Deposit by trustee of funds of separate trusts in a single bank account, 117 ALR 179.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 ALR 361.

#### 10-6-28. When agent depositing principal's money not liable for bank failure.

If the money of a principal shall be deposited by a private agent in the name of the principal in the hands of a bank of good credit and the deposit is according to the common usage of the place, the agent shall not be responsible for any loss arising from the failure of the bank. (Civil Code 1895, § 3008; Civil Code 1910, § 3580; Code 1933, § 4-209.)



**History of Code section.** — This Code section is derived from the decision in *Rogers v. Hopkins & Glenn*, 70 Ga. 454 (1883).

### JUDICIAL DECISIONS

**Demand deposit by fiduciary not investment requiring court order.** — A deposit in a bank by a fiduciary, such as a guardian, of trust funds in the fiduciary's custody and control, subject to the fiduciary's withdrawal on demand, does not constitute an investment of the funds which can be made only by an order of court. *Gross v. Butler*, 48 Ga. App. 750, 173 S.E. 866 (1934).

**Guardian not insurer of safety of deposited funds.** — Whatever duty may rest upon a guardian to invest the funds of a ward in securities such as the guardian may be legally authorized to invest them in, the guardian is not an insurer of the safety of the funds in the guardian's hands and is not liable for their loss, where, in handling the funds, the guardian has acted in good faith and in the exercise of the care and diligence required of an ordinarily prudent person. *Gross v. Butler*, 48 Ga. App. 750, 173 S.E. 866 (1934).

**Guardian not liable for bank failure where required care was exercised.** — Where the guardian has, in the guardian's fiduciary capacity, deposited the funds subject to withdrawal by the guardian at any time, in a bank of solvent reputation and which the guardian has no reason to believe is insolvent and the funds, through no fault of the guardian, are lost by the insolvency of the bank, the guardian has thereby exercised the care and diligence required of the guardian in the handling of the funds, and is not liable for their loss. *Gross v. Butler*, 48 Ga. App. 750, 173 S.E. 866 (1934).

**Deposit must be in name of estate.** — It is the duty of a trustee or administrator to deposit money belonging to the estate in the name of the particular estate. *Gatewood v. Furlow*, 19 Ga. App. 74, 90 S.E. 973 (1916).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 221.

**C.J.S.** — 2A C.J.S., Agency, § 291

**ALR.** — Who must bear loss of funds from failure of bank, at which bill or note is payable, during delay in presenting it, 2 ALR 1381.

Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 ALR 1055.

Deposit to individual account of checks or notes drawn or endorsed by agent or fiduciary, as charging bank with notice of misappropriation, 57 ALR 925; 64 ALR 1404; 106 ALR 836; 115 ALR 648.

Personal liability of agent in respect of funds received from third person and turned over to principal not entitled thereto, 82 ALR 307.

Responsibility of attorney, broker, or other agent depositing his principal's money in his own name or account for loss resulting from the failure of depository or depreciation of currency, 96 ALR 798.

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 ALR2d 1340.

### 10-6-29. Mingling goods of principal and agent.

An agent, by willfully mingling his own goods with those of his principal, shall not create a tenancy in common; but, if incapable of separation, the whole shall belong to the principal. (Orig. Code 1863, § 2171; Code 1868, § 2167; Code 1873, § 2193; Code 1882, § 2193; Civil Code 1895, § 3020; Civil Code 1910, § 3592; Code 1933, § 4-210.)

## JUDICIAL DECISIONS

**Agent cannot create tenancy in common by mingling goods.** — A special agent, by mingling the agent's own goods with those of the agent's principal, cannot create a tenancy in common. *Hall v. Page*, 4 Ga. 428 (1848).

**Agent loses agent's property unless confusion was innocent.** — By virtue of this section if one fraudulently, willfully, or wrongfully mixes or confuses one's goods with those of another and cannot distinguish one's own, one will lose the goods; but where one does so innocently or by mistake, if one can distinguish them or show their value or their proportion of value to the whole, one ought in equity to be allowed to do so. The question is for the jury. *Claflin & Co. v. Continental Jersey Works*, 85 Ga. 27, 11 S.E. 721 (1890).

**Agent liable for all mingled funds absent proof as to each source.** — Where an administrator sold as a unit and for a lump sum four parcels of land, as to only two of which the administrator has obtained an order of court, the administrator in thus causing a confusion of funds brings upon oneself and one's security the burden of showing what proportion of the funds were derived from

the sale of the other two parcels, in order to escape liability therefor; and, upon a failure to carry such burden the administrator was held liable for the entire sum. *American Sur. Co. v. Pettie*, 178 Ga. 26, 171 S.E. 916 (1933).

**Agent must separate agent's own funds to claim the funds.** — A factor with whom property has been deposited who, after having made advancements to the owner upon the property, sells a portion of the property during the owner's lifetime and applies the proceeds thereof upon the indebtedness and sells the remainder of the property after the death of the owner, must, when one is entitled to the proceeds of the property sold before the death of the owner, but, by reason of a claim of the widow and minor children of the owner to a year's support, is not entitled to the proceeds of the property sold after the death of the owner, before one can assert one's claim to the proceeds of the property to which one is entitled, separate and distinguish them from the proceeds of the property sold after the death of the owner. *Philpot v. Ramsey & Hogan*, 47 Ga. App. 635, 171 S.E. 204 (1933).

**Cited in** *Davis v. Wright*, 194 Ga. 1, 21 S.E.2d 88 (1942).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 221.

**C.J.S.** — 2A C.J.S., Agency, § 291.

**ALR.** — Responsibility of attorney, broker, or other agent depositing his principal's money in his own name or account for loss resulting from the failure of depository or depreciation of currency, 96 ALR 798.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 ALR 361.

Liability of attorney for loss of client's money or personal property in his possession or entrusted to him, 26 ALR2d 1340.

## 10-6-30. Agents and fiduciaries to keep accounts; effect of neglect.

It shall be the duty of agents, trustees, administrators, guardians, conservators, receivers, and all other fiduciaries to keep their accounts in a regular manner and to be always ready with them supported by proper vouchers; neglect of this duty shall be ground for charging them with interest on balances on hand and with costs. (Civil Code 1895, § 3007; Civil Code 1910, § 3579; Code 1933, § 4-211; Ga. L. 2006, p. 805, § 2/SB 534.)

**History of Code section.** — This Code section is derived from the decisions in *Dowling v. Feeley*, 72 Ga. 557 (1884), and

*Poullain v. Poullain*, 76 Ga. 420, 4 S.E. 92 (1886).

### JUDICIAL DECISIONS

**Proof of compliance with section.** — The burden of proof is upon the agent to show compliance with this section. *Dodge v. Hatchett*, 118 Ga. 883, 45 S.E. 667 (1903).

While ordinarily one attacking a return of a guardian has the burden to impeach the correctness thereof, the burden of proof is upon the guardian to show a compliance with this section. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Supporting claim with vouchers.** — When a receiver is called upon for an accounting, the burden is upon the receiver to support the claim for expenditures by proper vouchers or to show some sufficient reason why the receiver cannot do so. *Dodge v. Hatchett*, 118 Ga. 883, 45 S.E. 667 (1903); *Merritt v. George*, 168 Ga. 497, 148 S.E. 334 (1929).

**Proper accounting and payment over by agent is presumed.** — There is a legal presumption, in the absence of proof to the contrary, that an agent has performed the agent's duty and paid over and accounted to the agent's principal for moneys collected by the agent in the agent's capacity as agent, and the burden is on the principal to show the contrary. *Kelley v. Carolina Life Ins. Co.*, 48 Ga. App. 106, 171 S.E. 847 (1933).

**Guardian making an annual return** should lay the guardian's account before the probate court, plainly setting forth, with sufficient certainty, the guardian's charges against the ward. This account is the case the guardian should prove. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Vouchers are the guardian's evidence to support the guardian's account.** *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Vouchers entitled to no weight as evidence.** — The vouchers are entitled to no weight as evidence on the score that the

probate court allowed the vouchers. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Annual returns of a guardian**, allowed by the probate court, are only prima facie evidence of the correctness thereof, and in an application for a settlement the returns may be attacked by the ward, the burden being on the ward to impeach the returns. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Approval of returns is not final, conclusive judgment.** — The approval of returns by the probate court, made when the ward was an infant and unable to question the legality and accuracy of such returns and of the expenditures charged against the estate, is not intended to mean a final, conclusive judgment, but only a conditional judgment contingent upon further needs. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Returns may be attacked by ward upon reaching majority.** — Purported vouchers or receipts are not alone sufficient to constitute conclusive evidence that such expenditures were made. Their approval by the court being prima facie only, an attack by the ward, upon discovering after reaching majority that such expenditures were not made and that there were not proper vouchers attached to the items of the returns including such expenditures, is not subject to dismissal. *Pettigrew v. Williams*, 65 Ga. App. 576, 16 S.E.2d 120 (1941).

**Cited in** *Oslin v. State*, 161 Ga. 967, 132 S.E. 542 (1926); *Allen v. Southern Ins. Sec. Corp.*, 54 Ga. App. 316, 187 S.E. 714 (1936); *Thomas v. State*, 87 Ga. App. 765, 75 S.E.2d 193 (1953); *International Horizons, Inc. v. Committee of Unsecured Creditors*, 16 Bankr. 484 (N.D. Ga. 1981).

### OPINIONS OF THE ATTORNEY GENERAL

**County administrator/county guardian may aggregate the funds** of the estates the administrator administers in a single fiduciary account provided that accurate records

are maintained separately identifying the monies and disbursements of each estate included in the aggregation. 1982 Op. Att'y Gen. No. U82-31.



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 207.

**Am. Jur. Pleading and Practice Forms.** — 24 Am. Jur. Pleading and Practice Forms, Trusts, § 264.

**C.J.S.** — 2A C.J.S., Agency, §§ 288, 289, 294.

**ALR.** — Authority of agent to assent to account stated, 2 ALR 71.

Right of agent to offset his own claim against collection made for principal, 2 ALR 132.

Liability of receiver in his official capacity for torts or negligence of receivership employees, 10 ALR 1055.

Necessity of proof by trustee that charges

or expenses for which he claims credit upon an accounting were proper disbursements, 13 ALR 364.

Rate of interest chargeable against guardians, executors or administrators, and trustees, 37 ALR 447; 55 ALR 950; 112 ALR 833; 156 ALR 936.

Deposit by trustee of funds of separate trusts in a single bank account, 117 ALR 179.

When statute of limitations commences to run against action by principal to recover money or other property from agent, 141 ALR 361.

Guardian's liability for interest on ward's funds, 72 ALR2d 757.

## 10-6-31. When agent entitled to commission and expenses.

An agent who shall have discharged his duty shall be entitled to his commission and all necessary expenses incurred about the business of his principal. If he shall have violated his engagement, he shall be entitled to no commission. (Orig. Code 1863, § 2168; Code 1868, § 2164; Code 1873, § 2190; Code 1882, § 2190; Civil Code 1895, § 3014; Civil Code 1910, § 3586; Code 1933, § 4-212.)

## JUDICIAL DECISIONS

**Agent impliedly agrees to exercise good faith.** — The law implies as a part of the contract by which every agency arises that the agent agrees to have and exercise for and toward a principal loyalty and absolute good faith. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**Deception bars benefit to agent.** — If the agent practices upon the principal any deception (whether intentional or not) whereby the principal is misled and damaged and the agent would reap any benefit, the transaction is fraudulent, and the courts will not allow the agent to take or retain the benefit. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**Agent must act in fiduciary manner for compensation.** — An agent is entitled to compensation during the period of time in which the agent acts in a fiduciary manner; the agent forfeits compensation only during the period of time in which the agent fails to act in a fiduciary manner. *E.H. Crump Co. v. Millar*, 194 Ga. App. 687, 391 S.E.2d 775,

cert. denied, 194 Ga. App. 911, 391 S.E.2d 775 (1990).

**Agent's breach forfeits right to commissions.** — Any breach of the agent's implied contract on the agent's part forfeits the agent's right to commissions. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**Agent's fault or lack thereof.** — The law requires utmost good faith on the part of an agent with a principal when undertaking to carry out the contract of agency, and if the agent, through no fault of the principal, fails to perform the duties for which the agent has been employed, or where, through the agent's fault, by reason of fraud perpetrated by the agent, a contract which the agent has negotiated for a principal's benefit is unenforceable and is repudiated by the person with whom the agent has contracted, and thus the agent has failed to perform the duties of the agency, the agent is not entitled to compensation from the principal. *Rood v. Anchors*, 42 Ga. App. 76, 155 S.E. 65 (1930).

**Agent retained right to compensation.** — The trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to its six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007), cert. denied, 2008 Ga. LEXIS 81 (Ga. 2008).

**Principal may recover agent's compensation upon discovering failure to perform.** — When the principal has paid the agent for services rendered pursuant to the contract of agency and is in ignorance of the fact that the agent has failed in the performance of the agent's duties as agent, the principal has

a right, upon a discovery of this fact, to recover the money thus paid to the agent as compensation. *Rood v. Anchors*, 42 Ga. App. 76, 155 S.E. 65 (1930).

**Indemnification of agent for expenses.** — The general rule is that, if one is employed or directed by another to do an act in the other's behalf, the law implies a promise of indemnity by the principal for expenditures incurred as a proximate consequence of the good faith execution of the agency. *Dollar v. First Bank*, 153 Ga. App. 789, 266 S.E.2d 566 (1980).

**Cited in** *Allen v. Southern Ins. Sec. Corp.*, 54 Ga. App. 316, 187 S.E. 714 (1936); *Vinson v. E.W. Buschman Co.*, 172 Ga. App. 306, 323 S.E.2d 204 (1984); *Doxie v. Ford Motor Credit Co.*, 603 F. Supp. 624 (S.D. Ga. 1984); *Stolz v. Shulman*, 191 Ga. App. 864, 383 S.E.2d 559 (1989).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 243 et seq.

**C.J.S.** — 2A C.J.S., Agency, §§ 302, 310.

**ALR.** — Right of agent to offset his own claim against collection made for principal, 2 ALR 132.

Right of one selling on commission as affected by principal's refusal to fill order, 12 ALR 150.

Rights and remedies upon cancellation of sales agency, 32 ALR 210; 52 ALR 546; 89 ALR 252.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 ALR 993.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

What change affecting corporation satisfies condition of contract providing compensation for effecting sale of corporate stock or a specified change in the corporate structure or organization, 101 ALR 1222.

Employee's or agent's acceptance of bonus, gratuity, or other personal benefit from one with whom he deals on employer's or principal's account as affecting his right to

recover wages, salary, or commissions, 102 ALR 1115.

Principal's right to recover commissions paid by him or by third person to unfaithful agent, 134 ALR 1346.

Real estate broker's right to recover damages in tort upon ground that he was wrongfully prevented from earning or collecting commissions, 146 ALR 1417.

Right of agent or broker, employed to sell personally on commission, to commissions on sales made or consummated by his principal or another agent, 12 ALR2d 1360.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 ALR2d 1410.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 ALR2d 376.

Broker's right to commission on sales consummated after termination of employment, 27 ALR2d 1348.

"Exclusive right to sell" and other terms in real estate broker's contract as excluding owner's right of sale, 88 ALR2d 936.

Personal liability of servant or agent for advances or withdrawals in excess of commissions earned, bonus, or share of profits, 32 ALR3d 802.

Right of mortgage broker to commission where principal violated conditions of agreement, 45 ALR3d 1326.

Measure of damages recoverable by loan broker for breach of brokerage contract, 67 ALR3d 1069.

Validity, construction, and effect of provision in exclusive listing agreement for payment of commission on termination by owner, 69 ALR3d 1270.

## 10-6-32. Owner's right to sell property placed with broker; broker's right to commissions.

The fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner. (Civil Code 1895, § 3015; Civil Code 1910, § 3587; Code 1933, § 4-213.)

**History of Code section.** — This Code section is derived from the decisions in *Hyams v. Miller*, 71 Ga. 608 (1883), *Doonan v. Ives & Krouse*, 73 Ga. 295 (1885), and *Emery v. Atlanta Real Estate Exch.*, 88 Ga. 321, 14 S.E. 556 (1891).

**Law reviews.** — For article, "Compensation of the Georgia Real Estate Broker," see 6 Ga. L. Rev. 375 (1972). For annual survey

article discussing real property law, see 51 Mercer L. Rev. 441 (1999). For annual survey of real property law, see 57 Mercer L. Rev. 331 (2005).

For comment discussing a broker's entitlement to a commission where buyer defaults in light of *Ellsworth-Dabbs, Inc. v. Johnson*, 50 N.J. 528, 236 A.2d 843 (1967), see 19 Mercer L. Rev. 460 (1968).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### OWNER'S RIGHT TO SELL

#### BROKER'S RIGHT TO COMPENSATION

#### PRACTICE AND PROCEDURE

1. PLEADING
2. BURDEN OF PROOF
3. QUESTIONS FOR JURY OR COURT
4. INSTRUCTIONS

### General Consideration

**"Owner" defined.** — "Owner," as used in this section, is construed to mean "owners," if the property belongs to joint owners. *Stallworth v. Martin-Ozburn Realty Co.*, 17 Ga. App. 689, 87 S.E. 1094 (1916).

**Cited in** *Latimer v. Gifford*, 37 Ga. App. 1, 138 S.E. 859 (1927); *Fox v. Von Kamp*, 52 Ga. App. 776, 184 S.E. 645 (1936); *Williamson-Inman & Co. v. Thompson*, 53 Ga. App. 821, 187 S.E. 194 (1936); *Irish v. Fisher*, 74 Ga. App. 631, 40 S.E.2d 588 (1946); *Foster v. Sikes*, 202 Ga. 122, 42

S.E.2d 441 (1947); *Waring v. John J. Thompson & Co.*, 76 Ga. App. 494, 46 S.E.2d 364 (1948); *Thompson v. Hudson*, 76 Ga. App. 807, 47 S.E.2d 112 (1948); *McNabb v. Hardeman*, 77 Ga. App. 451, 49 S.E.2d 194 (1948); *Selton v. Dowling*, 79 Ga. App. 690, 54 S.E.2d 763 (1949); *Rothberg v. Manhattan Coil Co.*, 84 Ga. App. 528, 66 S.E.2d 390 (1951); *Weldon v. Lashley*, 214 Ga. 99, 103 S.E.2d 385 (1958); *Meza v. Van Deventer*, 97 Ga. App. 738, 104 S.E.2d 478 (1958); *National City Bank v. Graham*, 105 Ga. App. 498, 125 S.E.2d 223 (1962); *Pendley v. Jessee*, 134 Ga. App. 138, 213 S.E.2d 496



(1975); *Ranck & Keefe, Inc. v. First Richmond Corp.*, 138 Ga. App. 542, 226 S.E.2d 795 (1976); *Martin v. Hendrix, Waddell, Martin & Co.*, 140 Ga. App. 557, 231 S.E.2d 526 (1976); *Dorsey-Alston Co. v. Bohn*, 141 Ga. App. 894, 234 S.E.2d 716 (1977); *Newman v. James M. Vardaman & Co.*, 162 Ga. App. 878, 293 S.E.2d 462 (1982); *Glenn v. Fourteen W. Realty, Inc.*, 169 Ga. App. 549, 313 S.E.2d 730 (1984); *Barton & Ludwig, Inc. v. Thompson*, 170 Ga. App. 187, 316 S.E.2d 786 (1984); *Foshee v. Harris*, 170 Ga. App. 394, 317 S.E.2d 548 (1984); *Coldwell Banker Com. Group, Inc. v. Nodvin*, 598 F. Supp. 853 (N.D. Ga. 1984); *Prestige Realty Co. v. CM & W Constr. Co.*, 177 Ga. App. 843, 341 S.E.2d 321 (1986); *Batchelor v. Tucker*, 184 Ga. App. 761, 362 S.E.2d 493 (1987).

### Owner's Right to Sell

**Conferring the exclusive right to sell** excludes sales by the owners themselves. *Barrington v. Dunwoody*, 35 Ga. App. 517, 134 S.E. 130, cert. denied, 35 Ga. App. 807 (1926).

**Owner may sell despite appointment of agent.** — Under this section, if there is no express provision to the contrary, the appointment of a real estate agent to sell property does not deprive the owner of the right of selling the property personally without liability to account to the real estate agent for the commission. *Humphries & Jackson v. Smith*, 5 Ga. App. 340, 63 S.E. 248 (1908); *Ford & Pruett v. Thomason*, 11 Ga. App. 359, 75 S.E. 269 (1912); *Floyd & Lee v. Boyd*, 16 Ga. App. 43, 84 S.E. 494 (1915); *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929) (see O.C.G.A. § 10-6-32).

If a property owner has authorized a broker to procure a purchaser for the owner's property but has not given the owner an "exclusive agency" to do so, the owner remains free to sell the property personally or to sell it through another broker. *Kraft Land Servs., Inc. v. Hart Co.*, 165 Ga. App. 358, 300 S.E.2d 186 (1983).

**Exclusive agent.** — Though the owner appoints a real estate broker the owner's exclusive agent to sell designated property, in the absence of a contractual provision to the contrary, the owner may sell the owner's own property without incurring liability to the broker for commissions. *Bradbury v.*

*Morrison*, 93 Ga. App. 704, 92 S.E.2d 607 (1956).

**Effect of irrevocable appointment for fixed period.** — An owner of real estate, by employing an agent to effect the sale thereof under a written contract under seal, does not preclude the owner from selling the property, provided the owner makes the sale in the utmost good faith, without any purpose to defraud the agent of the agent's right to commissions under the contract. The fact that the contract provides that the agency created thereby is irrevocable for the term of three months is not of itself sufficient to prevent the owner from personally selling the property within that time, if the owner does so to a person with whom the agent has had no prior negotiations relating to the sale or purchase of the property. *Moore v. May*, 10 Ga. App. 198, 73 S.E. 29 (1911).

**Effect of agreement.** — The provision of O.C.G.A. § 10-6-32 that the broker's commissions are earned when the broker procures a buyer ready, willing, and able to buy on terms stipulated by the owner did not apply where the agreement established that the owner was liable for payment of a commission if the property was sold during the term of the agreement, even if the sale was accomplished without the broker's involvement. *OTI Shelf, Inc. v. Schair & Assocs.*, 238 Ga. App. 12, 517 S.E.2d 542 (1999).

**Sale may be to broker's prospect if negotiations have ended.** — If the first broker has been unable to sell the prospective purchaser and thereafter negotiations between the two have been entirely broken off, then the owner, or another broker, may thereafter sell without incurring liability to the first agent, even though the sale is made to the initial prospect. *Cadranel v. Wildwood Constr. Co.*, 101 Ga. App. 630, 115 S.E.2d 415 (1960).

**Owner's mere negotiations do not end agent's right to commissions.** — The agent cannot be deprived of the agent's commission by negotiations between the owner and a prospective purchaser with whom the owner has not entered into a mutually binding and enforceable contract for the sale of the property. *Hawks v. Moore*, 27 Ga. App. 555, 109 S.E. 807 (1921).

**Section contemplates binding contract of sale.** — The provision of this section reserv-

**Owner's Right to Sell (Cont'd)**

ing to the owner the right of "selling" the property contemplates that the owner and the purchaser have entered into a mutually binding and enforceable contract before the broker produces a duly qualified purchaser. *Hawks v. Moore*, 27 Ga. 555, 109 S.E. 807 (1921).

**Broker's Right to Compensation**

**"Able" defined.** — The word "able," as used in this section, means financially able. *Shaw v. Chiles*, 9 Ga. App. 460, 71 S.E. 745 (1911); *Howell Realty Co. v. Boggs*, 127 Ga. App. 867, 195 S.E.2d 253 (1973); *Rucker v. Corbin*, 188 Ga. App. 182, 372 S.E.2d 512 (1988).

The ability to buy, required in a purchaser obtained by a real estate broker as a condition to the broker's right to earn a commission for the broker's services, is the financial ability to meet the required terms of the sale; it does not mean solvency or ability to respond in damages for a breach of the contract. *Stewart v. Sink*, 29 Ga. App. 17, 114 S.E. 71 (1922); *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**Salesman in employ of broker.** — This section has no application where the plaintiff is a real estate salesman in the employ of the defendant, a real estate broker, and plaintiff's claim is based entirely upon the written contract of employment with defendant. *Howell Realty Co. v. Boggs*, 127 Ga. App. 867, 195 S.E.2d 253 (1973).

**Broker employed to lease.** — The provisions of this section apply if property is placed in the hands of a broker for the purpose of procuring a lease thereof. *Meinhard v. Stillwell Realty Co.*, 47 Ga. App. 194, 169 S.E. 732 (1933).

If an agent is employed by a real estate renting agency to procure rental agreements between lessors and lessees for such renting agency, for a stipulated percentage of the commissions received by such agency for collecting the rents paid by the lessees under such leases, the agent is ordinarily entitled to such compensation if the agent brings the principal and third persons, who are through the agent's efforts willing to enter a lease as to certain property, into communication with the renting agency, and as a result the parties through the renting agency

close the transaction by executing the lease, and the renting agency obtains the handling of the rentals accruing under the lease. *Johnson v. Lipscomb-Weyman-Chapman Co.*, 46 Ga. App. 798, 169 S.E. 266 (1933).

**Broker employed to purchase instead of sell.** — By judicial decision, this section has been made applicable to brokers finding property for those principals desiring to purchase. *Sharp-Boylston Co. v. Lundeen*, 145 Ga. App. 672, 244 S.E.2d 622 (1978).

A real estate agent employed to purchase land is as much entitled to be compensated, in accordance with the agent's contract, as one employed to sell land in behalf of the owner. *Hendrix v. Crosby*, 76 Ga. App. 191, 45 S.E.2d 448 (1947); *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

**This section presupposes the existence of an agency** between the real estate broker and the property owner before the broker can collect a commission. *Galloway v. McKinley*, 73 Ga. App. 381, 36 S.E.2d 485 (1945).

**Principal not liable to broker acting without authority.** — While an owner of property is bound to pay an authorized broker for the broker's services in procuring a lease of property, if a broker without any authority whatever finds a prospective tenant and induces the tenant to make an offer to lease the property, the owner is not obligated to accept the offer and may accept a later offer, less favorable, from another broker without becoming liable to the broker procuring the first offer, even though the tenant is the same person presented by the first broker. *Wilharbla Realty Co. v. Carrington*, 62 Ga. App. 778, 9 S.E.2d 842 (1940).

The utmost good faith must be exercised between the principal and broker; but if there was no agreement or relationship between them with respect to the sale of the property or the procuring of a purchaser therefor, there can be no recovery on the part of the broker. *Galloway v. McKinley*, 73 Ga. App. 381, 36 S.E.2d 485 (1945).

**Exclusive sales agency in consideration of broker's promise to list is valid.** — The grant of an exclusive brokerage sale contract in consideration of the broker's promise to list, offer for sale, endeavor to sell, enlist the organization's best efforts to such end in the ordinary course of business, and advertise in such manner as is deemed advisable is not void as being nudum pactum. Efforts to find



prospects, show the prospects the property, and relay purchase offers to the owners is a part performance under these terms. *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971).

**Georgia law does not require real estate listings to be reduced to writing**, and oral contracts are enforceable. *Thomas v. Memory*, 154 Ga. App. 756, 270 S.E.2d 24 (1980).

**Oral contracts enforceable.** — An agreement employing the plaintiff to obtain a purchaser for certain real estate owned by the defendants, although oral, may be the basis for an action. *Hunter v. Benamy*, 101 Ga. App. 907, 115 S.E.2d 424, *aff'd*, 216 Ga. 511, 117 S.E.2d 627 (1960).

**Brokerage contract is not within statute of frauds.** — A contract amounting to a brokerage contract for the sale of lands, containing no power on the part of the broker to execute a conveyance of the lands, is a contract for services and does not come within the statute of frauds as constituting a contract for the sale of lands. *Cantrell v. Johnston*, 74 Ga. App. 74, 38 S.E.2d 893 (1946).

**Limitations on right to commissions must be embodied in contract.** — If the owner of the property desires to limit the owner's liability for commissions in a manner other than that which is governed by the general rule, such as that commissions will be due only in the event of a consummated sale, provision for such limitation of liability must be embodied in the authority to sell. *Hall v. Vandiver*, 37 Ga. App. 656, 141 S.E. 332 (1928).

**Contract may make right subject to acceptance of title.** — An owner may stipulate in the contract of listment that the owner is not to be subject to the payment of brokerage commissions until the actual acceptance of title by the offeror. *Kiser Real Estate Co. v. Shippen Hardwood Lumber Co.*, 34 Ga. App. 308, 129 S.E. 294 (1925).

**Contract may make right subject to payment of purchase price.** — The owner may, by the express terms of the owner's agreement with the broker, limit the owner's liability by specifically providing that the commissions shall become earned, due, and payable only as the purchase price shall be actually paid. Such a provision would not, however, affect the broker's rights to commissions in a case where, during the agency,

the broker finds a purchaser, ready, able, and willing to buy, and who actually offers to buy on the terms stipulated, but where the owner personally refuses to consummate the trade. *Hogan v. Gilbert*, 27 Ga. App. 444, 108 S.E. 625 (1921).

**Contract may require broker to procure contract of sale or only able purchaser.** — A real estate broker may contract, as a condition precedent to earning a commission, to procure a contract of sale or the broker's undertaking may be simply to procure a purchaser ready, willing, and able to buy, and who offers to buy, upon the terms stipulated by the owner. *Knowles v. Haas & Dodd*, 70 Ga. App. 715, 29 S.E.2d 312 (1944).

**Contract may require other service than procuring purchaser.** — Sometimes, under the broker's employment, the broker's duty is not merely to procure a purchaser, but to perform some other agreed service within a reasonable time, or within a limited time. In such cases the general rule in this section as to what is required of the broker in order to be entitled to commissions is modified accordingly. *Phinizy v. Bush*, 129 Ga. 479, 59 S.E. 259 (1907).

**This section has no application to a sales agency contract.** *Chastain v. Allison*, 122 Ga. App. 811, 178 S.E.2d 752 (1970).

If the plaintiff and the defendant entered into an express contract creating the relationship of exclusive sales agency, the provisions of this section are not applicable. *Ragsdale v. Smith*, 110 Ga. App. 485, 138 S.E.2d 916 (1964).

**Broker's right to commissions may be limited to consummated sales.** — It is possible for the owner, by the contract of employment, to appoint, not a broker, but an exclusive sales agent, so that the latter will be entitled to commissions only upon consummated sales, and not upon mere executory contracts as contemplated by the provisions of this section. *Roberts v. Prater & Forrester*, 29 Ga. App. 245, 114 S.E. 645 (1922).

**Mere reference to selling does not limit broker's right.** — The mere fact that in a contract between an owner and a broker, listing property for sale, use is made of the words "to sell," does not change the status of the agent thus employed from that of a broker to a sales agent, so as to render inoperative the provision of this section, that



**Broker's Right to Compensation (Cont'd)**

the broker's commissions are earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy. *Roberts v. Prater & Forrester*, 29 Ga. App. 245, 114 S.E. 645 (1922); *Wehunt v. Babb*, 84 Ga. App. 536, 66 S.E.2d 405 (1951) ("negotiate the sale" used).

**Broker as "procuring cause" of sale.** — If a broker can show that the broker was the "procuring cause" of the sale, the broker is entitled to a commission even though the broker has no exclusive agency and even though someone else may actually have consummated the sale. *Kraft Land Servs., Inc. v. Hart Co.*, 165 Ga. App. 358, 300 S.E.2d 186 (1983).

In determining whether or not a real estate broker is the procuring cause of a sale if there is no exclusive contract to sell, the broker must show and prove that there were negotiations still pending between the broker and the prospective purchaser and that the owner was aware that negotiations were still pending at the time the broker consummated the sale. *Kraft Land Servs., Inc. v. Hart Co.*, 165 Ga. App. 358, 300 S.E.2d 186 (1983); *Income Properties v. Glass*, 195 Ga. App. 127, 392 S.E.2d 728 (1990).

If an express contract governs the conditions under which a commission is to be paid, the common law "procuring cause" doctrine does not apply. *B & R Realty, Inc. v. Carroll*, 245 Ga. App. 44, 537 S.E.2d 183 (2000).

**Effect of reference to "other terms acceptable to me".** — Under provisions in a broker's contract for sale under the terms stipulated "or any other terms acceptable to me," an offer to buy for a lesser price procured and submitted to the defendants by the plaintiffs would constitute performance. *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971).

**Reference to named sales amount "net to him".** — An agreement between owner and broker for sale of the owner's property for a named amount "net to him" does not import by implication a contract to allow the broker, as a fee, the excess of the purchase price above the sum so named. *Norwood v. Robie*, 102 Ga. App. 206, 115 S.E.2d 729 (1960).

**Broker's action is on a contract, not contract of sale.** — An action by the broker to

recover the broker's commissions alleged to be due is not an action upon the contract of sale which the broker has procured between a principal, the owner of the land, and the customer, the purchaser, but is a suit upon the contract, either express or implied, between the broker and the principal to pay commissions for services performed by the broker in respect to selling or procuring a purchaser for the real estate. *Knowles v. Haas & Dodd*, 70 Ga. App. 715, 29 S.E.2d 312 (1944).

If realty company, as agent for owner in good faith procured a purchaser who offered in writing to buy certain real estate on the terms and conditions specified by owner, and the owner accepted the purchaser tendered and executed the contract of sale, a verdict for the realtor for the usual and customary commission would have been authorized; and the realty company was not required to proceed against the purchaser for the company's commission under certain provisions of the sale contract between purchaser and owner, as the company did not sign the sales contract, was not a party to the contract, and therefore could not sue the purchaser by virtue of such contract. *Cox v. Dolvin Realty Co.*, 56 Ga. App. 649, 193 S.E. 467 (1937).

**Broker's contract may be part of contract of sale with third party.** — If the right of action by the plaintiff broker is based upon an agreement to pay a commission contained in an alleged written contract for the sale of the defendant's property which is negotiated by the plaintiff with a third party, the liability of the defendant must be determined by the validity and effect of the written contract. *Ragsdale v. Smith*, 110 Ga. App. 485, 138 S.E.2d 916 (1964).

**Contract of sale may place limitations on right to commissions.** — The general rule laid down by this section that a real estate broker's commission is earned when, during the agency, the broker finds a purchaser ready, able, etc., does not apply when an agreement to pay a definite amount as commission is included in a preliminary contract of sale between the owner and the proposed purchaser, by the terms of which a commission "for making the trade" is to be paid only in the event "it is closed"; a verdict in favor of the broker suing for such commission is not demanded when there is evidence

that the would-be purchaser declined to complete the sale, upon the ground that the purchaser had been advised that the title to the real estate in question was defective. *Nutting & Co. v. Kennedy*, 16 Ga. App. 569, 85 S.E. 767 (1915).

**Broker's contract irrevocable during agreed term.** — If the owner of land gives to a broker, for a valuable consideration, a written option, for a named number of days, to sell the owner's land at a certain fixed price, the owner cannot lawfully withdraw the option during the life of the contract. And the broker's commissions are earned under this section if, during the life of the option, the broker finds a purchaser ready, able, and willing to buy, and who actually offers to buy, the land on the terms stipulated by the owner. *Cobb v. Jolley*, 30 Ga. App. 48, 116 S.E. 553 (1923).

**If not agreed, term is reasonable time.** — If no time limit is fixed in a contract authorizing an agent to sell real estate, then, under the law, the agent has a reasonable time within which to do so. *Wood v. Planzer*, 73 Ga. App. 731, 37 S.E.2d 813 (1946).

If the agent expends time and effort in endeavoring to effect a sale pursuant to the agent's employment by the owner to obtain a specified commission if a sale is made, the listing ripens into a contract by the agent's furnishing a consideration through the expenditure of the agent's physical and fiscal efforts to find a buyer. When the listing has ripened into such a contract and no time limit has been fixed, the listing's duration is for a reasonable time. *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

**Owner's right to defeat agent's commission.** — When the owner of real estate has authorized a broker to sell the real estate, without setting a time limit, the owner is bound to exercise good faith towards the agent and not captiously withdraw the property for the purpose of defeating the agent's commission about to be earned. *Wood v. Planzer*, 73 Ga. App. 731, 37 S.E.2d 813 (1946); *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

**Right to commission during term of lease extended by extension of lease.** — If a contract of lease contains an option to the lessee to purchase the property at a price and on terms as stated "at any time during the time this lease is in effect," with an

agreement by the lessor-owner to pay to the broker a commission of 5 percent of the purchase price, "in the event this option is exercised," and where, before the expiration of the lease, the lessor and lessee extend it for an additional six months, within which time the option is exercised and a deed is made, the lessor will still be liable to the broker for the agreed commissions just as if the option had been exercised during the original term of the lease. *Odell v. Wessinger*, 54 Ga. App. 838, 189 S.E. 367 (1936).

**If negotiations are successful, broker entitled to commission.** — A broker is entitled to a commission whenever negotiations conducted by the broker on behalf of the principal culminate in the purchase of the property by the principal or would have so culminated but for the principal's interference. *Sharp-Boylston Co. v. Lundeen*, 145 Ga. App. 672, 244 S.E.2d 622 (1978).

**Securing a binding contract of sale is a prerequisite to recovery.** *Barnes v. Whatley*, 221 Ga. App. 110, 470 S.E.2d 498 (1996).

**Consummation of sale entitles broker to commission.** — The broker is entitled to commissions when the broker produces a purchaser who consummates the sale on terms satisfactory to the owner. *Glassman v. Melrose Constr. Co.*, 100 Ga. App. 763, 112 S.E.2d 282 (1959).

**Option obtained that is later exercised entitles broker to commission.** — This section applies if the purchaser procured by the broker first buys an option to purchase, and subsequently, within the life of the option, exercises the purchaser's option by electing to purchase and gives timely and unconditional notice thereof to the other party. In such a case the broker's right to the broker's commissions does not ripen into a cause of action until the option has been actually exercised. *Snead v. Wood*, 24 Ga. App. 210, 100 S.E. 714 (1919); *Odell v. Wessinger*, 54 Ga. App. 838, 189 S.E. 367 (1936).

If a real estate salesman procures for a customer only an option to buy and the option is afterwards exercised and a contract of sale thereby results, the broker has consummated the contract and has earned a commission. *Mendenhall v. Adair Realty & Loan Co.*, 67 Ga. App. 154, 19 S.E.2d 740 (1942).

**Commission properly refused if contract of sale not affected.** — If the essentials



**Broker's Right to Compensation (Cont'd)**

necessary for a contract of sale which would have effectuated the intention and agreements of the parties was lacking, the court correctly refused to order the payment of a commission. *William L. Thomas Co. v. Kretsos*, 115 Ga. App. 550, 155 S.E.2d 453 (1967).

**Contract of sale need not be carried out if enforceable.** — The right of a broker to the broker's commission does not depend upon the carrying out of the contract of sale, but the broker is entitled to the commission when the broker has procured a purchaser and the seller has accepted the purchaser and entered into a binding and enforceable contract of sale. *Davis v. Holbrook*, 75 Ga. App. 417, 43 S.E.2d 791 (1947).

The final act of closing the sale is not a condition precedent to the broker's right to a commission, if the broker has secured a binding contract of sale. *Northside Realty Assocs. v. MPI Corp.*, 245 Ga. 321, 265 S.E.2d 11 (1980).

When vendee sent vendor a written offer to purchase the property and to prorate the taxes for year due and vendor accepted this offer and executed a written acceptance thereof and turned the same over to broker, who notified vendee of such acceptance, a valid contract arose between the parties for the sale of the property on the terms stated in the written offer, and the broker's commission was earned. *Smith v. Knight*, 75 Ga. App. 178, 42 S.E.2d 570 (1947).

The sale need not actually occur, in order for the broker to earn a commission, if the parties entered into a binding and enforceable agreement. *Carroll v. Harry Norman, Inc.*, 198 Ga. App. 614, 402 S.E.2d 357 (1991).

The trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007), cert. denied, 2008 Ga. LEXIS 81 (Ga. 2008).

**Production of able purchaser during term earns commission.** — In view of the testimony of the defendant that the plaintiff, a broker suing for commissions, told the defendant that the would-be purchaser was ready to take the property on the terms stated and that the defendant knew the would-be purchaser was able to pay for the property, which evidence was corroborated by the testimony of the plaintiff and the would-be purchaser, the verdict for the plaintiff cannot be set aside on appeal. *Davis v. Davis & Joiner Realty*, 23 Ga. App. 577, 99 S.E. 60 (1919).

If property is placed in the hands of a real estate broker for sale on a commission, the commission is earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy, and who actually offers to buy on the terms stipulated by the owner. *Ray v. Hutchinson*, 27 Ga. App. 448, 108 S.E. 815 (1921); *Wood v. Planzer*, 73 Ga. App. 731, 37 S.E.2d 813 (1946).

When a broker secures a purchaser for lands during the life of the broker's contract of employment who is ready, able, and willing to purchase on the terms stipulated by the owner, the broker has earned the broker's commission agreed upon. *Cantrell v. Johnston*, 74 Ga. App. 74, 38 S.E.2d 893 (1946).

If real estate brokers present a purchaser ready, willing, and able to complete the sale and close the transaction, unless the purchaser breaches a fiduciary duty, the brokers are entitled to the sales commission provided in the contract. *Paredes v. Bud Bailey Corp.*, 160 Ga. App. 572, 287 S.E.2d 620 (1981).

**Commission without actual consummation of sale.** — A real estate agent may earn commissions under this section even when a sale is not actually consummated, but the agent must procure a purchaser who is ready, willing, etc., or else the agent is not entitled to a commission. *Floyd & Lee v. Boyd*, 16 Ga. App. 43, 84 S.E. 494 (1915); *Rothberg v. Manhattan Coil Co.*, 84 Ga. 528, 66 S.E.2d 390 (1951), commented on in 3 *Mercer L. Rev.* 348.

**Commission without binding written contract.** — In a suit for commission it is not essential to recovery that there shall have been executed a written contract of sale binding alike on the seller and the pur-



chaser. *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

**Commission where owner agrees to remove lien.** — A real estate broker earns the broker's commission under this section when during the agency the broker finds a purchaser ready, able, etc. This is true even though there may exist a lien upon the property, known to the broker, but which the owner in a contract with the purchaser, accepting the offer and binding the sale, agrees to remove. *Martin v. Thrower*, 28 Ga. App. 270, 110 S.E. 742 (1922).

**Commission where purchaser's offer is contingent on obtaining loan.** — Language in a contingency clause in a contract for the sale of real estate stating, "Purchaser agrees within seven days after the date of this contract to make application for such loan and to pursue and seek to obtain such loan diligently and in good faith. Purchaser agrees to accept a commitment and to execute and deliver all documents required to close the loan, if a commitment to make the loan is obtained by Purchaser or by Seller or Broker on behalf of Purchaser," are express promises sufficient to supply mutuality of obligation in exchange for the seller's holding open the offer to sell until the time specified for the closing, and this fulfills the agent's obligation to furnish a ready, able, and willing buyer. *Fourteen W. Realty, Inc. v. Screws*, 147 Ga. App. 362, 248 S.E.2d 722 (1978).

**Owner need not be confronted with buyer.** — Under this section, the commissions are earned when a purchaser is found and the owner is notified, though the prospective purchaser is not brought into the actual presence of the owner and no contract of sale binding alike on the seller and purchaser has been made. *Wilmot & Cosby v. Silverman*, 26 Ga. App. 196, 105 S.E. 654 (1921).

**Broker need not have obtained offer if sale completed with fraudulent intent.** — If the broker has failed to procure an offer to buy upon the terms stipulated and the owner has not relinquished the owner's right to sell the property personally, to authorize a recovery of commissions it must appear that the owner negotiated the sale directly to the customer procured by the broker with a fraudulent intent to deprive the broker of the broker's commission, in order for the

broker to recover the broker's commission. *Kuniansky v. Williams*, 101 Ga. App. 678, 115 S.E.2d 204 (1960).

**Showing broker was procuring cause of sale is gist of action.** — The gist of an action by a broker to recover commissions is the showing that the plaintiff-broker was the procuring or efficient cause of the sale. *Woodall v. McEachern*, 113 Ga. App. 213, 147 S.E.2d 659 (1966); *Fields Realty & Ins. Co. v. Smith*, 123 Ga. App. 342, 180 S.E.2d 909 (1971).

A realty company is not entitled to any brokerage commission where the firm never had any direct contact with the party who bought the property and was not the procuring cause of the sale. *King-Williams Realty & Mtg., Inc. v. State Farm Life Ins. Co.*, 142 Ga. App. 620, 236 S.E.2d 695 (1977).

**Broker must be shown to be cause of sale whether broker's claim is for breach of contract or in tort.** — Whether the claim is in the nature of a breach of a contract between the seller and broker or a claim in tort based on a conspiracy to deprive the broker of a commission, it must appear that the broker's effort was a procuring or efficient cause of the sale. *Tidwell & Yarbrough Realty Co. v. Foster*, 123 Ga. App. 192, 180 S.E.2d 259 (1971).

In the absence of alleging or proving that the plaintiff-broker was the procuring or efficient cause of the sale, there can be no contract breached in the first instance nor a conspiracy coupled with a wrong done in the second. *Fields Realty & Ins. Co. v. Smith*, 123 Ga. App. 342, 180 S.E.2d 909 (1971).

**Burden of proof on broker.** — In a suit for commissions the burden of showing all the requirements is on the broker. *Carroll v. Harry Norman, Inc.*, 198 Ga. App. 614, 402 S.E.2d 357 (1991).

Summary judgment for a broker on the broker's suit for recovery of a real estate sales commission was reversed, where the broker did not carry the broker's burden of demonstrating that the purchaser failed to make a reasonable attempt to obtain the loan the purchaser was obliged to seek under the contractual terms, or that the purchaser qualified for such, or that the purchaser agreed to close with an optional loan. *Carroll v. Harry Norman, Inc.*, 198 Ga. App. 614, 402 S.E.2d 357 (1991).

**Broker must have sold or procured sale of property.** — In order for a broker to earn

**Broker's Right to Compensation (Cont'd)**

commission on account of the sale of property, the broker must either have sold the property or been the procuring cause of the sale. *Hendrix v. Crosby*, 76 Ga. App. 191, 45 S.E.2d 448 (1947); *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948); *Tidwell & Yarbrough Realty Co. v. Foster*, 123 Ga. App. 192, 180 S.E.2d 259 (1971); *First Nat'l Bank & Trust Co. v. McNatt*, 141 Ga. App. 6, 232 S.E.2d 356 (1977); *Booth v. Watson*, 153 Ga. App. 672, 266 S.E.2d 326 (1980).

**Finding the prospect and attempting to make the sale are not sufficient**, in law, to justify payment of commissions to an agent. The sale of the property is what gets results for the owner and for the agent. To earn a commission, one must be the procuring cause. One must, during the agency, find a purchaser ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner. *Jordan v. Dolvin Realty Co.*, 54 Ga. App. 472, 188 S.E. 304 (1936).

A broker with whom property is listed for sale does not make out a case of procuring cause by merely showing that the broker first located the ultimate purchaser, if it further appears that without interference by the owner the broker was unsuccessful in bringing about an offer which could be consummated and that the sale was made after the broker had abandoned the broker's effort. *Tidwell & Yarbrough Realty Co. v. Foster*, 123 Ga. App. 192, 180 S.E.2d 259 (1971).

**Owner-negotiated sale.** — In the absence of an agreement to the contrary, the owner is not deprived of the right to sell the property personally and consequently does not ordinarily become liable to the purchaser for commissions upon a sale negotiated by the owner. *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929).

**Termination of broker's negotiations.** — That commission which it has been agreed a broker will be paid to procure a purchaser is not recoverable from a principal who subsequently made an exchange proposed by him by virtue of this section upon the theory that the broker had furnished a purchaser ready, able, etc., where the broker had not been given an exclusive brokerage and there was nothing to indicate that the negotiations

between the broker and the purchaser had not been terminated. *Drew v. Cone*, 19 Ga. App. 704, 91 S.E. 1068 (1917).

Brokers in whose hands property is placed for sale, in order to earn commissions on account of the sale of such property, must either have sold the property or been the procuring cause of the sale. If the purchaser who was spoken to by the brokers had abandoned all idea of the trade, and the brokers had no influence at all in bringing it about, the brokers would not be entitled to commissions, although the purchaser subsequently may have bought from the owner. *Crutchfield v. Western Elec. Co.*, 66 Ga. App. 161, 17 S.E.2d 246 (1941).

Where an owner lists property for sale with a broker and the broker procures a prospect, but the sale as contemplated is not consummated and the parties in good faith break off negotiations, the broker is not the procuring cause of the ultimate transaction between the same owner and buyer and is not entitled to a commission. *Parrish v. Ragsdale Realty Co.*, 135 Ga. App. 491, 218 S.E.2d 164 (1975).

**No interference from owner.** — If plaintiff brought suit to recover broker's commissions alleged to be due on the sale of a hotel lease and furnishings, but the plaintiff had not produced a customer who was ready, able, and willing to buy and who actually offered to buy on the terms stipulated by the defendant owner, at the time of the sale by the owner through another broker, the negotiations between the plaintiff and the prospective buyer had come to an end, and the owner had not interfered with the efforts of the plaintiff to make a sale to the prospect, the jury was authorized to return a verdict in favor of the defendant. *Thompson v. Weeks*, 60 Ga. App. 560, 4 S.E.2d 415 (1939).

**Acquiescence in rescission of contract of sale.** — A real estate agent is not entitled to commissions for the sale of land, where, prior to the completion of the sale, the parties disagree as to the terms of the sale and it is agreed between them that the transaction be considered at an end, if the agent acquiesces in such rescission of the contract of sale, even though the owner of the land subsequently places it in the hands of another agent who sells it on practically the same terms to the purchaser secured by the first agent, unless fraud or bad faith be



shown. *Girardeau & Saunders v. Gibson*, 122 Ga. 313, 50 S.E. 91 (1905); *F.L. Allison & Co. v. McMath Plantation Co.*, 29 Ga. App. 414, 115 S.E. 916 (1923).

**Offer by proposed purchaser different from terms stipulated by owner.** — By virtue of this section, an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the broker to the broker's commissions. *Parker v. Stubbs*, 139 Ga. 46, 76 S.E. 571 (1912); *Howard v. Sills & Purvis*, 154 Ga. 430, 114 S.E. 580 (1922), answers conformed to, 29 Ga. App. 410, 116 S.E. 31 (1923); *Atlanta Realty Co. v. Campion*, 94 Ga. App. 136, 93 S.E.2d 781 (1956).

Generally, a broker's commission is earned when, during the agency, the broker finds a purchaser ready, able, and willing to buy and who actually offers to buy, on the terms stipulated by the owner, and an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the broker to the broker's commission. *Sikes v. Markham*, 74 Ga. App. 874, 41 S.E.2d 828 (1947).

While in every action for broker's commissions proof of acceptance of an offer might not be required, if the action is predicated upon the broker's having procured a buyer ready, willing, and able to buy on terms stipulated by the owner, the proof of an offer by the proposed purchaser to buy on terms not stipulated by the owner will not entitle the plaintiff broker to the broker's commissions. *Fourteen W. Realty Inc. v. Lane*, 147 Ga. App. 171, 248 S.E.2d 233 (1978).

In order for the agent to recover the agent's commission, the offer to buy must be in the exact terms stipulated and the offer must be accepted unequivocally and without variance of any sort. *Barnett v. Eubanks*, 105 Ga. App. 749, 125 S.E.2d 571 (1962).

An offer by the proposed purchaser to buy on terms not stipulated by the owner, which is refused, will not entitle the agent to a commission. Even a slight variation will prevent the agent from recovering. *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

Proof of an offer by a proposed purchaser to buy on terms not stipulated by the seller will not entitle a broker to the broker's commissions. *Clover Realty Co. v. Gouyd*, 153 Ga. App. 64, 264 S.E.2d 547 (1980).

**Even a slight variation from the owner's terms** will prevent the agent from recovering. *Schaffer v. Padgett*, 107 Ga. App. 861, 131 S.E.2d 796 (1963); *Bentley Group, Ltd. v. Paces Ferry Anesthesiology Assocs.*, 180 Ga. App. 818, 350 S.E.2d 826 (1986).

**Variance may authorize repudiation of contract.** — If there was a clear variance between the contract effected by the plaintiff and that which the plaintiff was authorized to make, the owner has the right to repudiate the contract, as there was no acceptance on the terms stipulated by the owner under this section. *Huson v. Dawson Naval Stores & Lumber Co.*, 23 Ga. App. 353, 98 S.E. 186 (1919).

**Agreement may authorize compensation when any terms are accepted by principal.** — If the plaintiff's commission, under agreement with the defendant, was to be the difference between the terms acceptable to the defendant and the actual sale price of the business, the plaintiff would be entitled to recover the plaintiff's commission upon proof that the defendant, during the agency, accepted any one of the various sets of terms offered by purchasers, secured by the plaintiff, who were ready, able, and willing to purchase. *Ray v. Thomas McDonald Corp.*, 90 Ga. App. 872, 84 S.E.2d 705 (1954).

**Broker must fully perform unless principal prevents performance.** — If the compensation is to be paid by way of commissions, the whole service or duty must be performed before any right to commissions arises, unless the act of the principal has prevented the performance of it. *Hyams v. Miller*, 71 Ga. 608 (1883); *Craigsmiles v. Steyerman*, 27 Ga. App. 14, 107 S.E. 386 (1921).

To entitle a sales agent to commissions in a case where the sale has not been consummated, it must be made to appear that the agent has performed the whole duty or service required of the agent under the agent's contract, except insofar as the agent has been prevented by the conduct of the owner. *Roberts v. Prater & Forrester*, 29 Ga. App. 245, 114 S.E. 645 (1922).

**Broker cannot recover where owner's offer is conditioned on option that prospect buys and exercises.** — The real estate broker's commissions are not earned until the broker's principal, the owner, makes an unconditional offer to sell and the offer is accepted by a purchaser found by the bro-



**Broker's Right to Compensation (Cont'd)**

ker; accordingly, if the offer of the owner is conditioned upon an outstanding option not being exercised and the purchaser found by the broker buys the option from its holder, has it transferred to the purchaser, and exercises it by buying the property, the broker cannot recover. *Birchmore v. Upchurch*, 78 Ga. App. 233, 50 S.E.2d 857 (1948).

**No commission if customer's offer is unacceptable but customer is assigned contract with third party.** — A real estate broker is not entitled to a commission from an owner of real estate for sale of the real estate to a customer of the broker who had made an unacceptable offer for the property and with whom the broker was still negotiating, where the sale was made to such customer by virtue of the assignment in good faith of a contract for the purchase of the property from one who was not a customer of the broker. *Dolvin Realty Co. v. Jones*, 63 Ga. App. 351, 11 S.E.2d 105 (1940).

**Sale after full performance does not cut off broker's right.** — If there is such compliance with a broker's contract as to entitle a plaintiff broker to commission, the fact that the land was sold by the owners or by a third person would not cut off the broker's right to payment. *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971).

**Broker, if procuring cause, entitled to compensation although principal closes transaction.** — If the agent is the procuring cause of the transaction, the agent is entitled to compensation for effecting the transaction, if the principal closes the transaction itself. *Johnson v. Lipscomb-Weyman-Chapman Co.*, 46 Ga. App. 798, 169 S.E. 266 (1933).

If property placed in the hands of a broker for sale is subsequently sold by the owner, the broker is entitled to the commission, if the broker was the procuring cause of the sale, although the sale was actually consummated by the owner. *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948); *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

**Sale by owner to purchaser procured by broker.** — Under this section, when a broker procures a purchaser ready, able, etc., to buy, the principal cannot defeat the broker's right to commission by completing the sale

personally through another broker. *Gresham v. Lee*, 152 Ga. 829, 111 S.E. 404, answers conformed to, 28 Ga. App. 576, 112 S.E. 524 (1922). See also *Central of Ga. Ry. v. McKenzie*, 125 Ga. 222, 53 S.E. 591 (1906).

The principal cannot, with knowledge of the negotiations between the purchaser and the agent, and while such negotiations are still pending, defeat the right of the agent to recover such commission by interfering with and the principal completing the sale of which the agent was the procuring cause. *Gresham v. Connally*, 114 Ga. 906, 41 S.E. 42 (1902); *Case Threshing Mach. Co. v. Binns*, 23 Ga. App. 46, 97 S.E. 443 (1918); *Brown & Peeples v. Stokes*, 25 Ga. App. 254, 103 S.E. 423 (1920); *Washington v. Jordan*, 28 Ga. App. 18, 109 S.E. 923 (1921); *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929); *Bromberg v. Drake*, 91 Ga. App. 118, 85 S.E.2d 160 (1954).

If the owner of property has listed it with a real estate broker to be sold, and the broker procures a prospective purchaser, and the owner, with knowledge of this fact intervenes or sells the property to the customer or prospective purchaser procured by the broker, an inference is authorized that the broker has earned a commission and can recover it from the owner. *Mendenhall v. Adair Realty & Loan Co.*, 67 Ga. App. 154, 19 S.E.2d 740 (1942); *Spence v. Walker*, 92 Ga. App. 609, 89 S.E.2d 668 (1955).

The owner, or another broker, even though there is no exclusive agency provision in the agreement, cannot, with knowledge of negotiations between a prospect and another broker, interfere and by closing the sale defeat the right of the first agent to the agent's commissions. *Cadranel v. Wildwood Constr. Co.*, 101 Ga. App. 630, 115 S.E.2d 415 (1960).

**Sale at differing terms to purchaser procured by broker.** — While even the slightest variation from the terms the owner fixed in the listing with the agent will prevent the recovery of commissions, such a departure does not in all cases prevent the agent from recovering commissions where a sale has been made by the owner to a buyer procured by the agent. The test to be applied is whether the agent was the procuring cause of the sale made to a buyer directly by the owner. *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

**Sale at less than listed price to purchaser procured by broker.** — The owner may sell the property, and if the owner does not use the broker's labor to help in the sale, the owner owes the broker nothing, but if a purchaser procured by the broker buys from the owner, even at a lower price than that given the broker, the owner would be liable for the broker's commission if the broker's effort was the procuring cause of the sale. *Hendrix v. Crosby*, 76 Ga. App. 191, 45 S.E.2d 448 (1947); *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948); *Tidwell & Yarbrough Realty Co. v. Foster*, 123 Ga. App. 192, 180 S.E.2d 259 (1971); *Booth v. Watson*, 153 Ga. App. 672, 266 S.E.2d 326 (1980).

If the broker is the procuring cause, the owner is liable for commissions even if the owner sells to the broker's prospect at a price less than that listed with the broker. *Glassman v. Melrose Constr. Co.*, 100 Ga. App. 763, 112 S.E.2d 282 (1959).

**Purchase at higher price than broker authorized to pay.** — If the defendant used the plaintiff's labor in getting the price of the property substantially reduced and used the information furnished by the plaintiff in contacting the seller's agent, and the plaintiff's effort was the procuring cause of the sale and culminated in the defendant purchasing the property, defendant could not defeat the broker's right to the broker's commission by purchasing the property directly through the seller's agent, even though the buyer paid a slightly higher price for it than the buyer had authorized the broker to pay, but the broker would be entitled to the broker's commissions for purchasing the property. *Hendrix v. Crosby*, 76 Ga. App. 191, 45 S.E.2d 448 (1947).

**Principal's knowledge of broker was procuring cause.** — The rule that renders the owner liable to the agent where the agent was the procuring cause of a sale is subject to the further requirement that the owner have knowledge, at the time of entering into the contract of sale or of selling it without a contract, of the fact that the buyers were procured by the agent. *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962).

**Knowledge that negotiations were still pending.** — If the owner sells to a buyer who was initially approached by a broker, in determining whether or not the broker was the procuring cause of the sale where there

is no exclusive contract to sell, it must be established that: (1) the negotiations were still pending between the broker and the prospective purchaser; and (2) the owner was aware that the negotiations were still pending at the time the owner consummated the sale. *Booth v. Watson*, 153 Ga. App. 672, 266 S.E.2d 326 (1980); *Gibbs v. Nixon*, 154 Ga. App. 463, 268 S.E.2d 670 (1980); *Hodges-Ward Assocs. v. Ecclestone*, 156 Ga. App. 59, 273 S.E.2d 872 (1980).

**Mere knowledge of proposed sale does not establish negotiations.** — Mere knowledge by the prospective purchaser of the proposed sale as received by it from the broker is totally insufficient to establish negotiations in the purchase of the property. *Gibbs v. Nixon*, 154 Ga. App. 643, 268 S.E.2d 670 (1980).

**Principal cannot defeat claim by pretended intervening sale to third person.** — Since the utmost good faith must be exercised between the owner and the broker, the owner cannot defeat the broker's claim for commissions by resorting to any subterfuge, such as a pretended conveyance to a third person while still retaining control of the property, in order that the title may be acquired by the customer procured by the broker through such third person. *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929).

**Bona fide intervening sale is good defense.** — A bona fide intervening sale, if established, would amount to a complete defense to the broker's claim. *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929).

**Unless principal repurchases and continues to use broker's services.** — If the owner, after having made a bona fide sale of the property to a customer procured by the owner and not by the broker, continues to avail himself of the broker's services by encouraging the broker to continue negotiations for the sale of the property to the customer with whom the broker had been negotiating and afterwards accepts the broker's customer and sells the property to the broker's customer upon the terms originally prescribed by the owner, the owner, having in the meantime repurchased the property, cannot avoid liability to the broker for commissions upon the ground of a previous sale of the property by the owner. *City Nat'l Bank*



**Broker's Right to Compensation (Cont'd)**

& Trust Co. v. Orr, 42 Ga. App. 807, 157 S.E. 520 (1931).

**Broker need not be sole cause to earn commission.** — In determining whether a broker has earned the broker's commission for procuring a purchaser, it is not necessary that the broker's services shall have been the sole cause; but it is enough if the efforts of the broker, acting on the purchaser, are the efficient cause of the offer. *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948).

It need not appear that the broker's effort was the sole procuring cause, but it is enough if it appears that it was an efficient cause. *Tidwell & Yarbrough Realty Co. v. Foster*, 123 Ga. App. 192, 180 S.E.2d 259 (1971).

**If there were two brokers, question is whose efforts were primary, procuring cause.** — Where the services of a broker, as well as those of another broker, have conjointly contributed to the successful termination of negotiations resulting in the transfer of real estate for an owner, the question which of the brokers is entitled to commissions from the owner for effecting such transfer depends upon whose efforts were the primary, proximate, and procuring cause of the transfer negotiated. *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980).

**Award may be based on quantum meruit even if broker not procuring cause.** — A jury can award damages based on quantum meruit even if the jury determines that the plaintiffs were not the procuring cause of the transfer. *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980).

**Owner liable if real party in interest was procured by broker.** — Lessor's liability to pay broker's commission pursuant to agreement in lease containing option of purchase would not be defeated by the fact that deed was executed to wife of lessee at his instance, where the lessee was the real party at interest, or was jointly interested with his wife, or by the fact that the deed recited a consideration of less than the contract amount, where the lessor, without the consent or knowledge of the broker, completed the transaction by accepting all of the consideration in cash instead of the agreed part cash and part time payments, and the total

amount paid actually exceeded the contract price, and even if, as contended, the amount accepted by the lessor had been less than the agreed price, liability would not have been defeated. *Odell v. Wessinger*, 54 Ga. App. 838, 189 S.E. 367 (1936).

**Principal refusing to effectuate sale liable to broker.** — If the owner, without legal excuse, refuses to effectuate the sale, the owner becomes liable for the commissions pursuant to the provision of this section; and after such a refusal, it is generally not necessary that the proposed purchaser shall have made to the owner an actual tender of the purchase price. *Hogan v. Gilbert*, 27 Ga. App. 444, 108 S.E. 625 (1921).

Under contracts creating the ordinary relationship of principal and real estate broker and providing commissions for the latter, the principle of this section applies, and the broker has made a sale whenever, through the broker's influence, a person ready, able, and willing to buy on the terms proposed is brought to the principal, though, through the fault or disinclination of the principal, no actual sale is ever consummated. *Humphries & Jackson v. Smith*, 5 Ga. App. 340, 63 S.E. 248 (1908); *Kesler v. Stults*, 15 Ga. App. 735, 84 S.E. 201 (1915).

If an owner of land authorized a broker to sell the land at a stated price, agreeing to pay the broker a certain sum as commission for making the sale, and the latter procured an offer to be made for the purchase of the land at that price, on stated terms of payment, which offer was accepted by the owner, the broker was entitled to the broker's commission notwithstanding there was a failure to consummate the sale, if the cause of the failure was the refusal of the owner to proceed further with the transaction because the owner was dissatisfied with the terms of payment to which the owner had agreed; if this was the sole ground of objection assigned by the owner at the time of the refusal, other grounds of objection then known to the owner were waived, and would not avail the owner as a defense to an action for the commission. The question of estoppel becomes one for determination of the jury. *Broyles v. Haas*, 51 Ga. App. 374, 180 S.E. 517 (1935).

**Interference of principal with consummation.** — By virtue of this section, the agent would not be deprived of the agent's com-



missions if it is made to appear that the whole service or duty devolving upon the agent has been performed and that only the refusal or interference of the owner has prevented the consummation of the sale according to the terms authorized in the contract of listment. *Roberts v. Prater & Forrester*, 29 Ga. App. 245, 114 S.E. 645 (1922).

This section does not mean that a broker is entitled to the broker's commissions only when the transaction has been closed by a conveyance and payment of the purchase price. A contract for commissions on sales entitles the broker to the specified compensation whenever through the broker's influence a prospective purchaser has been brought to the principal, though by reasons of some fault or disinclination of the latter the sale is never completed or is consummated on terms somewhat different from those originally proposed by the principal. *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

A contention that where a sale is not consummated, the seller is relieved of the seller's obligation to pay the commission, though a purchaser ready, able, and willing to buy was produced, is without merit when it appears that the failure to consummate the sale was the seller's fault. *Hope v. DeForest Realty, Inc.*, 144 Ga. App. 269, 241 S.E.2d 49 (1977).

A broker makes out a prima facie case that the broker was the procuring cause of the completed transaction when the broker shows that negotiations for the sale were set on foot through the broker's efforts, that the broker performed every service required by the employment which it was possible to perform, and that the failure on the broker's part to personally consummate the transaction was due to the interference of the defendant. *Nestle Co. v. J.H. Ewing & Sons*, 153 Ga. App. 328, 265 S.E.2d 61 (1980).

**Refusal of owner to carry out trade.** — If a broker has a purchaser ready, willing, and able to buy and who offers to buy on terms stipulated by the owner and the owner refuses to carry out the trade, it is not generally necessary, in order for the broker or agent to recover the commissions, that the proposed purchaser should make to the proposed vendor an actual tender of the purchase price. *Smith v. Tatum*, 140 Ga. 719,

79 S.E. 775 (1913); *Winter v. Flournoy Realty Co.*, 27 Ga. App. 87, 107 S.E. 398 (1921); *Carter v. Ray*, 70 Ga. App. 419, 28 S.E.2d 361 (1943).

**Principal cannot defeat broker's right by having sale made to corporation instead of principal.** — The fact that a corporation organized by the defendant for the purpose of purchasing certain property in deed bought the property did not affect the plaintiff's right to recover for the services performed by the plaintiff and accepted by the defendant, as the defendant could not form a corporation and purchase the property through it directly from the owner so as to defeat the plaintiff's right to compensation for the plaintiff's services. *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948).

**Sale by stockholders does not make corporation liable.** — The subsequent actual sale by the several stockholders of the defendant corporation of their individual holdings of corporate stock, being an individual and not a corporate act, could not form the basis of an action for commissions against the corporation. *F.L. Allison & Co. v. McMath Plantation Co.*, 29 Ga. App. 414, 115 S.E. 916 (1923).

**Broker's right to commissions does not depend on performance by purchaser.** — The right of a real estate broker to the broker's commissions does not depend upon the carrying out and fully performing of the contract of sale by the purchaser. *Payne v. Ponder*, 139 Ga. 283, 77 S.E. 32 (1913).

When an agent employed to sell certain real estate for the owner at a stipulated price procures a purchaser who is accepted by the owner and a contract is entered into between them, the commission of such agent is earned, provided the agent acted in good faith towards the agent's principal in the transaction, although the purchaser later defaults for no reason caused by the agent. *Cox v. Dolvin Realty Co.*, 56 Ga. App. 649, 193 S.E. 467 (1937).

**Purchaser's refusal to consummate contract does not prevent recovery by broker.** — An agent will not be prevented from recovering commissions for obtaining a purchaser who is accepted in furtherance of which a binding contract is made, though the purchaser deliberately refuses to consummate the contract. *Cox v. Dolvin Realty Co.*, 56 Ga. App. 649, 193 S.E. 467 (1937).

**Broker's Right to Compensation (Cont'd)**

If the purchaser procured by the broker entered into a valid contract with the owner, whereby the purchaser became bound to buy upon the terms stipulated, and the owner became bound to sell, the broker had earned the broker's commission by virtue of such binding and completed contract, even though the purchaser, before the expiration of a reasonable time allowed to the owner to remove the lien, refused to carry out the contract to purchase. *Davis v. Holbrook*, 75 Ga. App. 417, 43 S.E.2d 791 (1947).

If the seller accepts the terms of the purchaser's offer by signing a sales contract, the seller has accepted the broker's procurement, and the seller cannot thereafter defeat the broker's right to a commission by refusing to close the transaction. *Jones v. Trail Cities Realty, Inc.*, 160 Ga. App. 533, 287 S.E.2d 588 (1981).

**Purchaser's inability to make title for exchange prevents recovery by broker.** — If an agent's customer agreed with the principal upon an exchange of lots and was unable to make title the agent did not earn any commission as the purchaser was not "ready, willing and able" to buy upon the terms agreed upon by the agent with the principal. *Harris v. Warmack*, 24 Ga. App. 600, 101 S.E. 713 (1919).

**Vendee refusing to perform is liable for commission paid out by vendor.** — When vendee refused to comply with the contract to purchase property and vendor paid the broker the commission, the vendor was then entitled to maintain an action against vendee for damages for a breach of the contract in the amount of the commission so paid by the vendor. *Smith v. Knight*, 75 Ga. App. 178, 42 S.E.2d 570 (1947).

**Unconsummated sale does not bar commission.** — The fact that a sale is never actually consummated does not bar recovery of commissions unless the owner agreed that payment of commissions was contingent upon such, and unless the failure to consummate the sale is not the fault of the owner. *Steinemann v. Vaughn & Co.*, 169 Ga. App. 573, 313 S.E.2d 701 (1983).

**Broker is not guarantor of purchaser's financial ability or performance.** — If the plaintiff occupied the status of broker (as

distinguished from a sales agent), and as such procured a purchaser ready, able, and willing to buy on terms agreeable to the seller, plaintiff would not, in the absence of a contractual undertaking, become a guarantor either of the financial ability of the purchaser or of the subsequent performance by the purchaser of the offer to buy, especially if the seller actually accepted the offer, and accordingly, the seller was not entitled to a recoupment in suit by broker for commissions on three cars of peanuts actually delivered and accepted by the purchaser, because, on account of a drop in the market price of the commodity, the fourth car in the order was countermanded and refused. *Farmers Peanut Co. v. Zimmerman-Alderson Carr Co.*, 52 Ga. App. 265, 183 S.E. 115 (1935).

**Agent must act in good faith.** — An agent is not an insurer of the ability of the purchasers procured by the agent, if the purchasers are accepted as satisfactory by the principal and binding contracts of sale are made by the principal with such purchasers; but the agent is bound to act in good faith towards the principal. *Williamson, Inman & Co. v. Thompson*, 50 Ga. App. 564, 179 S.E. 289 (1935).

**Agent's bad faith not waived by entering into contract or seeking to enforce it.** — Neither entering into contract to sell nor futile attempts to enforce a contract would be such conduct as would waive the seller's right to defend against the agent's suit for commissions on the grounds of the agent's bad faith, if the enforcement of the contract involves a determination of whether the representation of the buyer's financial ability was true or not. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**Principal may recover compensation paid if broker obtains contract by fraud and then substitutes purchaser.** — If, by the terms of the contract of agency, the agent, as a real estate broker, is to procure a purchaser of property belonging to the principal, and the agent by exceeding the agent's authority and misrepresenting the property perpetrates a fraud upon the purchaser and thereby obtains an unenforceable contract with the purchaser, and on account of the fraud the contract is rescinded by the purchaser, and the agent knowingly, and without the princi-



pal's knowledge, substitutes as purchaser one who the principal believes is an agent of the purchaser whom the agent had procured, the agent thereby fails to act in good faith with the principal, and the principal is entitled to recover from the agent compensation for the services which the principal had paid to the agent in ignorance of the fraud of the agent in obtaining the contract, and in ignorance of the purchaser's rescission of the contract. *Rood v. Anchors*, 42 Ga. App. 76, 155 S.E. 65 (1930).

**Telling owner purchaser must pay commissions does not create dual agency barring recovery.** — There was no such dual agency unknown to both principals as would defeat the right of the plaintiff to commission, where the defendant-owner was told that the purchaser of the property in question would have to pay the commissions. *Erwin v. Wender*, 78 Ga. App. 94, 50 S.E.2d 244 (1948).

**Contract ambiguity.** — Grant of summary judgment for the realty company was error since the contract was ambiguous as to whether the real estate commission was refundable once the property sale failed to close, and a question of material fact existed as to the parties' intent on that issue; the issue could not be resolved by application of the rules of contract construction, O.C.G.A. § 13-2-3, nor by parol evidence, O.C.G.A. § 13-2-2. *Krogh v. Pargar, LLC*, 277 Ga. App. 35, 625 S.E.2d 435 (2005).

## Practice and Procedure

### 1. Pleading

**Ability of purchaser should be alleged.** — Under this section, the ability to comply, that is that one is solvent and one's compliance can be compelled or the question of one's solvency has been waived, of the purchaser accepted by the principal and afterwards refusing to comply with the contract should be alleged. *Harvil v. Wilson Bros.*, 11 Ga. App. 156, 74 S.E. 845 (1912); *Wilson Bros. v. Verner*, 12 Ga. App. 511, 77 S.E. 656 (1913).

**Allegation of what occurred between purchasers and defendants.** — Plaintiffs should allege the facts as to what occurred between the defendant and the prospective purchasers upon which the plaintiffs rely in support of their claim for commissions. *McMath*

*Plantation Co. v. F.L. Allison & Co.*, 26 Ga. App. 744, 107 S.E. 420 (1921).

**Alleging direction to sign contract does not make action one on written contract of sale.** — Allegations that clients directed agent to sign a written contract and that client would send a check as earnest money are not necessary to the cause of action whereby a licensed real estate dealer sues for commissions and will not establish the action as a suit upon a written contract to purchase real estate. *Pierce v. Deich*, 81 Ga. App. 717, 59 S.E.2d 755 (1950).

**Only one count need be sufficient.** — In an action against the principal by the broker to recover commissions which was brought in two counts, each for the same amount, one count alleging a contract by which the broker was to procure a contract of sale between the broker's principal and the purchaser and the other count alleging that the plaintiff earned the commission under a brokerage contract by obtaining a customer ready, willing, and able to purchase the property and who actually offered to purchase upon the terms stipulated by the owner, where the verdict found for the plaintiff is sustainable under the second count, it is immaterial that the evidence was insufficient to support a verdict under the first count by reason of the contract of sale necessary to support such verdict being for any reason invalid, as by an insufficient description therein of the land purported to be sold. *Knowles v. Haas & Dodd*, 70 Ga. App. 715, 29 S.E.2d 312 (1944).

**Plaintiff's allegations held sufficient.** — See *Payne v. Ponder*, 139 Ga. 283, 77 S.E. 32 (1913); *McKenzie v. Patterson*, 27 Ga. App. 465, 109 S.E. 174 (1921).

Alleging contract for commission under this section from first payment and a first payment states a cause of action. *Luckey v. Daniels*, 25 Ga. App. 164, 102 S.E. 902 (1920).

If the plaintiff specifically alleges the existence and duration of the broker's agency, the property listed for sale, the terms of compensation for the performance of the broker's services, the terms of sale stipulated by the owner and the procurement by the broker of a purchaser ready, able, and willing to buy on such terms, and a refusal by the seller to pay the broker's commission in



**Practice and Procedure (Cont'd)****1. Pleading (Cont'd)**

accordance with their contract, the plaintiff's pleading is not subject to dismissal. *Norwood v. Robie*, 102 Ga. App. 206, 115 S.E.2d 729 (1960).

The plaintiff's pleading is not subject to dismissal because it seeks to recover on an oral agreement for the performance of services by the broker or because it does not allege that the transaction has been closed by a conveyance and payment of the purchase price. *Norwood v. Robie*, 102 Ga. App. 206, 115 S.E.2d 729 (1960).

If a real estate sales contract provides that the broker is made a party thereto to enforce the broker's commission rights and that liability for the commission can be based on the "seller's inability, failure, or refusal to convey" an allegation that the seller "fails and refuses" to close the transaction is sufficient. *Nussbaum v. Shaffer*, 105 Ga. App. 430, 124 S.E.2d 658 (1962).

**Plaintiff's allegations held insufficient.** — By virtue of this section, if an action for a commission on a sale of land is based upon a contract authorizing the plaintiff to sell the land for the defendant for a fixed price per acre within a specified time, and it does not appear from the plaintiff's allegations that the plaintiff procured a purchaser ready, able, and willing to buy at the price stipulated, or that during the life of the contract there was such interference on the part of the defendant as to prevent a sale of the property, or any secret agreement, collusion, or mutual understanding between the defendant and the prospective buyer, while negotiations were pending, to delay the consummation of the trade until after the expiration of the contract, the allegations are insufficient, even though it is alleged that immediately after the expiration of the contract (time being of the essence) the defendant sold the property to one who had been negotiating with the plaintiff. *Price v. Cocke*, 23 Ga. App. 578, 99 S.E. 47 (1919).

In a suit to recover commissions alleged to be due under a broker's contract, under this section, if the plaintiff's pleading fails to show that the plaintiff produced a purchaser who was ready, able, and willing to buy the property placed in the plaintiff's hands for

sale, on the terms prescribed by the owner, the court does not err in dismissing the pleading. *Montgomery v. Lester*, 25 Ga. App. 660, 104 S.E. 28 (1920).

Under this section, alleging efforts by a broker to sell property and that the broker interested certain persons and by the broker's efforts created a demand for the property, making it possible for the owner to sell to one not alleged to have been interested by the broker, does not state a cause of action. *Corker v. Simmons*, 26 Ga. App. 515, 106 S.E. 558 (1921).

The allegation that "plaintiff was the procuring cause of the sale" is a mere conclusion of the pleader when not sustained by the facts stated by the plaintiff, and the court does not err in dismissing plaintiff's pleading. *Craigmiles v. Steyermaier*, 27 Ga. App. 14, 107 S.E. 386 (1921).

A cause of action for commissions earned is not alleged if it does not appear that a purchaser was procured who actually offered to buy on the terms stipulated by the owner. *Frederick May & Co. v. B. Karpf, Inc.*, 80 Ga. App. 1, 54 S.E.2d 916 (1949).

**Answer alleging defense of broker's bad faith.** — Answer alleging that the plaintiff broker misrepresented the financial ability of the buyer, that is, that the buyer was ready, willing, and able to buy on the terms stipulated by the seller, thereby inducing the defendant to accept the buyer's offer and to enter into a contract which the buyer was unable to perform, set out a breach of the broker's duty of exercising the utmost good faith toward the principal, the seller, which was a defense to the broker's action for commissions. *Reisman v. Massey*, 84 Ga. App. 796, 67 S.E.2d 585 (1951).

**2. Burden of Proof**

**Burden on broker of showing all requirements of section.** — Under the general rule stated in this section, ordinarily the burden of showing all the requirements recited is on the broker in an action for commissions. *Phinizz v. Bush*, 129 Ga. 479, 59 S.E. 259 (1907).

**Burden of proving defense of purchaser's inability.** — If the customer procured by the broker is accepted by the principal, the burden will be upon the latter to show that

such purchaser was not able to comply with the contract, if the purchaser relies on that defense. *Phinizy v. Bush*, 129 Ga. 479, 59 S.E. 259 (1907).

**Proof of conspiracy.** — In order to establish that a conspiracy existed to deprive the broker of a real estate broker's commission, a party must show that the commission was earned; that the broker, as the plaintiff-broker, has been the procuring or efficient cause of the ultimate sale; and that there has been a wrongful interference with the broker and the purchaser. Having shown that the broker was the procuring cause of the sale, plaintiff broker must then demonstrate that the sellers actually knew that the purchaser may have been procured by the broker. *Hodges-Ward Assocs. v. Ecclestone*, 156 Ga. App. 59, 273 S.E.2d 872 (1980).

### 3. Questions for Jury or Court

**Whether broker has produced a purchaser** during the term of the agency is an issue of fact. *Ocean Lake & River Fish Co. v. Dotson*, 70 Ga. App. 268, 28 S.E.2d 319 (1943).

**Which broker's efforts were procuring cause.** — If the services of a broker, as well as those of another broker, have conjointly contributed to the successful termination of negotiations resulting in the sale of real estate for an owner, it becomes a question of fact as to which broker was the proximate, predominating, and procuring cause of the sale. *Gresham v. Lee*, 152 Ga. 829, 111 S.E. 404, answers conformed to, 28 Ga. App. 576, 112 S.E. 524 (1922); *Nicholson v. Smith & Son*, 29 Ga. App. 376, 115 S.E. 499 (1923); *City Nat'l Bank & Trust Co. v. Orr*, 39 Ga. App. 217, 146 S.E. 795 (1929).

**Whether contract applied to property is for jury.** — Issue whether contract as to commissions applied to goods accepted but not delivered was for jury, not court. *Interstate Chem. Corp. v. Slade & Treadwell*, 20 Ga. App. 776, 93 S.E. 422 (1917).

**Reasonable time.** — If no time is specified for a real estate agent to procure a ready, willing, and able purchaser, under the agency contract what would be a reasonable time is for the jury to determine under all the facts and circumstances of the case. *Wood v. Planzer*, 73 Ga. App. 731, 37 S.E.2d 813 (1946).

If a contract between the owner of real estate and the real estate agent for the sale of

property specified no time limit, and the commitment to purchase property by the purchaser was obtained ten days after the contract was made, and the sale was made by the agent on the terms stated less than three months from the date of the owner's contract with the agent, the jury is authorized to find that the agent has earned a commission under the contract. *Wood v. Planzer*, 73 Ga. App. 731, 37 S.E.2d 813 (1946).

**Whether broker made attempt to perform.** — Under provisions in a broker's contract for sale under the terms stipulated "or any other terms acceptable to me," a bona fide attempt to procure an offer to buy for a lesser price is sufficient to constitute performance, and whether or not such performance has occurred is a jury question. *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971).

If a promise as stated in a contract is "to list, offer for sale, and endeavor to sell" upon the terms stated in the contract or any other terms acceptable to the owner, and the plaintiff's affidavit shows that there were efforts to find prospects, show the prospects the property, and relay offers to the owner, it is a jury question whether or not there was such compliance with the contract as to entitle the plaintiff to commissions. *Stone v. Reinhard*, 124 Ga. App. 355, 183 S.E.2d 601 (1971).

**Whether a sales agent breaches a fiduciary duty to the seller** by working in concert with the agent's spouse, the purchaser, in the negotiations and execution of the sales contract is a question of fact for the court. *Paredes v. Bud Bailey Corp.*, 160 Ga. App. 572, 287 S.E.2d 620 (1981).

**Verdict for defendant required as matter of law.** — If in suit by broker for commission it appears that the plaintiff never produced a customer who was ready, able, and willing to buy, and who actually offered to buy on the terms expressly stipulated by the defendant, the owner of the property in question, that prior to the sale of the property by the defendant personally to one who had been introduced to the defendant by the plaintiff's agent as its prospect, the negotiations between such prospect and the plaintiff had come to an end, and that the defendant had not at any time interfered with the efforts of the plaintiff to effect a sale during the agency, a verdict in favor of the defendant



**Practice and Procedure (Cont'd)****3. Questions for Jury or Court (Cont'd)**

was demanded as a matter of law. *Landrum v. Lipscomb-Ellis Co.*, 62 Ga. App. 649, 9 S.E.2d 205 (1940).

**4. Instructions**

**Owner's right to sell.** — Since there was an issue of fact as to whether a broker was

employed to sell property or the broker's acts ratified, and it appeared that the owner sold the property personally, without the broker's aid, to a purchaser with whom the broker negotiated, the court should have charged pursuant to this section that placing the property in the hands of a broker did not prevent the owner from selling unless otherwise agreed. *Folds v. Lifsey Co.*, 26 Ga. App. 297, 105 S.E. 854 (1921).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 259 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 312 et seq.

**ALR.** — Does ordinary broker's contract exclude right of sale by owner, 10 ALR 814; 20 ALR 1268.

Right of one selling on commission as affected by principal's refusal to fill order, 12 ALR 150.

Duration of real estate broker's contract which specifies no time, 24 ALR 1537; 28 ALR 893.

Broker's right to commission as affected by failure to consummate sale within time limited by terms of employment, 26 ALR 784.

Rights and remedies upon cancelation of sales agency, 32 ALR 209; 52 ALR 546; 89 ALR 252.

Broker's right to commission where owner sells property to customer of broker at less than stipulated price, 43 ALR 1103; 46 ALR2d 848.

Character and extent of right of broker who has exclusive contract, where sale is effected without his agency, 64 ALR 395.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 ALR 993.

Right of real estate broker to list competing properties of different owners, 71 ALR 699.

Acceptance by principal of services of broker with knowledge that he acted also for the other party as affecting broker's right to compensation, 80 ALR 1075.

Illegality of transaction or proposed transaction as affecting right of real estate broker to commission for promoting it, 85 ALR 274.

Right of real estate broker against third person who prevented broker from earning commissions, or who received, or induced owner to pay to him or another, commission which the broker had earned, 97 ALR 1273; 146 ALR 1417.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

Principal's right to recover commissions paid by him or by third person to unfaithful agent or broker, 134 ALR 1346.

Necessity of specially pleading revocation of authority as defense to action for broker's commission, 144 ALR 694.

Real estate broker's right to commissions, under contract calling for net price or entitling broker to all above a specified price, where sale is not completed because of refusal or fault of owner, 144 ALR 921.

Real estate broker's right to compensation as affected by death of person employing him, 146 ALR 828.

Real estate broker's right to recover damages in tort upon ground that he was wrongfully prevented from earning or collecting commissions, 146 ALR 1417.

Construction and application of statute which enables real estate broker to recover commissions on oral contract with owner who has been served with written notice of the terms thereof, 148 ALR 676.

Failure, when refusing offer to purchase land, to state ground therefor as affecting right to assert such ground in defense of broker's action for compensation, 156 ALR 602.

Right of real estate broker under listing contract providing for compensation if sale is made during listing period, where con-



tract or incipient negotiations for sale with customer not produced by broker are not consummated within that period, 160 ALR 1048.

Broker's right to compensation as affected by the fact that customer procured by him joined with another in the purchase of the property involved, 164 ALR 949.

Rights and obligations of real estate broker employed to sell property as affected by option to purchase for himself, 164 ALR 1378.

Right of real estate broker, employed to effect or consummate sale, to compensation where principal refuses or is unable to complete transaction, 169 ALR 605.

Condemnation of property as affecting real estate broker's right to compensation, 170 ALR 1422.

Relative rights and liabilities of vendor and his broker to down payment or earnest money forfeited by vendee for default under real estate contract, 9 ALR2d 495.

Real estate broker's right to commission where purchaser refuses to go through with executory contract because of reckless misrepresentation made to him by broker respecting property, 9 ALR2d 504.

Statutory necessity and sufficiency of written statement as to amount of compensation in broker's contract to procure purchase, sale, or exchange of real estate, 9 ALR2d 747.

Broker's right to commission where customer repudiates or fails to complete contract or promise which is oral or not specifically enforceable, 12 ALR2d 1410.

Effect of statement of real estate broker to prospective purchaser that property may be bought for less than list price as breach of duty to vendor, so as to bar claim for commission, 17 ALR2d 904.

What deviation in prospective vendee's proposal from vendor's terms precludes broker from recovering commission for producing a ready, willing, and able vendee, 18 ALR2d 376.

Broker's right to commission on sales consummated after termination of employment, 27 ALR2d 1348.

Agreement between brokers as within statute requiring agreements for commissions for the sale of real estate to be in writing, 44 ALR2d 741.

Conveyance of real property to mortgagee

or lienholder as constituting "sale or exchange" rendering owner liable for commissions to broker having exclusive agency or exclusive right to sell, 46 ALR2d 1116.

Broker's right to commission for selling part of property, 47 ALR2d 680.

Broker's return of deposit to purchaser as waiver of right to demand commission from seller, 69 ALR2d 1244.

Broker's right to commission on sale rejected by principal because of buyer's fraud or misrepresentation, 79 ALR2d 1055.

Broker's right to commission on renewal, extension, or renegotiation of lease, 79 ALR2d 1063.

"Exclusive right to sell" and other terms in real estate broker's contract as excluding owner's right of sale, 88 ALR2d 936.

Real estate broker's right to compensation as affected by failure or refusal of principal's spouse to join in contract of sale, 10 ALR3d 665.

Validity, construction, and enforcement of business opportunities or "finder's fee" contract, 24 ALR3d 1160.

Liability of purchaser of real estate for interference with contract between vendor and real estate broker, 29 ALR3d 1229.

Liability of defaulting purchaser to owner's broker or auctioneer, 30 ALR3d 1395.

Broker's right to commission from principal upon procuring third party taking an option, 32 ALR3d 321.

Right of real estate broker to commission where listing contract is for sale of property and it is subsequently leased to one with whom broker had negotiated, 42 ALR3d 1430.

Validity, construction, and effect of real estate brokers' multiple-listing agreement, 45 ALR3d 190.

Right of mortgage broker to commission where principal violated conditions of agreement, 45 ALR3d 1326.

Construction of provision in real estate broker's listing contract that broker shall receive commission on sale after expiration of listing period to one with whom broker has "negotiated" during listing period, 51 ALR3d 1149.

Real estate broker's right to commission for procuring lessee, where lease terminates before contemplated term, 54 ALR3d 1171.

Validity, construction, and effect of provision in exclusive listing agreement for pay-

ment of commission on termination by owner, 69 ALR3d 1270.

Modern view as to right of real estate broker to recover commission from seller-principal where buyer defaults under valid contract of sale, 12 ALR4th 1083.

What constitutes financial ability to perform within rule entitling broker to commission for producing ready, willing and able purchaser of real property, 87 ALR4th 11.

### 10-6-33. Revocation of agency — When and how done; damages for unreasonable revocation.

Generally, an agency is revocable at the will of the principal. The appointment of a new agent for the performance of the same act or the death of either principal or agent revokes the power. If, however, the power is coupled with an interest in the agent himself, it is not revocable at will. In all cases the agent may recover from the principal, for an unreasonable revocation, any damages he may have suffered by reason thereof. (Orig. Code 1863, § 2161; Code 1868, § 2157; Code 1873, § 2183; Code 1882, § 2183; Ga. L. 1894, p. 44, § 1; Civil Code 1895, § 3003; Civil Code 1910, § 3575; Code 1933, § 4-214.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### POWER COUPLED WITH AN INTEREST

#### General Consideration

**Section not intended to be exhaustive.** — This section, expressing but one exception to the general rule of revocability of an agency at will was not intended to be exhaustive of the legal principles controlling revocation. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895); *Wheeler v. Pan Am. Petro. Corp.*, 48 Ga. App. 378, 172 S.E. 826 (1934).

**Revocable at will of principal.** — Generally, an agency is revocable at the will of the principal. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895); *Wheeler v. Pan Am. Petro. Corp.*, 48 Ga. App. 378, 172 S.E. 826 (1934); *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

If books were merely entrusted to a party as agent of a corporation for the purpose of selling the books with title remaining in the corporation, the corporation was empowered to revoke the agency at will and to take possession of the books by any lawful means. *Parks v. Atlanta News Agency, Inc.*, 115 Ga. App. 842, 156 S.E.2d 137 (1967).

**Death.** — Agency is ipso facto revoked by

death. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895).

**Agent is not barred from having interest.** — That an agent was not prohibited from having an interest was evident from former Code 1933, §§ 4-202 and 4-214. *Pendley v. Jessee*, 134 Ga. App. 138, 213 S.E.2d 496 (1975).

**Paying consideration for power is not sufficient.** — Power will not survive merely because the donee may have paid a valuable consideration for the power. *Turman v. Winecoff*, 138 Ga. 726, 75 S.E. 1131 (1912).

**Voluntary agency to settle lawsuit held revocable.** — If one, without consideration, entrusted an agent with a sum of money to settle a lawsuit between two others, one has the power of revocation under this section until the settlement is complete, especially if the contract is in writing and it is therein expressly agreed that the terms of the settlement are to be satisfactory to the person in every way, and if not, then the money is to be restored to the person. *Phillips v. Howell*, 60 Ga. 411 (1878).

**Attorney-client relationship does not come under this section;** it is an erroneous legal



theory to argue that retention of an attorney is nothing more than creation of an agency, so that under this section death of either the principal or agent revokes the power. *Continental Ins. Co. v. Weekes*, 140 Ga. App. 791, 232 S.E.2d 80 (1976) (attorney-client relationship held not involved).

**Power of sale in mortgage held revoked by mortgagor's death.** — A power of sale given by mortgage under this section is revoked by the mortgagor's death before the note falls due. *Lathrop & Co. v. Brown*, 65 Ga. 312 (1880); *Wilkins v. McGehee*, 86 Ga. 764, 13 S.E. 84 (1891).

**Power of sale in mortgage held irrevocable during mortgagor's lifetime.** — A power of sale, such as one contained in a mortgage, is irrevocable during the lifetime of the principal where it is given for a valuable consideration, and forms a part of a contract made as security for a debt, and is conferred for the purpose of effectuating the security, even though not coupled with an interest in the thing itself, and this is undoubtedly so if there is an express stipulation that the power shall be irrevocable. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895).

**Agency to sell land held not revocable until after reasonable time.** — If agents are employed to sell land for a specified commission to be paid when a sale is made and they expend time and effort in endeavoring to effect a sale, the owner cannot, without lawful cause, revoke the contract of agency at one's mere option and before the expiration of a reasonable time for performance. If no time limit is fixed in the contract for the contract's performance, the agents are entitled to a reasonable time. *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

**Consummation of sale by owner would not relieve the owner of liability for commission.** — The fact that a sale was finally consummated by the owner to a purchaser procured by the agents would not relieve the owner of the owner's liability for the commission. *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

**Agency to collect note owned in part by agent held not revoked by payee's death.** — If one lends money for oneself and as agent for others and takes a note so payable, the right and duty of the payee to collect the note for the principals for whom money was loaned is an agency coupled with an interest

which is not terminated by the death of the payee of the note; the executrix has the right to proceed to collect the note. *Scott v. Cain*, 77 Ga. App. 826, 50 S.E.2d 99 (1948).

**Termination by manufacturer of oral agreement for distributorship** did not give rise to action for wrongful termination, even though distributorship was to be for an indefinite time. *Loy's Office Supplies, Inc. v. Steelcase, Inc.*, 174 Ga. App. 701, 331 S.E.2d 75 (1985).

**Powers of remainderman to manage property until life tenant dies held irrevocable.** — Where A executed a deed to B, C, and D, for \$1.00 and other valuable considerations, providing that the property was conveyed in trust and empowering the grantees to pay insurance, taxes, and maturing loans on the property conveyed, to collect the rents, to sell and reinvest, and to pay the net income to the grantor for life, and providing that at A's death title should vest absolutely in B, C, and D, such deed conveyed the property to grantees subject to a life estate in the grantor, and the powers conferred by the deed were irrevocable. *Finn v. Dobbs*, 188 Ga. 602, 4 S.E.2d 655 (1939).

**Notice to remit proceeds revokes agency of bank to place proceeds to depositor's credit.** — A notice by a depositor given to a bank before the bank has collected checks which have been deposited with the bank as agent to collect, notifying the bank that the proceeds of the checks after being collected are not to be deposited to the depositor's credit, but are to be remitted by the bank to the depositor, is notice to the bank of a revocation by the depositor of the bank's agency to place the proceeds derived from the collection of the checks to the depositor's credit in the bank. *Macon Grocery Co. v. Citizens' Bank*, 42 Ga. App. 74, 155 S.E. 57 (1930).

**Filing suit to cancel power of attorney and deeds made thereunder revokes agency.** — A power of attorney not coupled with an interest is revocable at will; and the mere filing of suit to cancel a power of attorney and two deeds made by the attorney in fact amounts to a revocation thereof with respect to any future action thereunder by the attorney in fact. *Thompson v. Thompson*, 190 Ga. 264, 9 S.E.2d 80 (1940).

**Right to discharge at will shows employer-employee relationship.** — A



**General Consideration (Cont'd)**

charge of the court to the jury to the effect that, if a used car lot owner retained the right to direct or control the time or manner of executing the work of a salesman and had the right to discharge the salesman and to terminate at any time the arrangement between them, the relationship would be that of employer and employee or that of master and servant, but that, if the dealer did not have these rights, then the relationship between the dealer and the salesman would be another relationship, "such as the relationship of independent contractor and principal," was an accurate statement of the law. *Hamilton v. Pulaski County*, 86 Ga. App. 705, 72 S.E.2d 487 (1952).

**Power of attorney must be strictly construed and strictly pursued;** the act done must be legally identical with that authorized to be done. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Action lies for wrongful revocation.** — If the revocation of an agency is unreasonable and constitutes a breach of contract, whereby the agent sustains injury, the law affords the agent redress in an action for damages. *Standard Oil Co. v. Gilbert & Co.*, 84 Ga. 714, 11 S.E. 491, 8 L.R.A. 410 (1890); *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895).

If no time limit is fixed for performance in a contract employing agents to sell land, the agents are entitled to a reasonable time, and if, before the expiration of such reasonable time, the owner, without lawful cause, revokes the contract, the owner is liable to the agents in damages for so doing. *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

**Measure of damages would be determined by the contract of agency.** *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

**Burden of proving the revocation** of an agency is generally upon the party asserting revocation. *Holland v. King*, 72 Ga. App. 179, 33 S.E.2d 275 (1945).

**Cited in** *Southern Trading Corp. v. Benchley Bros., Inc.*, 34 Ga. App. 625, 130 S.E. 691 (1925); *Cartledge v. Trust Co.*, 186 Ga. 718, 198 S.E. 741 (1938); *Hancock v. Hancock*, 205 Ga. 684, 54 S.E.2d 385 (1949); *Thornton v. Lewis*, 106 Ga. App. 328, 126 S.E.2d 869 (1962); *Jones v. Destiny Indus.,*

*Inc.*, 226 Ga. App. 6, 485 S.E.2d 225 (1997); *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007).

**Power Coupled with an Interest**

**"Coupled with an interest".** — To be "coupled with an interest," the interest of the agent must lie in the subject matter of the agency and not merely in the contract of agency. *Cutcliffe v. Chesnut*, 126 Ga. App. 378, 190 S.E.2d 800 (1972).

The interest of the agent that will prevent revocation at the will of the principal, referred to in this section, must lie in the subject matter of the agency and not merely in the profits which are to result from the exercise of the power. *Lathrop & Co. v. Brown*, 65 Ga. 312 (1880); *Wilkins v. McGehee*, 86 Ga. 764, 13 S.E. 84 (1891); *Turman v. Winecoff*, 138 Ga. 726, 75 S.E. 1131 (1912); *Adair v. Smith*, 23 Ga. App. 290, 98 S.E. 224 (1919); *Wheeler v. Pan Am. Petro. Corp.*, 48 Ga. App. 378, 172 S.E. 826 (1934).

**Agency coupled with an interest is not revocable by death.** *Gurr v. Gurr*, 198 Ga. 493, 32 S.E.2d 507 (1944).

Death ordinarily terminates an agency, but where the agency is coupled with an interest, the rule does not apply. *Scott v. Cain*, 77 Ga. App. 826, 50 S.E.2d 99 (1948).

**Exception to normal death rule.** — To the rule that an agency is revoked by the death of the principal there is but one exception, and that exists where the power of the agent is coupled with an interest in the subject on which the power is to be exercised and not merely in that which is produced by the exercise of the agency. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895).

**An agency coupled with an interest is not revocable at will.** *Gurr v. Gurr*, 198 Ga. 493, 32 S.E.2d 507 (1944).

**If the power is coupled with an interest in the agent personally, the power is not revocable at will.** *Wheeler v. Pan Am. Petro. Corp.*, 48 Ga. App. 378, 172 S.E. 826 (1934).

**Mere recital that power is coupled with interest.** — A mere recital that a power of sale is coupled with an interest would not of itself make it such an interest. *Ray v. Hemphill*, 97 Ga. 563, 25 S.E. 485 (1895).

**Giving agent title to instrument makes agency irrevocable.** — If the agent has title to the instrument itself, the agent has such

an interest as will prevent termination of the agency. *Scott v. Cain*, 77 Ga. App. 826, 50 S.E.2d 99 (1948).

**Power of attorney to sue under contingent-fee contract.** — If an attorney is employed to sue for property under a special contract whereby the attorney's fee is payable out of the proceeds of the suit, such a contract is in the nature of a power with an interest, and such a power is irrevocable under this section. *Twiggs v. Chambers*, 56 Ga. 279 (1876).

**Right to control of security held not revoked by owner's death.** — Agreement between a company, the holder of a security deed, which as such had the right to demand possession of property for the purpose of controlling the property until the net amount from the rents and profits was sufficient to satisfy the debt, which was in arrears, and the owner, whereby the company was given the immediate direction and control of the apartment house, creates a power coupled with an interest, and the agency is not terminated by the death of the owner. *Henderson v. Nolting First Mtg. Corp.*, 184 Ga. 724, 193 S.E. 347 (1937).

**Factor's power of sale held not revoked by principal's death.** — A factor's power of sale

to reimburse the factor for advances the factor has made to the principal or expense in taking care of such property is coupled with an interest and is not revoked by the death of the principal. *Willingham v. Rushing*, 105 Ga. 72, 31 S.E. 130 (1898).

**Work and expense of agent to lease held to prevent revocation at will.** — Under this section, the work and expense of an authorized agent in finding a tenant and securing a lease could be taken as sufficient to establish such an interest that will prevent revocation at the will of the principal in the contract of rental. *Adair v. Smith*, 23 Ga. App. 290, 98 S.E. 224 (1919) (agent had interest in contract of rental, not just contract of agency).

**Distribution agency not made irrevocable by agent's efforts.** — In the absence of some contractual provision to the contrary, an agency for a petroleum corporation to distribute the corporation's products in a certain territory for commissions would not be irrevocable as a power coupled with an interest merely because the agent expends time, efforts, and money to increase the business of the agency. *Wheeler v. Pan Am. Petro. Corp.*, 48 Ga. App. 378, 172 S.E. 826 (1934).

## OPINIONS OF THE ATTORNEY GENERAL

**This section is not exhaustive of the exceptions to the general rule** that an agency is revocable at will. 1976 Op. Att'y Gen. No. 76-18.

**Power that is given for consideration as security is irrevocable.** — A power which is given to an agent in exchange for valuable consideration is irrevocable should the power form a part of the contractual agreement as a security for the debt. 1976 Op. Att'y Gen. No. 76-18.

**Power of wage collection given creditor is irrevocable during lifetime of employee.** — A power of attorney which authorizes the State Employees' Credit Union to collect the unpaid compensation due a state employee in the event of the employee's termination prior to the repayment of the employee's loan is irrevocable during the lifetime of the employee, although it does not constitute a power coupled with an interest within the meaning of this section. 1976 Op. Att'y Gen. No. 76-18.

**Death of principal revokes power.** — The general rule is that all powers are revoked by the death of the principal. 1976 Op. Att'y Gen. No. 76-18.

**Death of principal does not revoke powers which are coupled with an interest in the thing itself.** 1976 Op. Att'y Gen. No. 76-18.

**Without interest, power irrevocable during lifetime does not survive principal.** — Although a power is irrevocable during the lifetime of the principal, the power does not survive the death of the principal if the power does not confer a power coupled with an interest. 1976 Op. Att'y Gen. No. 76-18.

**Reciting interest insufficient.** — A recital in the instrument that a power of collection is coupled with an interest is not sufficient to create the necessary interest. 1976 Op. Att'y Gen. No. 76-18.

**Power to collect wages of terminated state employee may not be honored.** — In the absence of a contractual relationship or authorizing legislation, a state agency may not



properly honor a power of attorney authorizing collection by the State Employee's Credit Union of the unpaid wages due a terminated state employee in satisfaction of the unpaid balance on the employee's loan. 1976 Op. Att'y Gen. No. 76-18.

**Payment may be to spouse or children if employee has died.** — Should a terminated

state employee die prior to the employee's loan's repayment, the unpaid compensation due the employee, not to exceed \$2,500.00, may be paid to the employee's surviving spouse or minor children, as provided in former Code 1933, §§ 66-103 — 66-105. 1976 Op. Att'y Gen. No. 76-18.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 40 et seq., 60 et seq., 259.

**C.J.S.** — 2A C.J.S., Agency, § 95 et seq.

**ALR.** — Rights and remedies upon cancellation of sales agency, 32 ALR 210; 52 ALR 546; 89 ALR 252.

Death or incompetency of principal as affecting existing power of attorney to confess judgment, 44 ALR 1310.

What constitutes power coupled with interest within rule as to termination of agency, 64 ALR 380; 28 ALR2d 1243.

Payment to agent after death of principal, 67 ALR 1419.

Power of attorney as authorizing gift or conveyance or transfer without a present consideration, 73 ALR 884.

When attorney's power deemed coupled with an interest so as to prevent discharge or revocation, 97 ALR 923.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

Grounds for discharge of servant or agent existing during lifetime of employer, but unknown to him, as available to his executor or administrator, 109 ALR 474.

Construction, application, and effect of statutory provision that directors of corporation may remove officer, agent, or employee at pleasure, 111 ALR 894.

Real estate broker's right to compensation as affected by death of person employing him, 146 ALR 828.

Implied obligation of employee not to use trade secrets or confidential information for his own benefit or that of third persons after leaving the employment, 165 ALR 1453.

Agency conferred upon partners as affected by dissolution of the partnership, 170 ALR 512.

What constitutes power coupled with interest within rule as to termination of agency, 28 ALR2d 1243.

Termination by principal of distributorship contract containing no express provision for termination, 19 ALR3d 196.

#### 10-6-34. Revocation of agency — Effect of death or disability on pledge of stock with power of attorney.

Every creditor or other person advancing money upon the pledge of a certificate of stock or other scrip representing an ownership or interest in corporations in Georgia shall have such an irrevocable interest in such certificate of stock or other scrip as not to be affected by the death, insanity, or legal disability thereafter of the person in whose name such stock or other scrip stands upon the books of any corporation in Georgia; but such pledgee or holder of such stock or scrip assigned in blank, coupled with the power of attorney, shall have the same right after the death, insanity, or legal disability of the person in whose name the stock stands upon the books of the corporation as before the death, insanity, or legal disability of such person. (Ga. L. 1894, p. 44, § 1; Civil Code 1895, § 3003; Civil Code 1910, § 3575; Code 1933, § 4-214.)



**Law reviews.** — For note discussing revocation of proxy upon maker's incapacity, see 17 Ga. St. B.J. 88 (1980).

#### RESEARCH REFERENCES

**ALR.** — Death as revoking power of attorney to transfer corporate stock, 40 ALR 1004.

#### **10-6-35. Revocation of agency — Effect of death on power of attorney by member of armed forces, seaman, or person on war service.**

(a) No agency created by a power of attorney in writing given by a principal who is at the time of execution or who, after executing the power of attorney, becomes either:

(1) A member of the armed forces of the United States; or

(2) A person serving as a merchant seaman outside the limits of the United States; or

(3) A person outside the limits of the United States by permission, assignment, or direction of any department or official of the United States government in connection with any activity pertaining to or connected with the prosecution of any war in which the United States is then engaged

shall be revoked or terminated by the death of the principal as to the agent or other person who, without actual knowledge or actual notice of the death of the principal, shall have acted or shall act, in good faith, under or in reliance upon such power of attorney or agency; and any action so taken, unless otherwise invalid or unenforceable, shall be binding on the heirs, devisees, legatees, or personal representatives of the principal, provided that it shall be made to appear by proof that the person or persons, firm, or corporation receiving any property by reason of the exercise of the power shall have paid value for the property and the attorney in fact or agent shall make bond for title to purchaser of the property without notice of the death of the principal.

(b) An affidavit, executed by the attorney in fact or agent setting forth that he has not or had not, at the time of doing any act pursuant to the power of attorney, received actual knowledge or actual notice of the revocation or termination of the power of attorney, by death or otherwise, or notice of any facts indicating the same, shall, in the absence of fraud, be conclusive proof of the nonrevocation or nontermination of the power at such time. If the exercise of the power requires execution and delivery of any instrument which is recordable under the laws of this state, such affidavit, when authenticated for record in the manner prescribed by law, shall likewise be recordable.

(c) No report or listing, either official or otherwise, of “missing” or “missing in action,” as such words are used in military parlance, shall constitute or be interpreted as constituting actual knowledge or actual notice of the death of such principal or notice of any facts indicating the same or shall operate to revoke the agency.

(d) This Code section shall not be construed so as to alter or affect any provisions for revocation or termination contained in such power of attorney.

(e) This Code section shall apply to such powers of attorney executed prior to March 9, 1945.

(f) This Code section shall not apply to any last will and testament of the principal unless the power of disposal is in compliance with the last will of the principal. (Code 1933, § 4-214, enacted by Ga. L. 1943, p. 354, § 1; Ga. L. 1945, p. 398, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1989, a semicolon was deleted from the end of paragraph (a)(3).

#### RESEARCH REFERENCES

**ALR.** — Rights and remedies upon cancellation of sales agency, 32 ALR 210; 52 ALR 546; 89 ALR 252. 1310; 147 ALR 1297; 148 ALR 1384; 149 ALR 1451; 149 ALR 1452; 150 ALR 1417; 150 ALR 1418; 151 ALR 1453; 152 ALR 1450; 154 ALR 1447.

Soldiers’ and seamen’s wills, 137 ALR

#### 10-6-36. Revocation of agency — Effect of incompetency or incapacity of principal on power of attorney.

A written power of attorney, unless expressly providing otherwise, shall not be terminated by the incompetency or incapacity of the principal. The power to act as an attorney in fact for a principal who subsequently becomes incompetent or incapacitated shall remain in force until such time as a conservator or receiver shall be appointed for the principal or until some other judicial proceeding shall terminate the power. (Code 1933, § 4-214.1, enacted by Ga. L. 1973, p. 493, § 1; Ga. L. 1999, p. 485, § 2; Ga. L. 2008, p. 715, § 1/SB 508.)

**The 2008 amendment,** effective July 1, 2008, substituted “conservator” for “guardian of the property” in the last sentence.

**Law reviews.** — For note discussing revocation of proxy upon maker’s incapacity, see 17 Ga. St. B.J. 88 (1980).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 55.  
**C.J.S.** — 2A C.J.S., Agency, §§ 126, 127.

**ALR.** — Death or incompetency of principal as affecting existing power of attorney to confess judgment, 44 ALR 1310.

### 10-6-37. Revocation of agency — Action for wrongful discharge of agent before termination of contract.

When the contract is for a year, and the principal wrongfully discharges the agent before the end of the year, the agent may either sue immediately for any special injury from the breach of the contract, or, treating the contract as rescinded, may sue for the value of the services rendered, or he may wait until the expiration of the year and sue for and recover his entire wages. (Orig. Code 1863, § 2196; Code 1868, § 2191; Code 1873, § 2217; Code 1882, § 2217; Civil Code 1895, § 3016; Civil Code 1910, § 3588; Code 1933, § 4-215.)

### JUDICIAL DECISIONS

**Section applies where discharged servant had entered upon duties.** — This section applies where the servant had actually entered upon the performance of the duties undertaken and was discharged. *Putney v. Swift, Murphy & Co.*, 54 Ga. 266 (1875).

**Section inapplicable where servant never permitted to serve.** — This section is not applicable where A and B contract that A shall serve B as a clerk for four months at a specified rate per month and B refused, on application of A, to permit A to enter on the work. A has a right to recover, not A's four months' wages, but the damages which have come to A from B's breach of contract. *Putney v. Swift, Murphy & Co.*, 54 Ga. 266 (1875).

**Section inapplicable to permanent tenure.** — This section does not deal with an employment where the employee has permanent tenure. *City Council v. Hydrick*, 126 Ga. App. 611, 191 S.E.2d 563 (1972).

**Action under section is ex contractu.** — Under this section an employee's suit for damages on account of a breach of contract by discharge is an action ex contractu. *Cason v. Tye*, 9 Ga. App. 325, 71 S.E. 593 (1911).

**Cognizable agency contracts must refer to legal rights and duties.** — Contracts of agency, to be cognizable in law, must, like other agreements, have reference to the assumption of legal rights and duties, as opposed to engagements of a mere civic or social character, or of such other nature as to exclude monetary values. *Huckey v. Smith*, 42 Ga. App. 719, 157 S.E. 234 (1931).

**Cognizable agency contracts must have monetary value at law.** — In order to constitute a valid contract, the intention of the

parties must refer to legal relations, so that the courts may take cognizance of it, and it is generally said that the test of this quality of the contract is that the intention of the parties must relate to something which is of a monetary value in the eye of the law. *Huckey v. Smith*, 42 Ga. App. 719, 157 S.E. 234 (1931).

**Accrual of right of action where contract treated as continuing.** — If the employee elects to treat the employment contract as continuing after wrongful discharge, the right of action as to the last installment of the employee's salary does not accrue until expiration of the stipulated term of employment. *Rosenstock v. Congregation Agudath Achim*, 118 Ga. App. 443, 164 S.E.2d 283 (1968).

**Employee has six years to bring action on written contract.** — If the employment contract is in writing, the employee has six years after the expiration within which to bring an action. *Rosenstock v. Congregation Agudath Achim*, 118 Ga. App. 443, 164 S.E.2d 283 (1968).

**Action brought during term may include recovery to end.** — Although an action for breach of a contract of employment is brought before the term of hiring has expired, the recovery may embrace all the damages down to the expiration of the term, if the trial is held after the whole of such damages become susceptible of definite proof — that is, after the term expired. *Georgia, Fla. & Ala. Ry. v. Parsons*, 12 Ga. App. 180, 76 S.E. 1063 (1913).

**Quantum meruit available as remedy.** — If there exists a written contract which is broken, one of the remedies for the breach is



quantum meruit, that is, in treating the contract as rescinded. *Gilbert v. Powell*, 165 Ga. App. 504, 301 S.E.2d 683 (1983).

**Recovery properly limited to quantum meruit.** — There being no allegation in the petition and nothing in the evidence to show that the term of service had expired and that the servant was suing to recover the servant's entire damages or that the servant was suing for any special injury for a breach of the contract, the court did not err in treating the plaintiff's case as one based upon quantum meruit under this section, and in charging the jury accordingly. *Silverthorne v. Arkansas S.E. Ry.*, 142 Ga. 194, 82 S.E. 551 (1914).

**Measure of damages.** — When an offended party sues for the breach of a contract, the measure of the party's recovery is, prima facie, full payment at the contract rate, but the defendant may mitigate the damages by showing that the plaintiff, by the exercise of ordinary care and diligence, could have rendered the next loss less than that amount. *Mimms v. J.L. Betts Co.*, 9 Ga. App. 718, 72 S.E. 271 (1911); *J.L. Betts Co. v. Mimms*, 14 Ga. App. 786, 82 S.E. 474 (1914).

If there was a contract for the division of commissions between tax investigators and one investigator collected taxes but refused to pay plaintiff the plaintiff's share of the commission, it would appear that the principle controlling is analogous to that found in this section and that the plaintiff is entitled to the third of the remedies provided by this section. *Roberts v. Allen*, 31 Ga. App. 660, 122 S.E. 86, cert. denied, 31 Ga. App. 812 (1924).

If an employee is unlawfully discharged before the expiration of the term of employ-

ment and, before the expiration of the term, brings suit against the employer for damages sustained by reason of such discharge, the employee's measure of damages is the salary or advancements which the employee was entitled to receive under the terms of the contract for the remainder of the term, subject to reduction by proof at the trial. *Fried v. Portis Bros. Hat Co.*, 41 Ga. App. 30, 152 S.E. 151 (1930).

Trial court properly granted partial summary judgment pursuant to O.C.G.A. § 9-11-56 to an employer on an employee's action alleging breach of an employment contract, holding that the employee could only recover wages payable up to the time of trial; O.C.G.A. § 10-6-37 provided that in all employment contracts for a definite duration, an employee could sue for the value of the services rendered, or could wait until the expiration of the year and sue for and recover the employee's entire wages. In this action the employee elected to affirm the contract and bring an immediate suit for damages based upon the company's alleged breach of the employment contract, and under this option, the employee only had the right to prove, and to recover for, all damages which may have accrued up to the date of the trial. *Harvey v. J. H. Harvey Co.*, 276 Ga. 762, 582 S.E.2d 88 (2003).

**Cited in** *Norman v. Nash*, 102 Ga. App. 508, 116 S.E.2d 624 (1960); *Redman Dev. Corp. v. Pollard*, 131 Ga. App. 708, 206 S.E.2d 605 (1974); *Exum Walker, M.D., P.C., Pension Trust v. Joanna M. Knox & Assocs.*, 132 Ga. App. 12, 207 S.E.2d 570 (1974); *Harvey v. J. H. Harvey Co.*, 256 Ga. App. 333, 568 S.E.2d 553 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 40, 44, 329.

**Am. Jur. Trials.** — Defending Wrongful Discharge Cases, 36 Am. Jur. Trials 419.

**C.J.S.** — 3 C.J.S., Agency, § 604.

**ALR.** — Right of agent to offset his own claim against collection made for principal, 2 ALR 132.

Right to recover against employee or his bond for money or property, the fruits of an employment involving a violation of law, 2 ALR 906.

Rights and remedies upon cancellation of

sales agency, 32 ALR 210, 52 ALR 546, 89 ALR 252.

Character and extent of right of broker who has exclusive contract, where sale is effected without his agency, 64 ALR 395.

Right, under contract of employment providing for commissions based on amounts collected, to commissions on amounts collected after termination of employment or discharge for cause, upon business effected during term, 65 ALR 993.

Injunction as remedy for breach of contract to employ plaintiff or give exclusive

right to promote or sell defendant's product or invention, 173 ALR 1198.

Conclusive election of remedies as predicated on commencement of action, or its prosecution short of judgment on the merits, 6 ALR2d 10.

Recovery on quantum meruit where only express contract is pleaded, under Federal Rules of Civil Procedure 8 and 54 and similar state statutes or rules, 84 ALR2d 1077.

Price fixed in contract violating statute of frauds as evidence of value in action on quantum meruit, 21 ALR3d 9.

Elements and measure of damages in action by schoolteacher for wrongful discharge, 22 ALR3d 1047.

In-house counsel's right to maintain action for wrongful discharge, 16 ALR5th 239.

When statute of limitations commences to run as to cause of action for wrongful discharge, 19 ALR5th 439.

Negligent discharge of employee, 53 ALR5th 219.

### 10-6-38. Revocation of agency — Subsequent earnings in mitigation of damages on improper dismissal of agent.

When an agent has been improperly dismissed before the expiration of his time, earnings which were realized or might have been realized by him up to the end of the term shall go in mitigation of damages. (Civil Code 1895, § 3017; Civil Code 1910, § 3589; Code 1933, § 4-216.)

**History of Code section.** — This Code section is derived from the decision in *Ansley v. Jordan*, 61 Ga. 483 (1878).

## JUDICIAL DECISIONS

**Damages for wrongful discharge subject to reduction.** — If an employee is unlawfully discharged before the expiration of the term of employment and, before the expiration of the term, brings suit against the employer for damages sustained by reason of such discharge, the employee's measure of damages is the salary or advancements which the employee was entitled to receive under the terms of the contract for the remainder of the term, subject to reduction by proof at the trial. *Fried v. Portis Bros. Hat Co.*, 41 Ga. App. 30, 152 S.E. 151 (1930).

**Profits to agent from discharge.** — The regular measure of damages is subject to diminution under this section by any

amount which the proof shows the agent profited, or in the exercise of reasonable diligence should have profited, by reason of the agent's release from the performance of the service. *Realty Co. v. Ellis*, 4 Ga. App. 402, 61 S.E. 832 (1908).

**Probable commissions employee required to accept in lieu of salary.** — Damages will not be diminished by probable commissions, when contract was broken by refusal to let employee continue work unless the employee would accept commissions in lieu of salary. *Americus Grocery Co. v. Roney*, 129 Ga. 40, 58 S.E. 462 (1907).

**Cited in** *Harvey v. J. H. Harvey Co.*, 256 Ga. App. 333, 568 S.E.2d 553 (2002).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 329.

**C.J.S.** — 3 C.J.S., Agency, § 604.

**ALR.** — Right to recover against employee or his bond for money or property, the fruits

of an employment involving a violation of law, 2 ALR 906.

Rights and remedies upon cancellation of sales agency, 32 ALR 210; 52 ALR 546; 89 ALR 252.

Duty and liability of former employee to former employer in respect of transactions or matters pending and uncompleted at termination of employment, 100 ALR 684.

Elements and measure of damages in ac-

tion by schoolteacher for wrongful discharge, 22 ALR3d 1047.

Pre-emption of wrongful discharge cause of action by civil rights laws, 21 ALR5th 1.

### 10-6-39. Liability of principal for injuries by other agents.

Except as otherwise expressly provided, the principal shall not be liable to one agent for injuries arising from the negligence or misconduct of other agents about the same business. (Orig. Code 1863, § 2180; Code 1868, § 2176; Code 1873, § 2202; Code 1882, § 2202; Civil Code 1895, § 3030; Civil Code 1910, § 3602; Code 1933, § 4-217.)

**Cross references.** — Liability of employer for injury to employee by other employees,

§ 34-7-21. Liability of railroad employer for injuries to employees, § 34-7-41.

### JUDICIAL DECISIONS

**Continuation of common-law rule.** — At common law there could be no recovery against the principal for injuries sustained by an agent from the negligence or misconduct of other agents of the principal, engaged in the same business, and this rule was generally in force in this state by virtue of former Code 1873, § 2202. *Crusselle v. Pugh*, 67 Ga. 430, 44 Am. R. 724 (1881); *Barry v. McGhee*, 100 Ga. 759, 28 S.E. 455 (1897); *Kilgo v. Rome Soil Pipe Mfg. Co.*, 16 Ga. App. 737, 86 S.E. 82 (1915); *Lamb v. Floyd*, 148 Ga. 357, 96 S.E. 877, 1 A.L.R. 1172 (1918).

**Exception as to railroad employees.** — An exception has been made to the general rule laid down in this section in the case of railroad employees. *Robinson v. Huidekoper*, 98 Ga. 306, 25 S.E. 440 (1896).

Principal shall not be liable for injuries arising from the negligence or misconduct of another agent in the same business, and declares an exception in case of railroads. *Thompson v. Central R.R. & Banking Co.*, 54 Ga. 509 (1875).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 27 Am. Jur. 2d, Employment Relationship, § 340 et seq.

**C.J.S.** — 30 C.J.S., Employer's Liability for Injuries to Employees, § 228 et seq.

## ARTICLE 3

### RIGHTS AND LIABILITIES OF PRINCIPAL TO THIRD PERSONS

**Cross references.** — Liability of corporations to third persons for acts of officers relating to limitation upon power of officer

not known to such third persons, § 14-2-150. Imputing of negligence of one person to another person, § 51-2-1.

### JUDICIAL DECISIONS

**Construction of article.** — The whole of this article is to be taken together. *First Nat'l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95

Am. Dec. 400 (1868); *Byne v. Hatcher*, 75 Ga. 289 (1885).

**Apparent authority vanishes in presence**



**of knowledge of agent's powers.** — Doctrine of apparent authority rests upon principle that if one of two innocent parties must suffer, the one must bear the burden who places another in a position to cause loss. It necessarily follows that the doctrine may not be invoked by one who knows or has good reason to know the limits and extent of an

agent's authority. In such cases the rule is that any apparent authority that might otherwise exist vanishes in presence of person's actual or constructive knowledge of what agent is or is not empowered to do. *Atlanta Limousine Airport Servs., Inc. v. Rinker*, 160 Ga. App. 494, 287 S.E.2d 395 (1981).

#### RESEARCH REFERENCES

**ALR.** — Liability for misconduct or negligence of messenger not directly related to the service, 18 ALR 1416.

Liability of principal for amount of fraudulent excess collection by agent, 33 ALR 90; 46 ALR 1212.

Validity of contract negotiated by agent acting for both parties, 48 ALR 917.

Regulations, rules, custom, or usage of stock or produce exchange or of stock or produce broker as affecting customers, 79 ALR 592.

Liability of infant for torts of his employee or agent, 103 ALR 487.

"Vouching in" of one who is not liable over to defendant but is liable over to one whom the defendant has vouched in, 123 ALR 1153.

Lessee as agent of lessor within contemplation of mechanic's lien laws, 163 ALR 992.

Overcoming inference or presumption of driver's agency for owner, or latter's consent to operation, of automobile, 5 ALR2d 196.

Owner's presence in motor vehicle operated by another as affecting owner's rights or liability, 50 ALR2d 1281.

Shipowner's liability to longshoreman for injuries due to aspects of unseaworthiness brought about by acts of stevedore company or latter's servants, 77 ALR2d 829.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 ALR2d 15; 93 ALR3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Liability of executor or administrator, or his bond, for loss caused to estate by act or default of his agent or attorney, 28 ALR3d 1191.

Relief to owner of motor vehicle subject to state forfeiture for use in violation of narcotics laws, 50 ALR3d 172.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Fact that passenger in vehicle is owner as affecting right to recover from driver for injuries to, or death of, passenger incurred in consequence of driver's negligence, 21 ALR4th 459.

Fact that passenger in negligently operated motor vehicle is owner as affecting passenger's liability to or rights against third person—modern cases, 37 ALR4th 565.

#### 10-6-50. Scope of agent's authority; effect of private instructions; dealing with special agent.

The agent's authority shall be construed to include all necessary and usual means for effectually executing it. Private instructions or limitations not known to persons dealing with a general agent shall not affect them. In special agencies for a particular purpose, persons dealing with the agent should examine his authority. (Orig. Code 1863, § 2174; Code 1868, § 2170; Code 1873, § 2196; Code 1882, § 2196; Civil Code 1895, § 3023; Civil Code 1910, § 3595; Code 1933, § 4-301.)

**Law reviews.** — For article surveying the law in Georgia on admissions, see 8 Mercer L. Rev. 252 (1957).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### SCOPE OF AUTHORITY

1. GENERALLY
2. APPARENT AUTHORITY

##### INSTRUCTIONS OR LIMITATIONS ON AUTHORITY

1. GENERALLY
2. INQUIRING AS TO INSTRUCTIONS

### General Consideration

**“General agency”** exists if there is a delegation of authority to do all acts in connection with a particular trade or business. *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 101 S.E. 699 (1919); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

**“General agent”** may either be one clothed with power to do all the principal’s business, of every character, or the general agent may be one empowered to do all acts connected with a particular business or employment. *First Nat’l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868).

A “general agent” is defined to be one who is employed to transact generally all the business of the principal in regard to which the agent is employed, or in other words to do all acts connected with a particular trade, business, or employment, or to transact all the business of the principal of a particular kind or in a particular place. *Raines v. Graham*, 85 Ga. App. 815, 70 S.E.2d 125 (1952).

A “general agent” is one who is authorized to do all acts connected with a particular trade, business, or employment. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**“Special agent”** is one appointed to do a single act or several specified acts. *First Nat’l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868).

A “special agent” is authorized to do one or more specific acts in pursuance of particular instructions or within restrictions necessarily implied from the act to be done. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

A “special agent” is one to whom there is

a delegation to do a single act. *Lewis v. Citizens & S. Nat’l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976).

**Attorney as “special agent.”** — An attorney is not a general agent for all purposes, but the attorney’s authority is limited to the particular purpose for which the attorney was retained and the attorney’s authority to do other things must be inquired into; as a special agent, the attorney has no inherent power to dispose of the client’s property or legal right, but must obtain special authority. *Addley v. Beizer*, 205 Ga. App. 714, 423 S.E.2d 398, cert. denied, 205 Ga. App. 899, 423 S.E.2d 398 (1992).

**Third person may presume general agency continues until notice of revocation.** — Whenever a general agency has been established for any purpose, all persons who have dealt with the agent have a right to assume that the agent’s authority to deal with the third person in behalf of the agent’s principal continues, until notice, express or implied, has been conveyed to the third person that the agency has been revoked. *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 101 S.E. 699 (1919); *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**When acts of dual agent are avoidable.** — If an agent attempts to act for two parties, the effect of the agent’s acts may be avoided by the principal when such dual agency is without the principal’s full knowledge and consent. *Abercrombie v. Ford Motor Co.*, 81 Ga. App. 690, 59 S.E.2d 664, rev’d on other grounds, 207 Ga. 464, 62 S.E.2d 209 (1950).

**Agency cannot be proved by evidence of mere declarations of the alleged agent.** *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Agent's declarations are admissible with other evidence.** — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Third person must prove authority for acts beyond those reasonably necessary.** — A person dealing with a special agent takes the risk as to any extension of the agent's authority beyond that which is authorized, and the burden rests upon the special agent to show authority from the principal for any acts of the agent other than such usual and ordinary acts as are reasonably necessary to a due performance of the particular purpose of the agency. *Wise v. Mohawk Rubber Co.*, 23 Ga. App. 255, 98 S.E. 100 (1919).

**Authority to release must be proved.** — A person relying on a release of the person's contract by an agent must prove authority in the agent to make the release. *International Correspondence Sch. v. Wright*, 47 Ga. App. 861, 171 S.E. 831 (1933).

**Fact employees were acting within scope of employment must be proved.** — Fact that one or more employees were acting within the scope of their employment was a fact to be proved on the trial by competent evidence, if the same was not admitted by the defendants in their answer, and could be proved either by showing specific authority or it might be inferred from all of the facts and circumstances of the case. *Duchess Chenilles, Inc. v. Masters*, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

**Admission of agency in answer binds defendant.** — If plaintiff alleged that a certain individual was the agent of defendant company, and the answer admitted the agency, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant's contract, this admission was binding on defendant, notwithstanding testimony admitted without objection that the individual bought an option on the property and transferred it to the defendant. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Existence and extent of authority are questions of fact.** — Questions of the existence and extent of an agent's authority are generally for the triers of fact. *Allen & Bean,*

*Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

**Apparent authority.** — The question of the scope and extent of an agency's apparent authority is to be decided from all the facts and circumstances in evidence. All questions of law must be decided by the court, and all questions of fact must be decided by the jury. *Warnock v. Elliott*, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

**Extent of written authority is for court.** — If an agent's authority is conferred and defined in writing, the scope or extent of such authority must be determined from the terms of the writing and is to be determined and construed by the court. *Findlay Brick Co. v. American Sewer Pipe Co.*, 18 Ga. App. 446, 89 S.E. 535 (1916).

**Cited in** *Johnson v. Milam*, 38 Ga. App. 568, 144 S.E. 346 (1928); *Miles v. Foy*, 38 Ga. App. 473, 144 S.E. 802 (1928); *Armour Fertilizer Works v. Maddox*, 168 Ga. 429, 148 S.E. 152 (1929); *White v. Dotson*, 41 Ga. App. 436, 153 S.E. 233 (1930); *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930); *Central of Ga. Ry. v. Dabney*, 44 Ga. App. 143, 160 S.E. 818 (1931); *Nowell v. Mayor of Monroe*, 177 Ga. 648, 171 S.E. 136 (1933); *Gibbs v. Carolina Portland Cement Co.*, 50 Ga. App. 229, 177 S.E. 760 (1934); *Newton v. Gulf Life Ins. Co.*, 55 Ga. App. 330, 190 S.E. 69 (1937); *Weathers Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945); *Long Tobacco Harvesting Co. v. Brannen*, 99 Ga. App. 541, 109 S.E.2d 90 (1959); *Bulloch County v. Ritzert*, 99 Ga. App. 655, 109 S.E.2d 618 (1959); *Crown Carpet Mills, Inc. v. C.E. Goodroe Co.*, 108 Ga. App. 327, 132 S.E.2d 824 (1963); *Zanac, Inc. v. Frazier Neon Signs, Inc.*, 134 Ga. App. 501, 215 S.E.2d 265 (1975); *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975); *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 297 S.E.2d 740 (1982); *Glennville Hatchery, Inc. v. Thompson*, 164 Ga. App. 819, 298 S.E.2d 512 (1982); *Holcomb v. Evans*, 176 Ga. App. 654, 337 S.E.2d 435 (1985); *Transus, Inc. v. Crosby*, 196 Ga. App. 880, 397 S.E.2d 135 (1990); *Transouthern Freight Sys. v. Astley*, 201 Ga. App. 521, 411 S.E.2d 501 (1991).

## Scope of Authority

### 1. Generally

**Test of extent of authority.** — The extent of an agent's authority is not determined by



**Scope of Authority (Cont'd)****1. Generally (Cont'd)**

the title affixed to the agent's name, but, as between the agent's principal and third persons, the test is in the authority which the agent actually has or which the agent's principal expressly or impliedly represents the agent as having. *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**One may be called a special agent and yet be given the broadest powers.** *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**First sentence is taken from common law.** This section embodies a sound proposition taken from the common law, that is, that the agent's authority will be construed to include all necessary and usual means for effectuating authority. *Strong v. West*, 110 Ga. 382, 35 S.E. 693 (1900).

**First sentence applies to both general and special agents.** *Callaway v. Barmore*, 32 Ga. App. 665, 124 S.E. 382 (1924); *Star Furn. Co. v. Dubberly*, 46 Ga. App. 178, 167 S.E. 207 (1932).

**Authority of special and general agents.** — The provision of this section that "the agent's authority shall be construed to include all necessary and usual means for effectually executing it" has reference to both special and general agents. *Prudential Ins. Co. of Am. v. Franklin*, 51 Ga. App. 496, 180 S.E. 869 (1935).

While a general agent has broader powers than one selected to do a particular act, the authority in both cases must be construed to include all necessary and usual means for effectually executing the authority. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980 (1903); *Hopkins & Co. v. Armour & Co.*, 8 Ga. App. 442, 69 S.E. 580 (1910).

An agent's authority once established shall be construed to include all necessary and usual means for effectively executing the agent's authority, and this rule applies when the agency is created for general as well as for special purposes. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**Agent may do everything essential to agent's duties.** — An agent to conduct a given business for the agent's principal necessarily has authority to do everything which

is essential to the performance of the agent's duties as agent. *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

**Agent may do everything usual or necessary.** — Express authority to do an act includes as incidental thereto authority to do those things which are usual or necessary to accomplish effectually the act expressly authorized. *McDonald v. Pearre Bros. & Co.*, 5 Ga. App. 130, 62 S.E. 830 (1908).

Authority for an agent to do a thing generally includes authority to do everything usual and necessary for the accomplishment of the main object. *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Agent may use all usual means, unless contrary clearly appears.** — If an agency is created for the performance of an act beneficial to the principal, all the usual modes and means of accomplishing the objects of the agency are included in the agency's creation, unless the contrary clearly appears. *Strong v. West*, 110 Ga. 382, 35 S.E. 693 (1900); *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

The fact that at the time of an accident a truck driver was on the driver's way to the lumberyard to get lumber with which to fasten furniture more securely on the truck does not mean that the driver was deviating from the mission to haul furniture for the employer, since if the driver was moving the furniture under the authority of the master in the first instance, the driver's authority would include all necessary and usual means for effectually accomplishing the task. *Ellison v. Evans*, 85 Ga. App. 292, 69 S.E.2d 94 (1952).

**Rule applies to power of attorney.** — The general rule that an agent's authority shall be construed to include all necessary and usual means for executing the authority has application to the provisions of a power of attorney. *Johnson v. Johnson*, 184 Ga. 783, 193 S.E. 345 (1937).

**Authority does not extend beyond what is necessary or incidental to it.** — The agent's authority under this section does not extend beyond what is necessary or incidental to the authority given. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**Agent may only do what agent may reasonably infer principal desires.** — An agent is

authorized to do, and to do only, what it is reasonable for the agent to infer that the principal desires the agent to do in the light of the principal's manifestations and the facts as the agent knows or should know them at the time the agent acts. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

**When authority to sell inferred.** — Authority to sell the principal's property is inferred only when it is incidental to the transaction, usually accompanies the authority expressly conferred, or is reasonably necessary in accomplishing it. *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

**Authority to obtain execution of prepared contract does not include authority for other agreement.** — Under this section, authority to a special agent to obtain the signature of a seller to a prepared written contract for the sale of a certain amount of cotton, without more, does not include within itself authority to make a parol agreement that the cotton shall not in fact be delivered, but that the parties shall settle on the basis of the difference between the agreed price and the market price at the time for delivery. *Terry v. International Cotton Co.*, 138 Ga. 656, 75 S.E. 1044 (1912).

**Power to purchase includes power to execute note.** — An agent having authority to purchase fertilizer for a company, it will be presumed by virtue of this section that the agent had authority to execute in behalf of the company a note for the payment of the purchase price. *Swift & Co. v. Dawson Paper Shell Pecan Co.*, 24 Ga. App. 625, 101 S.E. 754 (1919).

**Power to make cash purchases does not include power to pledge credit.** — A person having authority from another to use the other's name in making cash purchases for the latter has no authority, as the latter's agent, to make purchases and pledge the principal's credit for their payment. *Morgan v. Georgia Paving & Constr. Co.*, 40 Ga. App. 335, 149 S.E. 426 (1929).

**Authority to sign note does not warrant signing note for larger amount.** — Under this section, if one person authorized another to sign one's name to a note for a certain amount and the latter, instead of so doing, signed a note for a larger amount, it is not an

abuse of power by the agent but an act by the agent wholly unwarranted. *King v. Sparks*, 77 Ga. 285, 1 S.E. 266, 4 Am. St. R. 85 (1886).

**Factor not authorized to pledge or mortgage.** — A factor for the sale of goods is a general agent for that purpose and cannot, as against the owner, pledge or mortgage them to a third party to secure advances made on the agent's own account. *First Nat'l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868).

**Drawing bills of exchange.** — Under this section, according to the evidence in this case, the drawing of foreign bills of exchange by the defendants, as the factors and shipping agents of the plaintiff, was the necessary and usual means to enable the defendants, as such agents, to obtain the proceeds of plaintiff's cotton in sterling bills. *Jones v. J.W. Lathrop & Co.*, 44 Ga. 398 (1871).

**Cotton factor's agent may make terms for shipments.** — A cotton factor's agent, who is authorized to solicit shipments of cotton to the agent's principal, is a general agent for that purpose, and is presumptively authorized to make terms upon which the cotton shall be shipped, received, stored, sold, and handled by the agent's principal. *John Flannery Co. v. James*, 13 Ga. App. 425, 79 S.E. 912 (1913).

**Authority to sell includes authority to agree on price.** — If one is appointed to sell a particular article to a particular person, this confers on the special agent authority to agree on the price; otherwise the appointment is illusory, and not real. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980 (1903); *Hopkins & Co. v. Armour & Co.*, 8 Ga. App. 442, 69 S.E. 580 (1910).

**Authority to collect.** — An agency to sell does not necessarily carry with it an agency to collect. *Walton Guano Co. v. McCall*, 111 Ga. 114, 36 S.E. 469 (1900).

An agency to sell does not necessarily or impliedly or incidentally carry with it the authority to collect. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**Credit manager does not have authority to accept order.** — An acceptance of an order for goods by the credit manager of a corporation is not binding on the corporation when the credit manager neither has authority to make sales nor was held out by the corporation as having such authority, but the



**Scope of Authority (Cont'd)****1. Generally (Cont'd)**

authority to sell was vested in another agent; and the deposit with a traveling salesman of a check as part payment on a proposed sale of goods, at the instance of the credit manager, which check was not accepted by the corporation but was returned to the drawee of the check, would not constitute part payment to the corporation. *W. & J. Sloane Selling Agents, Inc. v. Tampa Chair & Table Co.*, 53 Ga. App. 609, 186 S.E. 761 (1936).

**Collecting agency has authority to employ attorney to sue.** — If one holding a promissory note against another with a claim on certain property as security sends the note and papers evidencing the claims to a collecting agency, a power is created in the latter to procure the services of an attorney, if necessary, to collect the note and enforce the security. *Strong v. West*, 110 Ga. 382, 35 S.E. 693 (1900).

A collecting agency empowered by a patron to collect a claim is authorized to employ an attorney to institute suit on the claim in behalf of the client; the patron becomes the attorney's client, and for the attorney's conduct the patron is as much responsible as if the patron had employed the attorney in the first instance instead of engaging the services of the collecting agency. *Chamberlin Co. of Am. v. Mays*, 96 Ga. App. 755, 101 S.E.2d 728 (1958).

If an Atlanta collecting agency was employed by the defendant to collect a debt, through the medium of a Detroit collecting agency empowered under the terms of a contract with the defendant to sue the claim, to engage the services of the Atlanta agency, and to transmit to the latter the authority conferred upon it, the Atlanta agency was vested with authority to retain a lawyer to handle the litigation necessary to collect the debt, because the agency could not institute a suit on behalf of the defendant. *Chamberlin Co. of Am. v. Mays*, 96 Ga. App. 755, 101 S.E.2d 728 (1958).

**Authority to collect does not authorize receiving anything except cash.** — As a general rule, a special agent or attorney to collect a debt is not authorized to receive anything as a payment thereon except actual cash. *Walton Guano Co. v. McCall*, 111 Ga. 114, 36 S.E. 469 (1900); *Quillan & Bros. v.*

*Wales Adding Mach. Co.*, 34 Ga. App. 135, 128 S.E. 698 (1925).

**Authority to accept less than full amount.**

— Presumptively, an agent is hired to make contracts and not to cancel contracts, and a power to collect money under a contract will not raise a presumption of authority in the agent to vary the terms and accept less than the agreed price. *International Correspondence Sch. v. Wright*, 47 Ga. App. 861, 171 S.E. 831 (1933).

If there is no apparent limitation on an attorney's authority, an attorney at law who has had placed with the attorney an account for collection cannot accept from the debtor, in full accord and satisfaction, anything less than the full amount of the claim, and that in cash; nevertheless, authority to effectuate the collection gives to the attorney implied authority to do everything usual and immediately necessary to accomplish the main purpose of the agency, that of making the collection "in cash." *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

**Authority to endorse check received for full amount.** — An attorney with whom has been placed an account for collection, with no limitation on the attorney's authority as to the manner of collection, on receipt from the debtor of a check in the full amount of the claim and payable to the order of the client, has, without any enabling or permissive authority from the client, authority to endorse the name of the client personally as attorney, in order effectually to liquidate the collection; nor is the rule modified should the attorney, in lieu of taking manual possession of the money, deposit the check either to the attorney's individual account or to the attorney's account as attorney. *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

Action of attorneys with whom a claim was placed for collection in endorsing client's name on check in settlement thereof, by themselves as attorneys, and depositing the check to the attorney's credit, did not constitute the crime of forgery, as the attorneys had authority to so endorse the check; hence,



bank was within the bank's right and authority when the bank cashed or paid the check by deposit to the credit of the attorneys making the collection, and would not, under the facts, be liable to the client of the attorneys, to whom the attorneys may have defaulted in remittance of the proceeds arising from the collection. *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

**Authority to endorse check received if attorney has interest in collection.** — An attorney having an interest in a collection in the nature of a commission for services in effectuating the collection has authority to endorse the name of the attorney's client to whom the check is made payable, individually as attorney, in order that the attorney may deduct the commission fees before remittance of the collection to the client. *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

**Authority to foreclose security deed includes authority to execute required quitclaim reconveyance.** — If the holder of the legal title under a deed to secure debt executed a power of attorney empowering the holder's named attorney in fact to bring suit on papers comprising the deed and evidence of debt, to cause the property to be sold under levy after judgment, and to bid in the property in the name of such holder of the legal title, this authority included, as a "necessary and usual means" of selling the property, the right to execute the quitclaim reconveyance to the debtor, record of which in the clerk's office is made under former Code 1933, §§ 39-202 and 67-1501, a prerequisite to a valid levy and sale of the property. *Johnson v. Johnson*, 184 Ga. 783, 193 S.E. 345 (1937).

**Power to take bond does not include power to agree to conditions.** — Under this section, an ordinary (now judge of the probate court) who was appointed by the Governor to take a bond had no authority to consent to any stipulations or conditions, and any such consent would be in excess of the power conferred upon the ordinary.

*Lewis v. Board of Comm'rs*, 70 Ga. 486 (1883).

**Authority to make minor repairs necessarily includes the authority to employ others to do the work.** *Oconee County v. Rowland*, 107 Ga. App. 108, 129 S.E.2d 373 (1962).

**Deliveryman may obtain assistance of another in changing tire.** — If a servant is employed to take and deliver goods of the master in its truck to customers in another city, and after their delivery to return the truck to the master's place of business, and while the servant is thus en route, a blowout of a heavy tire occurs, the servant, in the absence of contrary instructions, is authorized, so far as reasonably necessary, to obtain the assistance of another in the furnishing of needful light for the work of changing the tire, when the blowout occurs at night. *McGhee v. Kingman & Everett, Inc.*, 49 Ga. App. 767, 176 S.E. 55 (1934).

**Foreman of construction gang has no authority to hire teams.** — Foreman of a construction gang is a special agent with limited powers and has no authority to hire teams for a definite term. *Langston v. Postal Telegraph-Cable Co.*, 6 Ga. App. 833, 65 S.E. 1094 (1909).

**Conditions which enter into validity of contract of insurance at its inception may be waived by the agent, and are waived if so intended, although they remain in the policy when delivered, and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or endorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy.** *National Fire Ins. Co. v. Thompson*, 51 Ga. App. 625, 181 S.E. 101 (1935).

**Agent is without authority to continue cancelled policy.** — If authority of agent is limited by terms of group insurance policy and such policy is cancelled, such agent is without authority to continue such cancelled policy in force, unless such continuation is accepted and agreed to by the officers of the company empowered so to do, or there has been an acceptance by the company of payments of premiums made for such purpose, and such agent is without authority to constitute the employer in group insurance policy the agent of the company to receive premiums for it. *Lancaster v. Travelers Ins. Co.*, 54 Ga. App. 718, 189 S.E. 79 (1936).

**Scope of Authority (Cont'd)****2. Apparent Authority**

**Principal bound by agent's apparent authority.** — The principal is bound when the agent lacks express authority but is possessed of apparent authority. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**"Apparent authority" defined.** — "Apparent authority" is power which results from acts that appear to third persons to be authorized by the principal. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

"Apparent authority" is the power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Basis of apparent authority doctrine.** — The doctrine of apparent authority is based upon the principle that where one of two innocent parties must suffer from the wrongful act of another, the loss should fall upon the one who, by that person's conduct created the circumstances which enabled the third party to perpetuate the wrong and cause the loss. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**Principal's conduct may establish agent's authority.** — The authority of an agent in a particular instance may be established by the principal's conduct and course of dealing. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**Agent is presumed to have authority within apparent scope.** — If a person imposes upon another the duties and responsibilities involving the management and control of a matter of business, the agent will be presumed to have authority to represent the agent's employer in any matter within the scope of the agent's apparent authority. *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**Principal is bound to the extent of the apparent authority the principal has conferred upon the agent,** and not by the actual or express authority, where that differs from the apparent authority. *Fireman's Fund Ins.*

*Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**In the case of a general agency,** the principal is bound by the acts of an agent within the apparent scope of the agent's authority. *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 101 S.E. 699 (1919); *Carmichael v. Silvers*, 90 Ga. App. 804, 84 S.E.2d 668 (1954).

**A general agent may bind the agent's principal** with respect to all matters within the apparent scope of the agent's authority. *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S.E. 1000 (1905).

**Special agent.** — If one holds another out as one's special agent, the principal is bound by the agent's apparent authority to do the particular thing thus authorized, as well as to do any and all things usual and necessary and to employ all usual and necessary means as may be reasonably required, in the due, proper, and ordinary performance of the particular purpose of the appointment. *Wise v. Mohawk Rubber Co.*, 23 Ga. App. 255, 98 S.E. 100 (1919); *Callaway v. Barmore*, 32 Ga. 665, 124 S.E. 382 (1924); *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**If principal's words or conduct cause third person to believe principal consents.** — Apparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on the principal's behalf by the person purporting to act for the principal. *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Estoppel against principal to deny authority.** — Under the doctrine of apparent authority an estoppel is worked against the principal to deny that there was authority, and the principal will not be permitted to prove that the agent's authority was, in fact, less extensive than that with which the agent was apparently clothed. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

**Establishing authority of agent.** — Authority of an agent in a particular instance may be established by the habits, conduct, and course of business of the principal. If one thus holds out to another that one's agent possesses certain authority and this induces or influences others in their dealings with the agent, the principal is estopped to deny that the agent has the authority which, as reasonably



deducible from the conduct of the principal, the agent apparently possesses. *Germain Co. v. Bank of Camden County*, 14 Ga. App. 88, 80 S.E. 302 (1913); *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 101 S.E. 699 (1919); *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968); *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975); *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Justified reliance required for estoppel.**

— In order for estoppel under the doctrine of apparent authority to occur it must appear that the third party dealt with the agent in reliance upon the authority which the principal has apparently conferred upon the agent, and it must appear that a person of ordinary prudence conversant with business usages and the nature of the particular business is justified in assuming that such agent had authority to perform a particular act and deals with the agent upon that assumption. *Interstate Fin. Corp. v. Appel*, 134 Ga. App. 407, 215 S.E.2d 19 (1975).

When an alleged principal, by acts or conduct, has knowingly caused or permitted another to appear as the principal's agent, the principal will be estopped to deny the agency, to the injury of third persons who have in good faith and in reasonable prudence dealt with the apparent agent on the faith of the relation. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

An estoppel is worked against the principal to deny authority if it appears that the third party dealt with the agent in reliance upon the authority apparently conferred upon it by the principal. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**Authority of an agent in a particular instance need not be proved by express contract.** *Germain Co. v. Bank of Camden County*, 14 Ga. App. 88, 80 S.E. 302 (1913); *Atlanta Biltmore Hotel Corp. v. Martell*, 118 Ga. App. 172, 162 S.E.2d 815 (1968); *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Authority to sell does not include apparent authority to release debtor.** — An agent or representative whose duties are merely to sell goods for a principal and collect therefor has no apparent authority under this section to release anyone from an obligation

due to the principal. *Morgan v. Weil Co.*, 31 Ga. App. 611, 121 S.E. 703 (1924).

**Authority to collect and adjust apparently includes authority to release.** — If an agent with authority from a principal to "adjust" and "collect" accounts is sent by the principal to collect an alleged indebtedness due the principal under a particular contract, which contract contemplates that the debtor might under some circumstances turn back to the creditor goods purchased from the creditor under the contract, one is a general agent for the purpose of adjusting and collecting the indebtedness, and it is apparently within the scope of one's authority to accept from purchasers of the debtor goods of the character bought by the debtor under the contract from the creditor, the agent's principal, and also to release the debtor from further liability under the contract, and also to accept payment in release of all liability under the contract of guaranty from the guarantor; and, although the agent may not have actually possessed such authority, a settlement by way of release, so made with one of the guarantors, without knowledge of such limitation, is binding upon the agent's principal. *Rawleigh Co. v. Royal*, 30 Ga. App. 706, 119 S.E. 339 (1923).

**Authority to endorse check includes apparent authority to deposit proceeds.** — If an attorney has authority to endorse a check payable to the attorney's client, the attorney has apparent authority to deposit the proceeds thereof either in the attorney's individual account or the attorney's account as attorney. *John Bean Mfg. Co. v. Citizens Bank*, 60 Ga. App. 615, 4 S.E.2d 924 (1939), overruled on other grounds, *Tifton Bank & Trust Co. v. Knight's Furn. Co.*, 215 Ga. App. 471, 452 S.E.2d 219 (1994).

**Traveling salesperson apparently has authority to transmit instructions as to insuring goods.** — Under this section, since it is a custom of wholesalers to effect insurance on goods shipped by the wholesalers, when requested or instructed so to do by their customers, an ordinary drummer or commercial traveler, who by the terms of employment is authorized to receive and transmit orders but not to close contracts, has apparent authority to receive and transmit instructions as to effecting insurance on goods ordered through the drummer or commercial traveler. *McDonald v. Pearre Bros. & Co.*, 5 Ga. App. 130, 62 S.E. 830 (1908).



**Scope of Authority (Cont'd)****2. Apparent Authority (Cont'd)**

**Real estate salesman apparently has authority to guarantee purchaser's lease will be cancelled.** — A person employed by a real estate broker to act for the person as a "real estate salesman," whose duties are to obtain listings of real estate for sale, "to make sales of real estate just in a general way," and who has "the privilege of making transactions generally," is a general agent for the broker to procure purchasers for real estate listed with the broker for sale; and it is within the scope of the apparent authority of the salesman as the agent of the broker, in negotiating sales of real estate, to bind the principal by an obligation to the purchaser made for the purpose of inducing the purchaser to buy the real estate, and as a part of the consideration moving to the contract for the purchase of the real estate, to guarantee to obtain for the purchaser a cancellation of a lease which the purchaser has as tenant of premises other than that which are the subject matter of the sale. *J.J. Williamson & Sons v. Smith*, 47 Ga. App. 495, 170 S.E. 709 (1933).

**Instructions or Limitations on Authority****1. Generally**

**Authority of attorney of record is fixed by contract and client's instructions.** — An attorney of record is a party's agent in the prosecution of a legal action, and the attorney's authority is determined by the terms of the attorney's contract of employment and the instructions given by the client. *Davis v. Davis*, 245 Ga. 233, 264 S.E.2d 177 (1980).

**Special agent, like broker, derives power from instructions.** — Under former Code 1873, §§ 2184 and 2196, a broker was a special agent and derived the broker's power and authority to bind the principal from the instruction given to the broker by the principal. *Clark & Nunnally v. Cumming & Co.*, 77 Ga. 64, 4 Am. St. R. 72 (1886).

**Special agent cannot bind principal beyond known limitations.** — One who deals with a special agent, knowing at the time the limits within which the agent, under the terms of the agent's appointment, has authority to bind the agent's principal, is bound to act with reference to this knowledge, and cannot hold the principal liable for loss occasioned by acts

of the agent in excess of, or contrary to, the latter's authority in the premises. *Littleton & Lamar v. Loan, Mercantile & Stock Ass'n*, 97 Ga. 172, 25 S.E. 826 (1895), later appeal, 100 Ga. 85, 26 S.E. 83 (1896); *Quillan & Bros. v. Wales Adding Mach. Co.*, 34 Ga. App. 135, 128 S.E. 698 (1925).

Under this section, in special agencies the rule is that if the agent exceeds the special and limited authority conferred upon the agent, the principal is not bound by the agent's acts, but they are mere nullities, so far as the principal is concerned, unless the principal has held the agent out as possessing a more enlarged authority. *Comer v. Foley*, 98 Ga. 678, 25 S.E. 671 (1896); *W. & J. Sloane Selling Agents, Inc. v. Tampa Chair & Table Co.*, 53 Ga. App. 609, 186 S.E. 761 (1936).

**Principal is never bound where third person knows authority was exceeded.** — A principal is not bound by the acts of an agent when those acts are beyond the scope of the agent's authority and the person dealing with the agent knows thereof. *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935).

If limitation on authority of agent is contained in an application for insurance, attached to and made part of policy, and the agent was therefore not acting within the apparent scope of the agent's authority in waiving a breach of condition existing when the policy was issued, the insurer is not bound by the alleged waiver or by any estoppel. *National Fire Ins. Co. v. Thompson*, 51 Ga. App. 625, 181 S.E. 101 (1935).

**Unknown, private instructions cannot affect third persons.** — Private instructions or limitations not known to persons dealing with an agent who assumes to act within the apparent scope of the agent's authority cannot affect the third parties. *Hutson v. Prudential Ins. Co.*, 122 Ga. 847, 50 S.E. 1000 (1905); *Hopkins & Co. v. Armour & Co.*, 8 Ga. App. 442, 69 S.E. 580 (1910).

**Unknown private instructions in case of general agent.** — Under this section, private instructions or limitations not known to persons dealing with a general agent are not binding upon such persons. *Bacon v. Dannenberg Co.*, 24 Ga. App. 540, 101 S.E. 699 (1919).

If it appears, without contradiction, that the agent had entire control of all the business affairs of the agent's sister, the landlord, including the management and control of

the farm, the agent must be held to have been a general agent, and the agent's alleged agreement would be binding on the principal as landlord. This would be true despite any private instructions or limitations upon the agent's authority not known to the person dealing with the agent as general agent. *Nelson v. Fuqua*, 46 Ga. App. 754, 169 S.E. 206 (1933).

If a clerk is left in charge of a mercantile establishment by the proprietors thereof in the proprietors' absence, with authority to conduct the business and to buy goods upon the credit of the proprietors, and with authority to conduct all the correspondence of the business, one is a general agent of the proprietors for the supervision of the establishment and the buying on their credit of goods of a mercantile character and suitable to the business conducted by the proprietors, and since one is such a general agent, limitations upon one's authority as to the amount and character of the purchases, which are unknown to persons dealing with the agent, do not affect them. *Mason v. Rice*, 47 Ga. App. 502, 170 S.E. 829 (1933).

**Unknown private instructions in case of special agent not exceeding necessary and usual means.** — Although the second sentence of this section mentions only general agents, so long as a special agent does not go beyond the necessary and usual means for executing the special agent's agency, the special agent's powers with reference to the particular undertaking are in the nature of those of a general agent to the extent that private instructions or limitations not known to the persons dealing with the special agent cannot affect the other parties. *Callaway v. Barmore*, 32 Ga. App. 665, 124 S.E. 382 (1924); *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

**Secret instructions in case of special agent to sell who fixes price.** — Where, without naming the terms of sale, the principal, in writing authorizes a special agent to sell personal property to a particular person, the authority of such special agent will be construed to include all necessary and usual means for effectually executing it, and such agent has authority to fix the price of the goods, and the purchaser is not bound to take notice of secret instructions given by the principal. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980 (1903).

**Secret instructions do not alter general rule as to authority to use usual means.** —

The rule that whenever an agent is empowered to do a particular thing, the agent is also empowered to use all lawful means to accomplish the thing, would not be altered by any secret instructions given to the agent by the principal, unknown to a third person. *John Flannery Co. v. James*, 13 Ga. App. 425, 79 S.E. 912 (1913).

## 2. Inquiring as to Instructions

**Third persons must inquire as to special agent's authority.** — According to this section, persons dealing with an agent appointed for a particular purpose are bound to inquire as to the extent of the agent's authority. *Baldwin Fertilizer Co. v. Thompson & McAlister*, 106 Ga. 480, 32 S.E. 591 (1899); *Harris Loan Co. v. Elliott & Hatch Book Typewriter Co.*, 110 Ga. 302, 34 S.E. 1003 (1900); *Carter v. Pembroke Nat'l Bank*, 11 Ga. App. 479, 75 S.E. 824 (1912); *Germain Co. v. Bank of Camden County*, 14 Ga. App. 88, 80 S.E. 302 (1913); *Quillan & Bros. v. Wales Adding Mach. Co.*, 34 Ga. App. 135, 128 S.E. 698 (1925); *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (1960); *Addley v. Beizer*, 205 Ga. App. 714, 423 S.E.2d 398, cert. denied, 205 Ga. App. 899, 423 S.E.2d 398 (1992); *Continental Ins. Co. v. Gazaway*, 216 Ga. App. 125, 453 S.E.2d 91 (1994); *Turnipseed v. Jaje*, 267 Ga. 320, 477 S.E.2d 101 (1996).

Even though buyers had no actual knowledge of limitations on the agent's authority to make representations on the quality of the carpet, the buyers were charged with a duty to discover the extent of the agent's authority. *Bruce v. Calhoun First Nat'l Bank*, 134 Ga. App. 790, 216 S.E.2d 622 (1975).

**Third persons must take notice of special agent's instructions.** — Every man deals with a special agent at the man's peril and is bound to take notice of the agent's instructions. *First Nat'l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868).

Those who deal with a special agent are charged with notice of the extent of the latter's authority, and if such agent makes a settlement not within the scope of the agency, the settlement is not binding on the principal. *Baldwin Fertilizer Co. v. Thompson & McAlister*, 106 Ga. 480, 32 S.E. 591 (1899).

One entering into a 15-year lease contract



**Instructions or Limitations on****Authority (Cont'd)****2. Inquiring as to Instructions (Cont'd)**

executed by an agent in behalf of a purported principal is charged with notice that the agent's authority to execute the lease is required by law to be in writing and is under a duty to inquire and ascertain whether such written authority exists and what the limits of the authority are, and such person is guilty of negligence in failing to make such an inquiry. *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (1960); *Union Camp Corp. v. Dyal*, 460 F.2d 678 (5th Cir.), cert. denied, 409 U.S. 849, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972).

**Third persons must take notice of special agent's instructions only if included in examined authority.** — Even if a letter is treated as creating a special agency to sell particular goods to a particular person, the purchaser was only required to examine the authority and was not bound by private instructions not included in the writing. *Bass Dry Goods Co. v. Granite City Mfg. Co.*, 119 Ga. 124, 45 S.E. 980 (1903); *Hopkins & Co. v. Armour & Co.*, 8 Ga. App. 442, 69 S.E. 580 (1910).

**Failure to inquire bars recovery from agent for misrepresenting authority.** — One who enters into a 15-year lease contract executed by an agent in behalf of a purported principal without making due inquiry into the agent's authority is precluded from recovering damages from the agent either on the ground that the agent contractually misrepresented the fact that the agent had authority, either expressly or impliedly, or on the ground that the agent fraudulently misrepresented that the agent had authority to execute the lease as agent. *Nalley v. Whitaker*, 102 Ga. App. 230, 115 S.E.2d 790 (1960).

**Rule applies to guardian.** — Since a guardian is in effect a special agent of the law to

manage the estate of a person non sui juris, it is incumbent upon all persons dealing with the guardian/special agent to examine the agent's authority. *Georgia R.R. Bank & Trust Co. v. Liberty Nat'l Bank & Trust Co.*, 180 Ga. 4, 177 S.E. 803 (1934).

**Railroad ticket agent.** — Under this section, a purchaser of railroad accommodations from a ticket agent was not required to communicate with the principal and verify the agent's actual authority. *Bryant v. Atlantic Coast Line R.R.*, 19 Ga. App. 536, 91 S.E. 1047 (1917).

**Agents for indemnity company issuing unusual bond.** — If a person dealing with agents, having a written power of attorney to execute bonds, has had experience in dealing with indemnity companies and knows that the bond is an unusual obligation for an indemnity company to write and is outside the ordinary range of the business of indemnity companies, and that the bond is not executed on the regular blank form used by the indemnity company, and is not executed in the office of indemnity company or in office of its authorized agents, but is executed in office of the person dealing with agents, this does not constitute knowledge of facts sufficient to put the person dealing with agents, as a prudent person, on inquiry as to the lack of the agents' authority to bind indemnity company. *Independence Indem. Co. v. Industrial Realty Co.*, 46 Ga. App. 637, 168 S.E. 122, aff'd, 178 Ga. 45, 172 S.E. 38 (1933).

**Principal may waive objection to want of authority.** — Person who deals with a special agent must examine the special agent's authority and determine at the person's own risk whether the particular act to be done is within such authority, but this does not prevent the principal from waiving the principal's right to object to the agent's want of authority. *Germain Co. v. Bank of Camden County*, 14 Ga. App. 88, 80 S.E. 302 (1913).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 68 et seq., 263.

**Am. Jur. Pleading and Practice Forms.** — 7 Am. Jur. Pleading and Practice Forms, Conspiracy, § 2.

**C.J.S.** — 2A C.J.S., Agency, §§ 128, 147, 154.

**ALR.** — Authority of agent to assent to account stated, 2 ALR 71.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or apparently authorized, to find a market, 8 ALR 203; 105 ALR 718.

Implied authority of servant or agent to bind employer for services of undertaker or other funeral expenses, 29 ALR 457.



- Liability of undisclosed principal on sealed contract, 32 ALR 162.
- Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 ALR 393.
- Authority of claim agent as regards terms or condition of settlement, 87 ALR 1277.
- Power of sale as including power to mortgage, 92 ALR 882.
- Agent's authority to collect or receive payment as including implied, apparent, or ostensible authority to do so before maturity of obligations, 100 ALR 389.
- Implied, apparent or ostensible, and presumed authority of bank cashier to surrender or waive some right of bank, 108 ALR 713.
- Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.
- Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 116 ALR 457; 83 ALR2d 1282.
- Agent's disregard of principal's instructions where power coupled with an interest, 162 ALR 1182.
- Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 ALR2d 406.
- Authority of agent to make payment on behalf of principal, as regards statute of limitations, 31 ALR2d 139.
- Agent's authority to agree contemporaneously with sale to repurchase or resell or for return of personal property, 34 ALR2d 510.
- Power of real estate broker to execute contract of sale in behalf of principal, 43 ALR2d 1014.
- Implied or apparent authority of agent to purchase or order goods or merchandise, 55 ALR2d 6.
- Authority of agent to borrow money for principal, 55 ALR2d 1215.
- Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.
- Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.
- Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 ALR2d 1389.
- Doctrine of apparent authority as applied to agent of municipality, 77 ALR3d 925.

**10-6-51. Principal bound by acts within scope of authority; no right to ratify in part.**

The principal shall be bound by all the acts of his agent within the scope of his authority; if the agent shall exceed his authority, the principal may not ratify in part and repudiate in part; he shall adopt either the whole or none. (Orig. Code 1863, § 2172; Code 1868, § 2168; Code 1873, § 2194; Code 1882, § 2194; Civil Code 1895, § 3021; Civil Code 1910, § 3593; Code 1933, § 4-302.)

**Law reviews.** — For note discussing governmental immunity from tort liability in Georgia, see 5 Ga. St. B.J. 494 (1969).

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION  
WHEN PRINCIPAL BOUND**

- 1. GENERALLY
- 2. EFFECT OF PARTIAL RATIFICATION

### General Consideration

**Section amplifies § 10-6-56.** — This section, providing that the principal shall be bound by all the acts of the principal's agent within the scope of the principal's authority, was a mere amplification of former Code 1933, § 4-307, and the same was true of former Code 1933, § 4-315, insofar as it referred to scope of authority. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Authority to do things necessary to accomplish object.** — Agent's authority generally includes authority to do everything necessary for accomplishment of main object. *Maggioni v. L.P. Maggioni & Co.*, 159 Ga. App. 463, 283 S.E.2d 682 (1981).

**Sufficiency of allegations of agency to bind principal.** — One way of alleging agency so as to bind the principal for the acts of the agent is to allege that the act was committed by the agent as agent for the principal and within the scope of the agent's employment. *Harris v. Barnes*, 100 Ga. App. 412, 111 S.E.2d 147 (1959).

Since the plaintiff's pleading failed to show that the alleged agent of the defendant bank was a general agent, or that the agent was a special agent with authority to bind the bank, but showed that the sheriff had dealt with the person as an agent of the bank, the pleading failed to show that the person had any power or authority to enter into any contract binding the defendant in the manner alleged. *First Joint Stock Land Bank v. Pitts*, 48 Ga. App. 805, 173 S.E. 732 (1934).

**Allegations showing ratification.** — Since the alleged acts of a finance company regarding an automobile sale contract included their acceptance of the benefits in the form of a note, conditional sale contract, payments on the note, and the insurance premium, this indicated a ratification of the agreement made by the president of the automobile dealership that assigned the contract to the finance company that credit life insurance would be procured, and showed such part performance on the part of the conditional buyer as to estop the finance company from attacking the agreement as oral and in conflict with any written provisions. In this situation, there appeared to be no conflict present, but rather an explanation of any ambiguity and a showing as to what constituted the entire contract. *Con-*

*sumers Fin. Corp. v. Lamb*, 217 Ga. 359, 122 S.E.2d 101 (1961).

**Admission of agency in answer binding on defendant.** — Since the plaintiff alleged that a certain individual was the agent of defendant company, and the answer admitted it, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant's contract, this admission was binding on defendant notwithstanding testimony admitted without objection that the individual bought an option on the property and transferred it to the defendant. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Agency cannot be proved by evidence of mere declarations of the alleged agent.** *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Agent's declarations are admissible with other evidence.** — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, declarations of the alleged agent are admissible in evidence. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Acts of agents of defendant may be proved to prove waiver by defendant.** — Act of fire insurance agents in waiving the necessity of filing proof of loss would be the act or conduct of the defendant, and accordingly the court did not err in admitting in evidence testimony of certain witnesses, over objection of defendant, as to the acts and conduct of such agents, for the purpose of showing waiver of proof of loss. *Concordia Fire Ins. Co. v. Hardman*, 63 Ga. App. 320, 11 S.E.2d 79 (1940).

**Whether acts within scope of employment question of fact to be proved.** — Fact that one or more employees were acting within the scope of their employment was a fact to be proved on the trial by competent evidence, if the same was not admitted by the defendants in their answer, and could be proved either by showing specific authority or it might be inferred from all of the facts and circumstances of the case. *Duchess Chenilles, Inc. v. Masters*, 84 Ga. App. 822, 67 S.E.2d 600 (1951).

**Contract admissible if agent's authority or ratification by principal inferable.** — Court

did not err in admitting the contract in evidence since the jury was authorized to infer that the contract was signed by an agent held out by partnership as having authority or ratified by the conduct of a partner during the existence of the partnership. *Hardin v. Atlanta Gas Light Co.*, 71 Ga. App. 63, 30 S.E.2d 121 (1944).

**Cited in** *Germain Co. v. Bank of Camden County*, 14 Ga. App. 88, 80 S.E. 302 (1913); *Harms v. Entelman*, 21 Ga. App. 295, 94 S.E. 276 (1917); *Central of Ga. Ry. v. Dabney*, 44 Ga. App. 143, 160 S.E. 818 (1931); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Star Furn. Co. v. Dubberly*, 46 Ga. App. 178, 167 S.E. 207 (1932); *Mathews v. Fort Valley Cotton Mills*, 179 Ga. 580, 176 S.E. 505 (1934); *Gibbs v. Carolina Portland Cement Co.*, 50 Ga. App. 229, 177 S.E. 760 (1934); *Ellison v. Franklin*, 181 Ga. 205, 181 S.E. 583 (1935); *American Ins. Co. v. Hattaway*, 194 Ga. 15, 20 S.E.2d 406 (1942); *Meeks v. Taylor*, 138 F.2d 458 (5th Cir. 1943); *Meeks v. Adams La. Co.*, 49 F. Supp. 489 (S.D. Ga. 1943); *Atlanta Laundries, Inc. v. Goldberg*, 71 Ga. App. 130, 30 S.E.2d 349 (1944); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *McDilda v. State*, 85 Ga. App. 348, 69 S.E.2d 627 (1952); *Moultrie Nat'l Bank v. Travelers Indem. Co.*, 181 F. Supp. 444 (M.D. Ga. 1959); *Owens v. White*, 103 Ga. App. 459, 119 S.E.2d 581 (1961); *Cheeley v. Wilcher*, 106 Ga. App. 680, 127 S.E.2d 844 (1962); *Aetna Cas. & Sur. Co. v. Brooks*, 218 Ga. 593, 129 S.E.2d 798 (1963); *Higgins v. D & F Elec. Co.*, 110 Ga. App. 790, 140 S.E.2d 99 (1964); *Mitchell v. Gay*, 111 Ga. App. 867, 143 S.E.2d 568 (1965); *Sasser v. Coastal States Life Ins. Co.*, 113 Ga. App. 17, 147 S.E.2d 5 (1966); *Gay v. AMOCO*, 115 Ga. App. 18, 153 S.E.2d 612 (1967); *Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co.*, 128 Ga. App. 779, 197 S.E.2d 839 (1973); *Lewis v. Citizens & S. Nat'l Bank*, 139 Ga. App. 855, 229 S.E.2d 765 (1976); *Ferguson v. Bishop*, 150 Ga. App. 469, 258 S.E.2d 143 (1979); *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841 (1980); *Maloy v. Ewing*, 157 Ga. App. 95, 276 S.E.2d 145 (1981); *Wallace v. Lessard*, 248 Ga. 575, 285 S.E.2d 14 (1981); *National Carloading Corp. v. Security Van Lines*, 164 Ga. App. 850, 297 S.E.2d 740 (1982); *Hutchens v. State*, 174 Ga. App. 507, 330

S.E.2d 436 (1985); *Holcomb v. Evans*, 176 Ga. App. 654, 337 S.E.2d 435 (1985); *Gymco Constr. Co. v. Architectural Glass & Windows, Inc.*, 884 F.2d 1362 (11th Cir. 1989); *Lipsey Motors v. Karp Motors, Inc.*, 194 Ga. App. 15, 389 S.E.2d 537 (1989); *Caribbean Lumber Co. v. Anderson*, 205 Ga. App. 415, 422 S.E.2d 267 (1992); *Pioneer Concrete Pumping Serv., Inc. v. T & B Scottdale Contractors*, 218 Ga. App. 596, 462 S.E.2d 627 (1995); *Brannen/Goddard Co. v. Collin Equities, Inc.*, 227 Ga. App. 352, 489 S.E.2d 106 (1997); *McDaniel v. Hensons', Inc.*, 229 Ga. App. 213, 493 S.E.2d 529 (1997); *Patriot Gen. Ins. Co. v. Millis*, 233 Ga. App. 867, 506 S.E.2d 145 (1998).

## When Principal Bound

### 1. Generally

**Principal responsible for acts in line of duty.** — What an agent does in the line of duty devolved upon the agent by the agent's superior will make the latter responsible, under this section and § 10-6-60. *Maddox & Rucker v. Cunningham*, 68 Ga. 431, 45 Am. R. 500 (1882).

The principal is bound by the authorized acts of the principal's agent as effectively as if the principal had been present and personally committed the act. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950).

**Principal responsible for acts of one partner if partnership is agent.** — If an owner of property employs a partnership as the owner's agent to sell the property, the owner will be bound by the acts and representations of each of the partners within the real or apparent scope of the agency, although the owner may have dealt with the partnership through one of the partners only. *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930).

**If agency disclosed, principal is maker of authorized instrument.** — If in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter, and not the agent, will be regarded as the maker of the instrument, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930).



**When Principal Bound (Cont'd)****1. Generally (Cont'd)**

**Master's property is subject to lien for labor and materials furnished through servant.** — Since the relationship of master and servant existed between an owner and builder, the master became liable for the acts of the servant as the master's agent within the scope of the agent's employment and therefore was subject to a personal judgment, and the master's property was subject to liens for the labor and materials which had been furnished to the master through such servant and of which the master had received the benefit. *Christian v. Bremer*, 199 Ga. 285, 34 S.E.2d 40 (1945).

**Members of a union are chargeable with the act of the officers of the union** in allowing a strike in another plant since the officers were clearly acting within the scope of their authority as defined by the union's constitution. *Ford Motor Co. v. Abercrombie*, 207 Ga. 464, 62 S.E.2d 209 (1950).

**Principal bound without knowledge, if acts were authorized.** — Authorized acts of the agent are binding upon the principal, although the principal has no knowledge thereof. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Principal is bound when the agent lacks express authority but is possessed of apparent authority.** *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**Principal estopped from denying agent's apparent authority.** — If agent has certain authority from principal by reason of principal's conduct and course of dealing as well as express agency contract, and thus induces another to deal with the principal's agent as such, the agent's principal is estopped to deny that the agent has such authority which, as reasonably appears or is deducible from conduct of parties (principal and agent), agent apparently has. *Hutsell v. U.S. Life Title Ins. Co.*, 157 Ga. App. 845, 278 S.E.2d 730 (1981).

**Estoppel is worked against the principal to deny authority** if it appears that the third party dealt with the agent in reliance upon the authority apparently conferred upon it by the principal. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**Principal bound even though agent is also agent for other party.** — An insurer may not clothe an agent with apparent authority to enter into an insurance contract and then escape the usual effects of estoppel because the agent is also the agent of the insured party. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**Principal is responsible for the torts of the principal's agent** when the agent is acting on behalf of the principal. *DeDavies v. U-Haul Co.*, 154 Ga. App. 124, 267 S.E.2d 633 (1980).

**Agent's absconding with an appearance bond fee** did not affect the validity of the bond, and forfeiture was authorized when the principal failed to appear. *C & F Bonding Co. v. State*, 224 Ga. App. 188, 480 S.E.2d 240 (1997).

**Fraud.** — The sheriff, being liable, under a former statute, to the plaintiff in a trover action for the sheriff's failure to take a good replevy bond, could maintain an action against the principal of the agent who committed a fraud upon him in procuring his acceptance of the replevy bond and in obtaining from him, to be turned over to his principal, the property seized in the trover action. *First Joint Stock Land Bank v. Pitts*, 48 Ga. App. 805, 173 S.E. 732 (1934).

**Principal may be criminally liable for agent's act.** — Under statutes positively forbidding certain acts irrespective of the motive or intent of the actor, a principal or master may be criminally liable for the principal's agent's or employee's act done within the scope of the agent's employment. *Lunsford v. State*, 72 Ga. App. 700, 34 S.E.2d 731 (1945).

**Principal only bound by acts within scope of agent's authority.** — The principal is only bound for the acts of the agent within the scope of the agent's authority. *Baldwin Fertilizer Co. v. Thompson & McAlister*, 106 Ga. 480, 32 S.E. 591 (1899).

A general agent may bind the agent's principal by any act within the scope of the agent's authority; the agent may do all acts proper for the accomplishment of the end or such as are usual in matters of this kind, but the agent cannot bind the principal by an act outside of the object of the agent's appointment. *First Nat'l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868).

**Undisclosed principal.** — A person cannot be held liable as an undisclosed principal unless the alleged agent who made the contract had actual authority as an agent to bind the principal. *Morgan v. Georgia Paving & Constr. Co.*, 40 Ga. App. 335, 149 S.E. 426 (1929).

**Principal not bound by acts outside scope.** — The principal is not bound by the acts of the agent outside the scope of the agent's authority. *First Joint Stock Land Bank v. Pitts*, 48 Ga. App. 805, 173 S.E. 732 (1934).

**Limitation on scope known to third person.** — A principal is not bound by the acts of an agent when these acts are beyond the scope of the agent's authority and the person dealing has notice thereof, under this section and §§ 10-6-21 and 10-6-50. *Cotton States Life Ins. Co. v. Scurry*, 50 Ga. 48 (1873); *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935).

**Limitation on power to procure attorney for collection.** — An agent to procure a competent attorney to collect a note, though the note is without negotiable words, is clothed with power to make the contract for its collection, unless the agent's agency is restricted and that restriction is made known to the attorney at the time the contract for collection is made. *Barclay v. Hopkins*, 59 Ga. 562 (1877).

**Waiver of breach of condition as to insurance policy.** — If limitation on authority of agent is contained in an application for insurance, attached to and made part of the policy, and the agent was therefore not acting within the apparent scope of the agent's authority in waiving a breach of condition existing when the policy was issued, the insurer is not bound by the alleged waiver or by any estoppel. *National Fire Ins. Co. v. Thompson*, 51 Ga. App. 625, 181 S.E. 101 (1935).

**Act ratified by principal.** — An act done by an agent in excess of the agent's authority does not bind the principal unless ratified by the latter. *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954).

**Duty to defend.** — General liability insurers of a contractor were held to have a duty to defend the owner of a real estate project, because their agent had the actual or apparent authority to issue certificates of insurance to the owner, and to bind their obligations to the owner, under Georgia agency

law. *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co.*, 337 F. Supp. 2d 1339 (N.D. Ga. 2004).

**Estoppel of principal to deny liability.** — Notwithstanding knowledge by the principal of unauthorized acts of the principal's agent, the principal is not chargeable therewith unless the principal ratifies such acts or for other reasons is estopped to deny the principal's liability therefor. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Receipt by principal of benefits of transaction.** — If the principal has obtained the benefits of the transaction in which the draft was given by the agent, the injured party may bring an action on the original transaction against the principal. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

If for some time alleged agent of defendant had purchased agricultural products for defendant with drafts drawn upon the defendant, on which drafts plaintiff bank advanced to defendant's agent the cash, the defendant was bound by such acts of the defendant's agent and estopped to deny that such person was acting as the defendant's agent or set up that the defendant was not liable for the amount of plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

**Act ratified by principal without intention.** — By retaining money paid after knowledge that the money's source was the principal's credit, through an unauthorized assumption of authority by an agent, the principal ratifies the act irrespective of any intent to do so. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Principal's knowledge of all material facts.** — In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. *City of Atlanta v. Smith*, 84 Ga. App. 815, 67 S.E.2d 480 (1951).

The act of an insurance company in retaining the premiums without knowledge of the facts did not amount to a ratification of the unauthorized act of the agent in reinstating a lapsed policy. *Independent Life &*



**When Principal Bound (Cont'd)****1. Generally (Cont'd)**

*Accident Ins. Co. v. Pantone*, 80 Ga. App. 426, 56 S.E.2d 153 (1949).

When the fact of agency is to be proved by the subsequent ratification and adoption of the act by the principal, there must be evidence of previous knowledge on the part of the principal of all the material facts. *Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 118 Ga. App. 861, 165 S.E.2d 887 (1968).

In applying this section, ratification is effective only with full knowledge of all material facts, and a principal, in adopting the acts of a purported agent, is not obligated for the whole of a transaction when the acts of the purported agent are not fully disclosed. *Southeastern Fid. Fire Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 118 Ga. App. 861, 165 S.E.2d 887 (1968).

**Principal must ratify or disaffirm promptly after learning of unauthorized act.**

— If an agent without authority enters into a contract on behalf of a principal, the principal, upon discovery of the circumstances, has a choice either to ratify or disaffirm the contract made in the principal's behalf, but the principal must act promptly and within a reasonable time. Once the choice has been made to ratify, the contract may no longer be disaffirmed. *Southern Motors of Savannah, Inc. v. Krieger*, 86 Ga. App. 574, 71 S.E.2d 884 (1952), overruled on other grounds, *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

**Knowledge of agent does not give principal notice.** — Knowledge of all the facts by the principal is essential to ratification. A principal is not put on notice of the unauthorized act of an agent by the mere knowledge of the agent of the acts the agent personally has done in excess of the agent's authority. *Gaulding v. Courts*, 90 Ga. App. 472, 83 S.E.2d 288 (1954).

**Third persons may presume general agency continues until notified of revocation.** — Whenever a general agency has been established for any purpose, all persons who have dealt with the agent have a right to assume that the agent's authority to deal with them in behalf of the agent's principal continues until notice, express or implied, has been conveyed to them that the agency

has been revoked. *Arrington & Blount Ford, Inc. v. Jinks*, 154 Ga. App. 785, 270 S.E.2d 27 (1980).

**Payment to agent does not relieve principal of liability to third person.** — Since a travel agent was defendant's disclosed agent in making arrangements for hotel accommodations with plaintiff, and defendant paid the agent for the hotel charges but the agent failed to pay plaintiff, defendant was bound for the unpaid debt where it appeared that the plaintiff had not chosen to make the agent its debtor, dealing with the agent alone, and that the exclusive credit was given to the agent. *Southeastern Foam Prods., Inc. v. Hilton Hotels Corp.*, 149 Ga. App. 372, 254 S.E.2d 494 (1979).

**Acts held within scope of authority.** — Because a corporation was organized, not only to build a schoolhouse, but also to supervise and carry on a school, when it appointed and held out to the world its superintendent as general agent, it became liable under this section for the contracts made by such agent within the scope of its business entrusted to the agent, including not only teaching, but also the making of such publications as would advance the interests of the academy entrusted to the agent. *Georgia Military Academy v. Estill*, 77 Ga. 409 (1886).

Under former Civil Code 1910, §§ 3593 and 3598, an agent authorized to sell mules in behalf of the agent's principal had authority to agree with a purchaser that if a mule which appeared to be sick did not recover, the seller will repay the purchase money. *Turner Bros. v. Manley*, 14 Ga. App. 215, 80 S.E. 680 (1914).

Under former Civil Code 1910, §§ 3593, 3595 and 3598, if a warehouse company placed an agent in charge of its warehouse for the purpose of dealing with the public and as such the agent had authority to receive, weigh, and give receipts for cotton, making a charge of 50¢ for 30 days, which other evidence showed included a charge for insurance, the agent's agreements within the scope of the agent's authority would bind the company. *Farmers Ginnery & Mfg. Co. v. Thrasher*, 144 Ga. 598, 87 S.E. 804 (1916).

Under this section, a bank will not be heard to plead that its vice-president exceeded the vice-president's authority as such



officer in receiving a special deposit for the bank. *Marietta Trust & Banking Co. v. Faw*, 31 Ga. App. 507, 121 S.E. 244 (1924).

If the owner of an office building, through the operator of an elevator as the owner's agent, operates an elevator in the building, it is manifestly the duty of the operator, as such agent of the owner, to take on and let off persons using the elevator, and if the operator of an elevator refuses to permit a person in the elevator to leave the elevator, the agent is acting within the scope of the agent's employment as agent for the owner of the building. *Turney v. Rhodes*, 42 Ga. App. 104, 155 S.E. 112 (1930).

Conditions which enter into the validity of a contract of insurance at its inception may be waived by the agent, and are waived if so intended, although the conditions remain in the policy when delivered, and limitations therein upon the authority of the agent to waive such conditions otherwise than in writing attached to or endorsed upon the policy are treated as referring to waivers made subsequently to the issuance of the policy. *National Fire Ins. Co. v. Thompson*, 51 Ga. App. 625, 181 S.E. 101 (1935).

**Authority to sell for cash.** — In view of this section, a purchaser is charged with notice that an agent is only authorized to sell for cash; a sale on credit may be treated as void by the principal. *Whitley v. James*, 121 Ga. 521, 49 S.E. 600 (1904).

**Acts held not within scope of authority.** — Power to make restricted endorsement will not authorize a general endorsement in blank. *Exchange Bank v. Thrower*, 118 Ga. 433, 45 S.E. 316 (1903).

By virtue of this section, if less than the amount of an execution is received from one of joint defendants therein, under an agreement made or authorized by the plaintiff that the payment thus received shall relieve that defendant from further liability, the agreement will discharge the other defendants; but such an agreement by a sheriff, made without authority from the plaintiff, will not have that effect. *Swicord v. Waxelbaum*, 23 Ga. App. 297, 97 S.E. 891 (1919).

By virtue of this section, if an owner of cotton shipped it to factors and as an agent of another shipped cotton of the principal to the same factors, the owner could not, without special authority, authorize the factors to

use money standing to the credit of the principal on the books of the factors to cover any deficit in the accounts or in the margins when the value of the owner's own cotton shipped to the factors became less than the advances of the latter. This is true, however general and broad the agent's power as agent may have been, unless the agent was expressly authorized by the principal to use the funds of the latter for the purpose indicated. *Whiteley v. Garrett & Calhoun, Inc.*, 152 Ga. 437, 110 S.E. 209 (1921).

Truck driver employed by the owner of the truck to deliver goods acts outside the scope of the driver's employment when the driver, for the driver's own pleasure and without the knowledge of the employer, invites another to ride on the truck, then the employer is not liable to the driver's guest for injury caused by negligence of the driver. *Morris v. Fruit Co.*, 32 Ga. App. 788, 124 S.E. 807 (1924).

If one is employed by a master to drive a motor vehicle, the master is not liable for the negligence of another procured by the employee without authority as a substitute driver unless the master subsequent to the act ratifies the employment of the substitute. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961) (ratification shown).

**Issues of fact as to agent's authority.** — While a business seller claimed that an employee of a brokerage company was not the seller's agent and thus did not bind the seller to a new closing date under O.C.G.A. § 10-6-51, the employee was named as the seller's listing agent and the seller knew that the employee might have given the purchaser some sort of verbal extension to postpone the closing date; thus, issues of material fact remained as to the employee's actual or apparent authority. *Santaniello v. Bennett*, 296 Ga. App. 548, 675 S.E.2d 282 (2009).

**Correct instruction as to signing for another who signs by mark.** — While, where a person authorizes another to execute a written instrument for the person, in the person's presence, it is not necessary, in order to constitute the act of the person actually signing the instrument the act and deed of the person authorizing the person to do so, that the person so authorizing should touch

**When Principal Bound (Cont'd)****1. Generally (Cont'd)**

the pen, a charge by the court that if a person authorizes another in the person's presence to sign the instrument for the person and does touch the pen and make the person's mark, the act of the party making the signature is the act and deed of the person so authorizing, states a correct proposition of law. *East Point Lumber Co. v. Chandler*, 46 Ga. App. 361, 167 S.E. 787 (1933).

**Instructions as to master's liability held not erroneous.** — If the judge charged the jury that if the person in charge of the defendant's car at the time of the injury was driving it "as the servant or agent of the defendant," the defendant would be responsible for any negligence of which the driver might be guilty, but the driver did not amplify this statement by adding that such alleged acts of negligence by the servant must have been done in the prosecution of or within the scope of the master's business, it was held that such a charge cannot be accounted as reversible error, for, while a master is bound by the acts of the servant only when the latter is acting within the scope of the servant's authority under this section and § 51-2-2, still, since the charge limited the accountability of the master for the negligence of the servant to the servant's acts when done "as the servant or agent of the defendant," this should be taken as the equivalent of a statement that the acts must have been done within the scope of the master's business. *Collier v. Schoenberg*, 26 Ga. App. 496, 106 S.E. 581 (1921).

Charge of the court that "if in the prosecution of the master's business the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**2. Effect of Partial Ratification**

**Principal must ratify or repudiate in whole.** — If, in cases where an agent exceeds

the agent's authority, the principal must ratify or repudiate in whole, there can be no tenable grounds for argument that, when an agent does not exceed the agent's authority, the principal may ratify in part and repudiate in part the contract made on the principal's behalf. *Savage v. Western Union Tel. Co.*, 198 Ga. 728, 32 S.E.2d 785 (1945).

**Accepting portion of agent's collection ratifies collection in toto.** — If an unauthorized agent collects the entire amount owing on a note and the principal accepts a portion of the proceeds and consents that the person making the collections may use the remainder for a short time, the principal will be held to have ratified the collection in toto. *Roberts v. Bank of Eufaula*, 20 Ga. App. 221, 92 S.E. 1015 (1917).

**Retention of benefits ratifies whole transaction.** — A bank cannot be heard to plead that its vice-president exceeded the vice-president's authority as such officer in receiving a special deposit, since the retention by it of the net proceeds of the transaction amounts to a ratification by it of the whole transaction under this section. *Marietta Trust & Banking Co. v. Faw*, 31 Ga. App. 507, 121 S.E. 244 (1924).

**Ratification of agent's agreements.** — While an agent to rent has no implied power to bind the landlord to a provision that the tenant shall make repairs to be paid for out of the rents accruing, if the agent exceeds the agent's authority by such an agreement, the landlord cannot solemnly claim that rent shall be paid the landlord at the figure which the landlord's agent and the tenant agreed to upon the condition regarding improvements without becoming bound to all of the terms and conditions upon which the landlord's agent and the tenant agreed, resulting in fixing the rent at that price; under this section, the landlord must, as a matter of law be held to have ratified the agreement in whole as made by the landlord's agent. *Sikes v. Carter*, 30 Ga. App. 539, 118 S.E. 430 (1923).

**Partial payment of invoice.** — Even though a company's sales vice president purchased advertising without authority, evidence that the company made a partial payment of the amount due several months after the advertisement was purchased, published, and invoiced reflected a ratification by the company as a matter of law. *Thomas*



Register of Am. Mfrs., Inc. v. Proto Sys. Elec. Packaging, Inc., 221 Ga. App. 779, 471 S.E.2d 235 (1996).

**Agent's representations in consummating contract.** — If one purporting to act as agent exceeds the agent's authority, the principal cannot ratify in part and repudiate in part, and therefore the principal cannot accept and retain the fruits of a contract so made by another in the principal's behalf without becoming bound by the representations of the person so purporting to act for the principal in consummating the agreement. *Lancaster v.*

*Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930); *Hawthorne Indus. v. Attaway Assocs.*, 153 Ga. App. 155, 264 S.E.2d 663 (1980).

**Partial acceptance of order does not bind principal if agent lacked authority to make sale.** — A seller's partial acceptance of an order given the seller's traveling salesman, who was not authorized to do more than receive and transmit orders and was unauthorized to make unconditional sale, was held not to bind the seller to fill unaccepted portion under this section. *Dannenberg Co. v. Hughes*, 30 Ga. App. 83, 116 S.E. 892 (1923).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 176, 198, 199, 262, 263.

**C.J.S.** — 2A C.J.S., Agency, §§ 51, 64.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Implied authority of servant or agent to bind employer for services of undertaker or other funeral expenses, 29 ALR 457.

Validity of contract negotiated by agent acting for both parties, 48 ALR 917.

Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 ALR 711.

Right of purchaser from agent or dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 ALR 393.

Liability of principal for overdraft drawn by agent and paid by bank, 58 ALR 816.

Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 ALR 915.

Authority of claim agent as regards terms or condition of settlement, 87 ALR 1277.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 ALR 895.

Acceptance by insurance agent of something other than money or insured's money obligation in payment of premium, 93 ALR 654.

Acceptance by collection agent authorized to receive money only, of something else upon which he realized money, as binding principal, 94 ALR 784.

Misrepresentations by one party's agent, who was not authorized in that regard, as ground of rescission by the other party, 95 ALR 763.

Liability of infant for torts of his employee or agent, 103 ALR 487.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Insurance company's responsibility for torts of agent causing physical injury to person or damage to property, 116 ALR 1389.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

Liability of attorney or law firm for conduct of employee or member of firm in connection with investment of funds of client, 136 ALR 1110.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Master's liability for injuries to nonemployee caused by servant's negligence in use of instrumentality different from that authorized, 166 ALR 877.

Dealer's liability for negligent operation



of car by prospective purchaser or one acting for him, 31 ALR2d 1445.

Authority of officer or agent to bind corporation as guarantor or surety, 34 ALR2d 290.

Implied or apparent authority of agent selling personal property to make warranties, 40 ALR2d 285.

Salesman's power to pledge employer's or principal's personal property, 49 ALR2d 1271.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 ALR2d 10.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 ALR2d 15; 93 ALR3d 826.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 ALR2d 1389.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 ALR3d 1135.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 ALR3d 777.

Liability of one contracting for private

police security service for acts of personnel supplied, 38 ALR3d 1332.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 ALR3d 843.

Insured's ratification, after loss, of policy procured without his authority, knowledge, or consent, 52 ALR3d 235.

Imputation of servant's or agent's contributory negligence to master or principal, 53 ALR3d 664.

Liability of travel agents for injuries on tour, 53 ALR3d 1310.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

Doctrine of apparent authority as applied to agent of municipality, 77 ALR3d 925.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 ALR3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Liability of travel publication, travel agent, or similar party for personal injury or death of traveler, 2 ALR5th 396.

## **10-6-52. Ratification relates back to agent's act; how act ratified; no revocation of ratification.**

A ratification by the principal shall relate back to the act ratified and shall take effect as if originally authorized. A ratification may be express or implied from the acts or silence of the principal. A ratification once made may not be revoked. (Orig. Code 1863, § 2170; Code 1868, § 2166; Code 1873, § 2192; Code 1882, § 2192; Civil Code 1895, § 3019; Civil Code 1910, § 3591; Code 1933, § 4-303.)

**Law reviews.** — For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986).

## **JUDICIAL DECISIONS**

### **ANALYSIS**

GENERAL CONSIDERATION

RELATION BACK OF RATIFICATION

IMPLIED RATIFICATION

### General Consideration

**“Ratification” defined.** — “Ratification” is the affirmance by a person of a prior act which did not bind the person but which was done or professedly done on the person’s account, whereby the act, as to some or all persons, is given effect as if originally authorized by the person. *Higgins v. D & F Elec. Co.*, 110 Ga. App. 790, 140 S.E.2d 99 (1964).

**Principal may by ratification or by failure to repudiate acts of principal’s alleged agent become bound.** *Klingbeil v. Renbaum*, 146 Ga. App. 591, 246 S.E.2d 698 (1978).

The act of one holding oneself out as agent in consummating a sale for one’s principal may be ratified by the principal, even if the agent was unauthorized in the first place to make the sale, and such ratification may be implied from the acts or silence of the principal. If a principal is informed by the principal’s agent of what the agent has done, unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

**Corporation’s president.** — If the president of a corporation, merely by virtue of the president’s office, has no power to bind the company by contract, the authority may be shown by ratification by the corporation of the contracts made by the corporation’s president. *Jack Fred Co. v. Lago*, 96 Ga. App. 675, 101 S.E.2d 165 (1957).

**Attorney purporting to represent party.** — While as a general rule a party is not bound by the acts of an attorney who purports to represent the party, but without being employed so to do, and need not accept any benefits to the party as a result of such unauthorized appearance, the party may do so by ratifying the attorney’s acts as in other cases of agency. *Felker v. Johnson*, 189 Ga. 797, 7 S.E.2d 668 (1940).

**Substitute driver procured without authority.** — If one is employed by a master to drive a motor vehicle, the master is not liable for the negligence of another procured by the employee without authority as a substitute driver unless the master subsequent to the act ratifies the employment of the substitute. *Carter v. Bishop*, 209 Ga. 919, 76 S.E.2d 784 (1953); *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961) (ratification shown).

**One committing forgery.** — When one purports to act as the agent of another, even by forgery, the principal for whom the agent purports to act may ratify the act. *Southern Fed. Sav. & Loan Ass’n v. Firemen’s Benevolent Ass’n*, 72 Ga. App. 663, 34 S.E.2d 674 (1945).

**Ratification must be unconditional.** — A promise afterwards made by a planter to a merchant to pay for oats if the planter’s overseer will approve the bill is not an unconditional act and therefore cannot amount to a ratification of the act of overseer in buying the oats. *Render v. Jones Mercantile Co.*, 33 Ga. App. 394, 126 S.E. 159 (1925).

**Act must be such as principal could have authorized.** — The principal cannot ratify that which the principal had no power to authorize. *Harrison v. McHenry*, 9 Ga. 164, 52 Am. Dec. 435 (1850); *Ozburn v. Woolworth*, 106 Ga. 459, 32 S.E. 581 (1899).

**Act must be done for person adopting it.** — An act cannot be ratified unless done for and in behalf of the person adopting it and attempting to ratify it. *Render v. Jones Mercantile Co.*, 33 Ga. App. 394, 126 S.E. 159 (1925).

The doctrine of ratification is not applicable against a person as to an act of one who did not assume to act in the person’s name or under authority from that person. *Smith v. Pope*, 100 Ga. App. 369, 111 S.E.2d 155 (1959); *Citizens & S. Realty Investors v. L.G. Balfour Co.*, 152 Ga. App. 852, 264 S.E.2d 304 (1980).

**Ratification of the act of one who volunteers to act as agent is valid.** *D. Goode & Son v. Rawlins*, 44 Ga. 593 (1872).

**Principal must have actual knowledge of unauthorized act.** — The unauthorized act of an agent, done in the principal’s behalf, cannot be ratified by the principal without actual knowledge of the act. *Penn Mut. Life Ins. Co. v. Blount*, 165 Ga. 193, 140 S.E. 496 (1927).

**Principal’s knowledge of all other material facts.** — Ratification of an unauthorized act of an agent, to be binding on the principal, must be made with full knowledge, on the part of the principal, of all material facts relating to the act in question. *Ludden & Bates Southern Music House v. McDonald*, 117 Ga. 60, 43 S.E. 425 (1903); *American Harrow Co. v. Dolvin*, 119 Ga. 186, 45 S.E. 983 (1903).

**General Consideration (Cont'd)**

Knowledge of all the facts is essential to a ratification. *Penn Mut. Life Ins. Co. v. Blount*, 33 Ga. App. 642, 127 S.E. 892 (1925).

Before a principal can be bound by a ratification of the act of an agent, the principal must at the time of ratification have full knowledge of all the material facts by which the principal is to be bound. *Weather Bros. Transf. Co. v. Jarrell*, 72 Ga. App. 317, 33 S.E.2d 805 (1945).

The act of an insurance company in retaining the premiums without knowledge of the facts did not amount to a ratification of the unauthorized act of the agent in reinstating a lapsed policy. *Independent Life & Accident Ins. Co. v. Pantone*, 80 Ga. App. 426, 56 S.E.2d 153 (1949).

In order to allege a good cause of action as to ratification, it must be shown that the ratifying body, such as a city council, had full knowledge of all material facts in connection with the transaction in question. *City of Atlanta v. Smith*, 84 Ga. App. 815, 67 S.E.2d 480 (1951).

**Principal's knowledge of material facts necessary.** — Agency may be established by the subsequent ratification and adoption of the act by the principal, but there must be some evidence of the principal's knowledge of the material facts. *Shirley v. Couch*, 177 Ga. App. 436, 339 S.E.2d 648 (1986).

**Knowledge at time ratification made.** — Ratification involves knowledge of the facts on the part of the person ratifying at the time when the ratification is made. *Dolvin v. American Harrow Co.*, 125 Ga. 699, 54 S.E. 706, 28 L.R.A. (n.s.) 785 (1906); *Dolvin v. American Harrow Co.*, 131 Ga. 300, 62 S.E. 198 (1908).

**Mere knowledge of alleged agent insufficient.** — If agency is sought to be proved by ratification, it must appear that the principal had full knowledge of all material facts in connection with the transaction in question and such knowledge must have been acquired by the principal otherwise than by the mere knowledge of the agent, the ratification of whose acts is contended for. *Kephart v. Gulf Ref. Co.*, 59 Ga. App. 432, 1 S.E.2d 221 (1939).

**Sealed authority unnecessary to ratify instrument not under seal.** — If an instrument

is not a contract under seal, no writing under seal is required to ratify the actions taken in behalf of the principal. Hence, the authority of the agent to execute such a contract is not required to be given in writing and under seal. *Klingbeil v. Renbaum*, 146 Ga. App. 591, 246 S.E.2d 698 (1978).

**Ratification cures agent's mistake.** — A contract made by an agent for the agent's principal is binding on the latter, though a mistake has been made therein by the agent, if such contract is ratified and acted on by the principal. *Southern Ry. v. White*, 108 Ga. 201, 33 S.E. 952 (1899).

Ratification, whether soon or late, is the equivalent of an original command and cures any defect in the execution of the agent's power. *Whitley v. James*, 121 Ga. 521, 49 S.E. 600 (1904).

**Ratification once made may not be revoked.** *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

**Burden of proving a ratification is on the party asserting ratification.** *Padgett v. Collins*, 89 Ga. App. 769, 81 S.E.2d 309 (1954).

**Jury question.** — Whether or not a ratification has resulted is usually a question of fact to be determined by the jury. *Gray, Bedell & Hughes v. Bass*, 42 Ga. 270 (1871); *Charles P. Burr & Co. v. William H. Howard & Sons*, 58 Ga. 564 (1877); *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923); *Thompson v. Neely & Wilcox*, 32 Ga. App. 131, 123 S.E. 171 (1924).

Whether or not the facts and circumstances of the particular case show a ratification of the acts of one alleged to have been acting for the defendant principal is ordinarily a question for the jury. *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961).

Whether a ratification occurred is usually a question for a jury. *Wielgorecki v. White*, 133 Ga. App. 834, 212 S.E.2d 480 (1975).

While director of municipal recreation authority, who made the purchases in question, had neither actual nor implied authority to act for city, a fact issue existed as to whether the city appropriated the goods purchased to the city's own use after abolishing the authority, as one who accepts possession of goods and permits them to be used for one's benefit cannot defeat an action for the purchase price by denying that the per-



son who purchased them had authority to act as one's agent. *Got-It Hdwe. & Gifts, Inc. v. City of Ashburn*, 155 Ga. App. 214, 270 S.E.2d 380 (1980).

**Pleading raising question of ratification makes case for jury.** — If the question of ratification by the principal of unauthorized acts of the agent by the acceptance of the fruits of the agent's conduct arises, the plaintiff's pleading makes a case for submission to the jury. *First Joint Stock Land Bank v. Pitts*, 48 Ga. App. 805, 173 S.E. 732 (1934).

**Cited in** *Moon Motor Car Co. v. Savannah Motor Car Co.*, 41 Ga. App. 231, 152 S.E. 611 (1930); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Mathews v. Fort Valley Cotton Mills*, 179 Ga. 580, 176 S.E. 505 (1934); *Liberty Mut. Ins. Co. v. Neal*, 55 Ga. App. 790, 191 S.E. 393 (1937); *Flescher Knitting Mills v. Union Dry Goods Store*, 58 Ga. App. 659, 199 S.E. 646 (1938); *American Ins. Co. v. Hattaway*, 194 Ga. 15, 20 S.E.2d 406 (1942); *Meeks v. Taylor*, 138 F.2d 458 (5th Cir. 1943); *Meeks v. Adams La. Co.*, 49 F. Supp. 489 (S.D. Ga. 1943); *Barron v. Chamblee*, 199 Ga. 591, 34 S.E.2d 828 (1945); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *McDilda v. State*, 85 Ga. App. 348, 69 S.E.2d 627 (1952); *Owens v. White*, 103 Ga. App. 459, 119 S.E.2d 581 (1961); *Builders Homes of Ga., Inc. v. Wallace Pump & Supply Co.*, 128 Ga. App. 779, 197 S.E.2d 839 (1973); *Wiley v. Georgia Power Co.*, 134 Ga. App. 187, 213 S.E.2d 550 (1975); *Ferguson v. Bishop*, 150 Ga. App. 469, 258 S.E.2d 143 (1979); *Hilliard v. Canton Whsle. Co.*, 151 Ga. App. 184, 259 S.E.2d 182 (1979); *Clyde Chester Realty Co. v. Stansell*, 151 Ga. App. 357, 259 S.E.2d 639 (1979); *Fradley v. Irvin*, 245 Ga. 307, 264 S.E.2d 866 (1980); *Wallace v. Lessard*, 248 Ga. 575, 285 S.E.2d 14 (1981); *Lanier Ins. Agency, Inc. v. Citizens Bank*, 168 Ga. App. 424, 309 S.E.2d 419 (1983); *Dedousis v. First Nat'l Bank*, 181 Ga. App. 425, 352 S.E.2d 577 (1986); *Lipsey Motors v. Karp Motors, Inc.*, 194 Ga. App. 15, 389 S.E.2d 537 (1989); *Gift Collection, Ltd. v. Small Bus. Admin.*, 738 F. Supp. 487 (N.D. Ga. 1989); *Church of God, Inc. v. Shaw*, 194 Ga. App. 694, 391 S.E.2d 666 (1990); *Hendrix v. First Bank*, 195 Ga. App. 510, 394 S.E.2d 134 (1990); *Underground Festival, Inc. v. McAfee Eng'r Co.*, 214 Ga. App. 243, 447 S.E.2d 683 (1994); *Medley v.*

*Boomershine Pontiac-GMC Truck, Inc.*, 214 Ga. App. 795, 449 S.E.2d 128 (1994); *Pioneer Concrete Pumping Serv., Inc. v. T & B Scottsdale Contractors*, 218 Ga. App. 596, 462 S.E.2d 627 (1995).

### Relation Back of Ratification

**Ratification relates back to the act ratified.** *Penn Mut. Life Ins. Co. v. Blount*, 33 Ga. App. 642, 127 S.E. 892 (1925).

Ratification by a principal relates back to the act ratified and takes effect as if originally authorized. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Intervening equity.** — As a general rule, ratification relates back to the act ratified under this section, except where there is an intervening equity. *Atlanta Buggy Co. v. Hess Spring & Axle Co.*, 124 Ga. 338, 52 S.E. 613, 4 L.R.A. (n.s.) 431 (1905); *Bridwell v. Gate City Term. Co.*, 127 Ga. 520, 56 S.E. 624, 10 L.R.A. (n.s.) 909 (1907); *Coursey v. Consolidated Naval Stores Co.*, 22 Ga. App. 538, 96 S.E. 397 (1918); *Mendel v. Converse & Co.*, 30 Ga. App. 549, 118 S.E. 586 (1923).

**Intervening rights of third persons.** — Ratification generally relates back to the act ratified, but where a mortgage is executed by a debtor to a creditor without the creditor's knowledge and not delivered to the latter but to the clerk for registration, and after it is recorded, the creditor accepts and thus ratifies it, judgment liens obtained after the delivery to the clerk but before the ratification by the creditor take precedence over the mortgage. *Evans v. Coleman*, 101 Ga. 152, 28 S.E. 645 (1897).

A ratification does not so relate back as to affect the rights of other parties which have intervened and accrued between the time of the unauthorized act and that of the ratification. *Graham v. Williams*, 114 Ga. 716, 40 S.E. 790 (1902).

Ratification does not affect antagonistic rights of others acquired between the unauthorized act and its ratification. *Dalton Buggy Co. v. Wood, Son & Bro.*, 7 Ga. App. 477, 67 S.E. 121 (1910).

A principal cannot ratify the acts of an agent so as to affect the intervening rights of third parties. *Padgett v. Collins*, 89 Ga. App. 769, 81 S.E.2d 309 (1954).

### Implied Ratification

**Ratification need not be by word or writing.** — It is not essential that the principal should expressly ratify by word or writing; it may be done by implication or by the subsequent acts or conduct of the parties. *Bush v. Fourcher*, 3 Ga. App. 43, 59 S.E. 459 (1907).

**Implication from acts or silence of the principal.** *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

**Receipt of benefit.** — An unauthorized contract made by an assumed agent, or by a real agent in excess of the agent's authority, becomes obligatory upon the principal if the latter receives the benefit of the contract. *Merchants' Bank v. Central Bank*, 1 Ga. 418, 44 Am. Dec. 665 (1846); *Haney School Furn. Co. v. Hightower Baptist Inst.*, 113 Ga. 289, 38 S.E. 761 (1901); *Coursey v. Consolidated Naval Stores*, 22 Ga. App. 538, 96 S.E. 397 (1918); *Hixon v. Hinkle*, 156 Ga. 341, 118 S.E. 874 (1923); *Swearingen v. Virginia-Carolina Chem. Co.*, 19 Ga. App. 658, 91 S.E. 1050 (1927).

If the principal obtained the benefits of the transaction in which the draft was given by the agent, the injured party may bring an action on the original transaction against the principal. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

If for some time alleged agent of defendant had purchased agricultural products for defendant, with drafts drawn upon the defendant, on which drafts plaintiff bank advanced to defendant's agent the cash, the defendant was bound by such acts of the agent and estopped to deny that such person was acting as an agent or set up that the defendant was not liable for the amount of plaintiff's money advanced on such unpaid drafts for the purchase of the farm products for the defendant which the defendant received and retained. *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935).

If the alleged acts of a finance company regarding an automobile sale contract included their acceptance of the benefits in the form of a note, conditional-sale contract, payments on the note, and the insurance premium, this indicated a ratification of the agreement made by the president of the automobile dealership that assigned the contract to the finance company that credit life insurance would be procured, and showed such part performance on the part of the

conditional buyer as to estop the finance company from attacking the agreement as oral and in conflict with any written provisions. In this situation, there appeared to be no conflict present, but rather an explanation of any ambiguity and a showing as to what constituted the entire contract. *Consumers Fin. Corp. v. Lamb*, 217 Ga. 359, 122 S.E.2d 101 (1961).

If a corporation, knowing all of the facts, accepts and uses the proceeds of an unauthorized contract executed in the corporation's behalf without authority, the corporation may be bound because of ratification. *Western Am. Life Ins. Co. v. Hicks*, 135 Ga. App. 90, 217 S.E.2d 323, cert. dismissed, 235 Ga. 603, 221 S.E.2d 27 (1975).

Retaining possession of and using for any considerable period of time property received constitutes a ratification of an unauthorized contract for exchange. *Southern Motors of Savannah, Inc. v. Krieger*, 86 Ga. App. 574, 71 S.E.2d 884 (1952), overruled on other grounds, *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

In accepting the fruits of a contract for exchange of automobiles and using the new automobile for the principal's exclusive benefit for a period of almost six weeks of intensive driving, during which time the principal fails to notify the seller of the new car of any intention to disaffirm the contract on the principal's part, such acts of the principal constitute a ratification of the unauthorized act of exchange of the agent so as to render the principal liable for the payment of the purchase money. *Southern Motors of Savannah, Inc. v. Krieger*, 86 Ga. App. 574, 71 S.E.2d 884 (1952), overruled on other grounds, *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

**Application in divorce action.** — Plaintiff had full knowledge of his former wife's unauthorized withdrawal of funds from his "money market account" at the time he entered into his divorce settlement agreement with her. Plaintiff and his ex-wife also agreed in their property settlement agreement that "all personal property in the [ex-wife's] possession and control or in [her] name was to be and become [her] sole and separate property, free and clear of any claims of [plaintiff] whatsoever." Consequently, since plaintiff knowingly received the benefit of his former wife's withdrawal,



he could not later make a claim against the bank that her withdrawal was unauthorized. *Hyer v. Citizens & S. Nat'l Bank*, 188 Ga. App. 452, 373 S.E.2d 391 (1988).

**Intent where benefits retained.** — An unauthorized act or transaction by an agent in excess of the agent's authority becomes binding and obligatory upon the principal if the latter, with knowledge of the facts, receives and retains the benefit thereof, since such acceptance of the benefit amounts to an implied ratification of such act, whether the principal intends thereby to ratify it or not. *Kelley v. Carolina Life Ins. Co.*, 48 Ga. App. 106, 171 S.E. 847 (1933).

By retaining money paid after knowledge that its source was the principal's credit, through an unauthorized assumption of authority by an agent, the principal ratifies the act irrespective of any intent to do so. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Act done for principal who has knowledge of facts.** — It is only where an act is done for and in behalf of another that it can be ratified by the latter's acceptance of the benefits accruing to the latter thereunder, and then only with knowledge of the facts. *Morgan v. Georgia Paving & Constr. Co.*, 40 Ga. App. 335, 149 S.E. 426 (1929).

Ratification cannot be implied if the act assertedly ratified was not done in behalf of and for the benefit of the party assertedly ratifying it. *Regional Pacesetters, Inc. v. Halpern Enters., Inc.*, 165 Ga. App. 777, 300 S.E.2d 180 (1983).

**Inference from failure to repudiate within reasonable time.** — Ratification pursuant to the provision of this section will be inferred if the agent has notified the principal of the agent's act and the principal has not repudiated it. Unless the principal repudiates the act promptly or within a reasonable time, a ratification will be presumed. *Whitley v. James*, 121 Ga. 521, 49 S.E. 600 (1904); *Brooke & Co. v. Cunningham Bros.*, 19 Ga. App. 21, 90 S.E. 1037 (1916); *Pilcher & Dillon v. Smith*, 31 Ga. App. 606, 121 S.E. 701 (1924); *Thompson v. Neely & Wilcox*, 32 Ga. App. 131, 123 S.E. 171 (1924); *Harris v. Underwood*, 208 Ga. 247, 66 S.E.2d 332 (1951).

If in the presence of the principal, sells goods of the latter, as the principal's agent, without objection, the tacit consent of

the principal will be presumed and will bind the principal. *N. Owsley & Son v. Woolhopter*, 14 Ga. 124 (1853); *Crockett v. Chattahoochee Brick Co.*, 95 Ga. 540, 21 S.E. 42 (1894).

An unauthorized transaction by an agent may be validated by the principal's acquiescence therein for an unreasonable time, after knowledge of such act. *Nations v. Russell*, 68 Ga. App. 329, 22 S.E.2d 756 (1942).

If an agent without authority enters into a contract on behalf of a principal, the principal, upon discovery of the circumstances, has a choice either to ratify or disaffirm the contract made in the principal's behalf, but the principal must act promptly and within a reasonable time. Once the choice has been made to ratify, the contract may no longer be disaffirmed. *Southern Motors of Savannah, Inc. v. Krieger*, 86 Ga. App. 574, 71 S.E.2d 884 (1952), overruled on other grounds, *Brown v. Techdata Corp.*, 238 Ga. 622, 234 S.E.2d 787 (1977).

If a master (principal) has knowledge that the master's servant (agent) pursues a given course of conduct and the master takes no steps to prevent such conduct, the master is liable for the consequences. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

**What is unreasonable time is generally for jury.** — If, after knowledge of what the agent has done, the principal makes no objection for an unreasonable time, a ratification results by operation of law. Generally, the question of what is an unreasonable period of time is one for the jury. *Klingbeil v. Renbaum*, 146 Ga. App. 591, 246 S.E.2d 698 (1978).

**Ratification of an agent's act is presumed from slight circumstances,** and is as effective as if the act was originally authorized, and is not revocable. *Napier v. Pool*, 39 Ga. App. 187, 146 S.E. 783, cert. denied, 39 Ga. App. 843 (1929).

While ratification of an unauthorized act of an agent is not to be presumed, the acts of a principal are to be liberally construed in favor of an adoption of the acts of the agent, and when the unauthorized act of the agent is done in the execution of power conferred, but in excess or misuse thereof, a presumption of ratification readily arises from slight acts of confirmation, or from mere silence or



**Implied Ratification (Cont'd)**

acquiescence, or where the principal receives and holds the fruits of the agent's act. *Kelley v. Carolina Life Ins. Co.*, 48 Ga. App. 106, 171 S.E. 847 (1933); *Nations v. Russell*, 68 Ga. App. 329, 22 S.E.2d 756 (1942).

The acts and conduct of the principal are construed liberally in favor of the agent. Slight circumstances and small matters will sometimes suffice to raise the presumption of ratification. *Burke County Bd. of Educ. v. Raley*, 104 Ga. App. 717, 123 S.E.2d 272 (1961).

**Mere retention of employee does not ratify actions.** — Mere retention of an employee after knowledge of the employee's wrongful act is not sufficient alone to amount to ratification by the employer of the act. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Ratification of unauthorized acts by employer.** — In a breach of contract suit involv-

ing an employment contract, the trial court properly entered a judgment in favor of the former employee after a bench trial as there was sufficient evidence to support the conclusion that even though the person who signed the employment contract was not authorized to execute the employment contract on behalf of the employer, the employer ratified the agreement by failing to never object to the agreement. In addition, the employer paid the former employee at least two times directly. *A & S Group, Inc. v. Murray*, 291 Ga. App. 331, 661 S.E.2d 701 (2008).

**Retaining property to which principal is already entitled.** — A principal already entitled to possession of property is not bound by an unauthorized agreement by which the principal is put in possession thereof, nor by retaining possession will the principal be charged with a ratification. *Baldwin Fertilizer Co. v. Thompson & McAlister*, 106 Ga. 480, 32 S.E. 591 (1899).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 176, 179, 180, 198, 200.

**C.J.S.** — 2A C.J.S., Agency, §§ 51, 65 et seq., 93.

**ALR.** — Doctrine of ratification invoked to charge one person with responsibility for the negligence of another not authorized to act for him, 85 ALR 915.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

What amounts to ratification by owner of unauthorized employment by broker or agent of subagent to procure a sale or purchase of property, 136 ALR 1418.

What amounts to ratification by principal or master of libel or slander by agent or servant, 139 ALR 1066.

Variance between allegation and proof as regards identity of servant or agent for whose acts defendant is sought to be held responsible, 139 ALR 1152.

Principal's liability for false arrest or imprisonment caused by agent or employee, 92 ALR2d 15; 93 ALR3d 826.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Discharge of debtor who makes payment by delivering checks payable to creditor to latter's agent, where agent forges creditor's signature and absconds with proceeds, 49 ALR3d 843.

Insured's ratification, after loss, of policy procured without his authority, knowledge, or consent, 52 ALR3d 235.

Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 ALR3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

### 10-6-53. Form in which agent acts immaterial.

The form in which the agent acts is immaterial; if the principal's name is disclosed and the agent professes to act for him, it will be held to be the act of the principal. (Orig. Code 1863, § 2173; Code 1868, § 2169; Code 1873, § 2195; Code 1882, § 2195; Civil Code 1895, § 3022; Civil Code 1910, § 3594; Code 1933, § 4-304.)

## JUDICIAL DECISIONS

**Disclosed principal liable when agent not dealt with alone.** — When a travel agent was defendant's disclosed agent in making arrangements for hotel accommodations with plaintiff, defendant paid the agent for the hotel charges, but the agent failed to pay plaintiff, defendant was bound for the unpaid debt since it did not appear that plaintiff had chosen to make the agent its debtor, dealing with the agent alone, and that exclusive credit was given to the agent. *Southeastern Foam Prods., Inc. v. Hilton Hotels Corp.*, 149 Ga. App. 372, 254 S.E.2d 494 (1979).

**Principal's name and agent's acting for principal must appear to bind principal.** — This section allows latitude as to the form in which an agent may contract, but in order to bind a principal the name of the principal must be disclosed, and the agent must profess to act for the principal. *Moore v. Adams*, 153 Ga. 709, 113 S.E. 383, 23 ALR 925 (1922).

**Disclosure of name must be in writing where required for principal to bind himself.** — This section does not purport to authorize an agent to contract for the agent's principal in a form which would be insufficient if the principal acted personally; if it is essential that the contracting party's name should appear in the writing where the party is contracting for the party, it is also necessary where the party contracts through an agent. *Moore v. Adams*, 153 Ga. 709, 113 S.E. 383, 23 ALR 925 (1922).

**Duly constituted agent is not responsible if agent has named principal.** — It is a general rule — standing on strong foundations, and pervading every system of jurisprudence — that if an agent is duly constituted, and names the agent's principal, and contracts in the agent's name, the principal is responsible and not the agent. *Gibbs v. Carolina Portland Cement Co.*, 50 Ga. App. 229, 177 S.E. 760 (1934).

**Instrument specifying agency and naming principal is binding on principal.** — If in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter, and not the agent, will be regarded as the maker of the instrument, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930); *Dover v. Burns*, 186 Ga. 19, 196 S.E. 785 (1938).

**Instrument binding on principal in individual capacity.** — An agent acting within the scope of the agent's authority may bind the agent's principal, although signing in the agent's individual capacity only, when it appears from the instrument that the principal and not the agent is intended to be bound. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**"Agent for" designated person in signature is merely descriptive.** — The expression "agent for" a designated person following the name in a signature attached to a contract is merely *descriptio personae*, and its presence in the signature does not of itself necessarily render the contract the undertaking of the designated principal, acting by and through the signer as the principal's agent. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Evidence that contract is principal's.** — Under former Code 1882, §§ 2195 and 2211, when two notes were given to the plaintiff for cotton seed for Green J. Jordan's plantation and signed, "J. Spradley, Agent for Green J. Jordan," this was a contract of Jordan, the principal, and not the contract of Spradley, the agent; more especially, as

the evidence in the record disclosed the fact that the agency was made known to the payee of the notes at the time the notes were given. *Tiller v. Spradley*, 39 Ga. 35 (1869).

**Acts held those of principal, not agent.** — Under former Code 1873, § 2195, a deed made by a trustee under former Code 1873, § 2563 and signed by the trustee as “trustee of M.R.” did not bind the trustee individually as to the warranty. *Shacklett v. Ransom*, 54 Ga. 350 (1875).

Under this section, a contract signed by a person who adds after the person’s signature the words “general manager,” is not the individual undertaking of the person signing, if the contract shows on the contract’s face that the contract was made in behalf of another, or if, in a suit for the contract’s breach, this fact appears by extrinsic evidence. *Raleigh & Gaston R.R. v. Pullman Co.*, 122 Ga. 700, 50 S.E. 1008 (1905).

An executory contract between “F.C. Miller, administrator of the estate of E.P. Miller,” and H, properly construed, was an agreement by F.C. Miller in the representative capacity. *Miller v. Hines*, 145 Ga. 616, 89 S.E. 689 (1916).

If the check of the wife is signed by husband as agent for his wife, the latter being named, it is in effect and in fact a check drawn by the wife upon an account kept in the bank in the name of the husband as agent for the wife. *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930).

When two attorneys in fact were expressly authorized by power of attorney to execute deed in the names of the principals “or otherwise,” under the facts, the security deed would be construed to be a conveyance by them in behalf of themselves and as attorneys in fact for the other heirs at law. *Cocke v. Bank of Dawson*, 180 Ga. 714, 180 S.E. 711 (1935).

**Contract held individual undertaking, not agency.** — Under this section, a contract by one described as president of an association indicated an individual undertaking rather than an agency. *Candler v. DeGive*, 133 Ga. 486, 66 S.E. 244 (1909).

**Disclosure of agency must be plead in action against principal.** — In an action against a principal based on a contract allegedly entered into by an agent, where the plaintiff did not allege that the agent revealed that the agent was acting for the

principal, the plaintiff’s pleading was insufficient. *Georgia Cas. & Sur. Co. v. Hardrick*, 211 Ga. 709, 88 S.E.2d 394 (1955).

**Admission of agency in answer binding on defendant.** — When plaintiff alleged that a certain individual was the agent of defendant company, and the answer admitted it, and no amendment was made striking that part of the answer, and the trial proceeded on the only issue left, to wit, whether the defendant had complied with the defendant’s contract, this admission was binding on defendant, notwithstanding testimony admitted without objection that the individual bought an option on the property and transferred it to the defendant. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**When issue of who is bound is question of fact.** — Under this section, omitting cases of contracts under seal, negotiable instruments, and those in which there is an express declaration in writing or an intention and agreement on the part of an agent to be individually bound, usually where the agent contracts in the agent’s own name, but with the agent’s principal known, the question as to whether the principal or agent is bound is one of fact. *Gibbs v. Carolina Portland Cement Co.*, 50 Ga. App. 229, 177 S.E. 760 (1934).

**Parol evidence may show contract was in fact principal’s.** — Under former Civil Code 1895, §§ 3022 and 3039, it was competent to show by parol evidence that the contract nominally that of the agent was in fact that of the principal. *Fitzgerald Cotton Oil Co. v. Farmers Supply Co.*, 3 Ga. App. 212, 59 S.E. 713 (1907).

If it does not appear from the face of the contract whether it is the signer’s individual undertaking or is that of the signer’s principal acting through the agent as the principal’s agent, it may, especially where the contract is not executed under seal, be shown extrinsically that the contract is that of the principal, executed for and in the principal’s behalf by the principal’s agent. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Where principal different from one indicated in signature.** — Where the question as to who is the real contracting party is one of fact which can be extrinsically determined, it may be shown that the person signing a



contract in one's own name, with descriptive terms of agency after one's signature, did so for and in behalf of another as the principal, by and through oneself as agent, although one's principal may be another and different person from the one indicated as the signer's principal in the descriptive terms attached to one's signature. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Agency cannot be proved by evidence of mere declarations of the alleged agent.** *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Agent's declarations admissible with other evidence.** — When accompanied by other evidence as to the conduct of the person in the character of agent and acceptance by the alleged principal of the fruits of the agency, declarations of the alleged agent are admissible in evidence. *Wofford Oil Co. v. Story*, 52 Ga. App. 496, 183 S.E. 840 (1936).

**Summary judgment improper.** — Summary judgment for an engineer in a concrete company's suit for services and materials provided to a construction project was error because the evidence could have authorized a jury to have found that the engineer obtained the concrete company's

agreement to provide services and material to the construction project without disclosing that the concrete company was dealing with the engineer, not directly, but only as an agent of the developer for purposes of O.C.G.A. §§ 10-6-53 and 10-6-85; a jury could have found that the concrete company reasonably understood that the engineer was binding itself as well as the developer. *Action Concrete, Inc. v. Focal Point Eng'g, Inc.*, 296 Ga. App. 567, 675 S.E.2d 303 (2009).

**Cited in** *Rowland v. Farmers Bank*, 52 Ga. App. 50, 182 S.E. 81 (1935); *First Christian Church v. Jefferson Std. Life Ins. Co.*, 183 Ga. 167, 187 S.E. 729 (1936); *Macomber v. Hudspeth*, 115 F.2d 114 (10th Cir. 1940); *Crosby v. Calaway*, 65 Ga. App. 266, 16 S.E.2d 155 (1941); *Childs v. Hampton*, 80 Ga. App. 748, 57 S.E.2d 291 (1950); *Fraser v. Moose*, 226 Ga. 256, 174 S.E.2d 412 (1970); *Bennett v. McCann*, 125 Ga. App. 393, 188 S.E.2d 165 (1972); *Oxford Bldg. Servs. v. Gresham*, 136 Ga. App. 460, 221 S.E.2d 667 (1975); *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977); *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841 (1980); *Cuba v. Hudson & Marshall, Inc.*, 213 Ga. App. 639, 445 S.E.2d 386 (1994).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 166 et seq., 263.

**C.J.S.** — 2A C.J.S., Agency, § 385.

**ALR.** — Liability of undisclosed principal on sealed contract, 32 ALR 162.

Liability of principal for overdraft drawn by agent and paid by bank, 58 ALR 816.

Acceptance by collection agent authorized to receive money only, of something else upon which he realizes money, as binding principal, 94 ALR 784.

Sufficiency of execution of instrument by agent or attorney in fact in name of princi-

pal without his own name appearing, 96 ALR 1251.

Liability of corporation on contract of promoters, 123 ALR 726.

Use of trade name in connection with contract executed by agent as sufficient disclosure of agency or principal to protect agent against personal liability, 150 ALR 1303.

Imputation of servant's or agent's contributory negligence to master or principal, 53 ALR3d 664.

## 10-6-54. When undisclosed principal liable on contract.

If an agent shall fail to disclose his principal, when discovered, the person dealing with the agent may go directly upon the principal under the contract, unless the principal shall have previously accounted and settled with the agent. (Orig. Code 1863, § 2175; Code 1868, § 2171; Code 1873, § 2197; Code 1882, § 2197; Civil Code 1895, § 3024; Civil Code 1910, § 3596; Code 1933, § 4-305.)

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
AGENT LIABILITY  
PRINCIPAL LIABILITY

## General Consideration

**Section codifies preexisting law.** — This section is a codification of the law as it stood prior to the original Code of 1863, and is not an innovation resulting from legislative enactment. *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S.E. 582, 3 Ann. Cas. 978 (1905).

**Section states general rule as to holding undisclosed principal.** — The general rule with reference to holding an undisclosed principal liable upon the contract of the principal's agent is stated in this section. *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S.E. 582, 3 Ann. Cas. 978 (1905).

**Section does not apply to contract under seal.** — The rule laid down in this section, that an undisclosed principal shall stand liable for the contract of the principal's agent, does not apply when the contract is under seal. *Van Dyke v. Van Dyke*, 123 Ga. 686, 51 S.E. 582, 3 Ann. Cas. 978 (1905); *Gill v. Atlanta, B. & Atl. Ry.*, 24 Ga. App. 780, 102 S.E. 457 (1920).

**Contract must purport to be principal's to bind the principal.** — The general rule is this: in order to bind a principal on a contract made by an agent, it must purport on the contract's face to be the contract of the principal, and the principal's name must be asserted in the contract. It is not enough that the agent be described as such in the instrument. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

Because the plaintiff contracted with the defendant individually, and not as anyone's agent, the fact that the defendant's employer made the downpayment was not conclusive as to which party entered into the agreement, and the plaintiff's claim against the defendant should not have been dismissed by the trial court sua sponte. *Bump-Aire Corp. v. Rogers*, 236 Ga. App. 422, 512 S.E.2d 326 (1999).

**Person acting on person's own account cannot bind another, despite benefit.** — The trustees of a church are not, as such, liable for the price of lumber sold and delivered to

the pastor on the pastor's individual account, when the pastor neither acted as their agent nor had authority to do so, although the lumber was, with the church's knowledge, used in improving the property of the church. *Montgomery v. Walton*, 111 Ga. 840, 36 S.E. 202 (1900).

The mere fact that a wife got the benefit of goods bought by her husband on his own credit would not, whether he was solvent or insolvent, make her liable in law to the seller for the price of such goods. *Hightower v. Walker*, 97 Ga. 748, 25 S.E. 386 (1896).

The mere fact that a wife may be the owner of a tract of land upon which a house is erected out of materials furnished solely on the credit of her husband will not render her liable for the value of such materials on the theory that she was the concealed principal of her husband where there is no evidence that he was in any way acting as her agent when he purchased the materials. *Blount & Morel v. Dugger*, 115 Ga. 109, 41 S.E. 270 (1902); *Cornelia Planing Mill Co. v. Wilcox*, 129 Ga. 522, 59 S.E. 223 (1907).

The mere fact that the wife is the owner of cows which were fed upon provender furnished solely upon the credit of her husband was held insufficient to establish her as the concealed principal of her husband, where there was no evidence that he was in any way acting as her agent when the purchase was made. *Moore v. Sims*, 24 Ga. App. 296, 100 S.E. 647 (1919).

**Undisclosed principal cannot deny liability for agent's act.** — If a husband is acting as agent for his wife and she is simply the undisclosed principal, her liability cannot be questioned any more than if he had, with her assistance, concealed or misled the plaintiff as to the true ownership of the property. *Porter v. Terrell*, 2 Ga. App. 269, 58 S.E. 493 (1907).

**Special contract.** — If the agent delivers the property in the agent's own name and the agent's principal is undisclosed, the latter is bound by any special contract, so far as the terms thereof are legal and binding,

which is made between the agent and the carrier; but if the company receives the goods as those of the principal and, without the knowledge or consent of the latter, the carrier attempts to make special contract with the agent, the principal is not bound thereby, unless the principal does some act from which the law infers a ratification. *Wellborn v. Southern Ry.*, 6 Ga. App. 151, 64 S.E. 491 (1909).

**Disclosure of agent must encompass principal's name** to relieve agent from personal liability. *Collins v. Brayson Supply Co.*, 157 Ga. App. 438, 278 S.E.2d 87 (1981).

**Contract liability of a principal and the principal's agent is not joint**, and after election to proceed against one, the other cannot be held. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**Undisclosed principal.** — If an employer is merely an agent and acts with the authority of an undisclosed principal, either may be held liable, but not jointly liable, and after election to proceed against one of them, the other is released from liability. *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926).

The party with whom an agent contracts without disclosing the agent's principal may treat the agent as the principal and elect to proceed against the agent as such in lieu of the principal, but the party may not proceed against the two jointly. *Dinkler Mgt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967).

**Third party must elect whether to proceed against agent or principal.** — One who is in fact merely an agent and acts with the authority of an undisclosed principal may, at the election of the opposite party, be held as the principal therein, but the contractual liability of such undisclosed agent and the agent's principal is not joint, and the injured party must elect against whom the party desires to proceed. *Washburn Storage Co. v. Elliott*, 93 Ga. App. 456, 92 S.E.2d 28 (1956).

**Cited in** *Miles v. Foy*, 38 Ga. App. 473, 144 S.E. 802 (1928); *Buffalo Forge Co. v. Southern Ry.*, 43 Ga. App. 445, 159 S.E. 301 (1931); *Fisher Scientific Co. v. McCorkle*, 163 Ga. App. 613, 295 S.E.2d 366 (1982).

### Agent Liability

**If an agent wishes to avoid personal liability**, the duty is on the agent to disclose the

agency and not on the party with whom the agent deals to discover the agency. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. 300, 145 S.E.2d 294 (1965); *Dinkler Mgt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967).

**Agents may be held when principals' identities not disclosed.** — If certain individuals composing a committee to represent the general citizenry, whose names and identities were not disclosed, purchased a monument to be erected as a memorial to the soldiers from a given county who died in the first World War and the contract of purchase and sale was duly executed by the seller in terms of the agreement, the members of the committee may be held liable as individuals in a suit by the seller on account for the price of the monument. *Schneider Marble Co. v. Knight*, 37 Ga. App. 646, 141 S.E. 420 (1928).

**Election to recover from agent.** — One who deals with an agent who fails to disclose the agent's principal may recover from the agent, where the person so elects, or the person may proceed against the principal, when made known, should the person not elect to proceed against the agent. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. App. 300, 145 S.E.2d 294 (1965).

One who performs personal services at the request of the agent, who fails to disclose the principal for whom the request is made, may recover from the agent, where the person so elects, or the person may proceed against the principal, when made known, should the person not elect to proceed against the agent. *Dinkler Mgt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967).

If an agent buys in the agent's own name without disclosing the principal and the seller subsequently discovers that the purchase was in fact made for another, the seller may, at the seller's choice, look for payment either to the agent or the principal, even though the title has been made to the agent and the agent has been debited with the account. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

To avoid personal liability, agent must disclose fact of agency and identity of principal, and one who deals with agent who fails to disclose the principal may at one's election recover from either agent or principal.



**Agent Liability (Cont'd)**

*Collins v. Brayson Supply Co.*, 157 Ga. App. 438, 278 S.E.2d 87 (1981).

If plaintiff did not take a default judgment against the undisclosed principal, no election was made as between the principal and agent, and the agent was subject to suit individually. *Watson v. Sierra Contracting Corp.*, 226 Ga. App. 21, 485 S.E.2d 563 (1997).

**Third person knowing of agency and making agent debtor cannot charge principal.** — A wife cannot be held accountable unless her husband acted as her agent in the transaction, nor even then if the fact of agency was known to the seller and the seller extended credit to her agent, not to her. *Fisher v. Darsey*, 21 Ga. App. 583, 94 S.E. 839 (1918).

If at the time of the sale the seller knows not only that the person who is nominally dealing with the seller is not principal but agent, but also who the principal really is, and, notwithstanding all the knowledge, chooses to make the agent the seller's debtor, dealing with the seller and the seller alone, the seller must be taken to have abandoned the seller's recourse against the principal, and cannot afterwards, upon failure of the agent, turn round and charge the principal, having once made an election at the time when the seller had the power of choosing between the one and the other. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**No recovery from agent after discovering agency and looking to principal.** — If the creditor, when the creditor ascertains that there is a principal who is liable, accepts the principal as the debtor and looks exclusively to the principal, the creditor cannot afterwards recover from the agent. *Miller v. Watt & Walker*, 70 Ga. 385 (1883).

**Agent receiving property for undisclosed principal does not take title.** — The ruling that where the original tenant, having reserved no rights against the subtenant in the transfer of a note to the landlord and having claimed no interest in the property delivered to the original tenant by the subtenant, the proceeds of which the original tenant paid to the landlord in satisfaction of the transferred note, title never vested in the original tenant, is not altered by the fact that the

subtenant may not have known that the subtenant's note to the tenant had been transferred to the landlord; where it appears without dispute that the original tenant did not accept the cotton as owner, but, even if under an assumed agency, received it only for the landlord as principal, undisclosed both to the subtenant and the claimant. *Watson v. Sudderth*, 32 Ga. App. 383, 123 S.E. 143 (1924).

**When extrinsic evidence admissible concerning agent being party to contract.** — If it appears unambiguously in an integrated contract that the agent is a party or is not a party, extrinsic evidence is not admissible to show a contrary intent, except for the purpose of reforming the contract. If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that one is not a party except: (a) for the purpose of reforming the contract; or (b) to establish that one's name was signed as the business name of the principal and that it was so agreed by the parties. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**Where wife retains property, only slight evidence of husband's agency required.** — Where the wife retains property and enjoys it, only slight evidence of the husband's agency in contracting the debt for the property is required to charge her. *Pinkston v. Cedar Hill Nursery & Orchard Co.*, 123 Ga. 302, 51 S.E. 387 (1905).

**If principal and agent are improperly joined, one may be dismissed.** — Where the plaintiff, having a right to elect whether he will sue the agent or the undisclosed principal, improperly joins both in the same action, he may exercise the right of election, proceed against one, and dismiss as to the other. *Lippincott & Co. v. Behre*, 122 Ga. 543, 50 S.E. 467 (1905).

**Principal Liability**

**Third party's right as to such principal does not depend upon diligence.** — The right to proceed against the principal, given by this section, is not dependent on the diligence of the plaintiff in discovering the fact of the concealed agency. *Baldwin v. Garrett & Sons*, 111 Ga. 876, 36 S.E. 966 (1900); *Beacham v. Coe-Mortimer Co.*, 30 Ga. App. 456, 118 S.E. 441 (1923);

*Barrington v. Davis Jenkins & Sons*, 44 Ga. App. 682, 162 S.E. 642 (1932).

**Upon discovery, third person may go against principal.** — When a person enters a demand for cars, without at that time disclosing an agency for another, but it appears that at the time of shipment, it was disclosed that the cars were intended solely for the use of another and the bill of lading was issued in the name of the true owner, under this section, the carrier might in such case go directly against the principal for demurrage charges, upon the agency being disclosed. *Central of Ga. Ry. v. Rabun*, 21 Ga. App. 402, 94 S.E. 598 (1917).

Under this section, if an agent fails to disclose the agent's principal, a person dealing with the former may, when the fact is discovered, go against the principal under the contract. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Right to proceed against principal depends on special agent's authority.** — The right of a third person to elect to proceed against principal is confined to the liability arising from the actual authority given the agent, when the authority given is a special and limited one, and no question of apparent authority or estoppel was involved. *Piel v. Snow's Laundry & Dry Cleaning Co.*, 92 Ga. App. 411, 88 S.E.2d 628 (1955).

**If no agency or if undisclosed principal has settled, one is not directly liable.** — Under this section, if there was in fact no agency, or if the agency existed, but the undisclosed principal has previously accounted and settled with the agent, the plaintiff is authorized to go directly upon the principal. *Price-Evans Foundry Co. v. Southern Bell Tel. & Tel. Co.*, 19 Ga. App. 264, 91 S.E. 283 (1917); *Beacham v. Coe-Mortimer Co.*, 30 Ga. App. 456, 118 S.E. 441 (1923).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 308.

**C.J.S.** — 3 C.J.S., Agency, §§ 489, 490.

**ALR.** — Signing of contract by agent of undisclosed principal as satisfying statute of frauds, 23 ALR 932; 138 ALR 330.

Liability of undisclosed principal on sealed contract, 32 ALR 162.

Sufficiency of execution of instrument by agent or attorney in fact in name of principal without his own name appearing, 96 ALR 1251.

Concealment of fact that party to contract was acting for undisclosed principal as fraud which will toll statute of limitations, 114 ALR 864.

Right to join agent and undisclosed principal in same action, 118 ALR 701.

Action or judgment against agent as affecting right to maintain action against undisclosed principal, 119 ALR 1316.

Exceptions to rule which permits suit by or against undisclosed principal, 130 ALR 664.

Use of trade name in connection with contract executed by agent as sufficient disclosure of agency or principal to protect agent against personal liability, 150 ALR 1303.

Principal's payment to or settlement with agent as affecting former's liability to third person with respect to contract negotiated by agent, 71 ALR2d 911.

## 10-6-55. Effect of seller giving credit to agent.

If the credit shall be given to the agent by the choice of the seller, he may not afterward demand payment of the principal. (Orig. Code 1863, § 2176; Code 1868, § 2172; Code 1873, § 2198; Code 1882, § 2198; Civil Code 1895, § 3025; Civil Code 1910, § 3597; Code 1933, § 4-306.)

**Cross references.** — Responsibility of agent, § 10-6-87.

## JUDICIAL DECISIONS

**Section not applicable where principal undisclosed.** — The provision of this section does not apply so long as the principal is undisclosed. *Beacham v. Coe-Mortimer Co.*, 30 Ga. App. 456, 118 S.E. 441 (1923).

**Generally, contract does not bind principal unless it purports to be principals.** — The general rule is this: in order to bind a principal, on a contract made by an agent, it must purport on the contract's face to be the contract of the principal, and the principal's name must be asserted in the contract. It is not enough that the agent be described as such in the instrument. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**Known principal cannot be held liable by third person dealing with agent.** — The wife could not be held accountable under this section if the fact of agency was known to the seller, and the seller extended credit to her agent, not to her. *Pinkston v. Cedar Hill Nursery & Orchard Co.*, 123 Ga. 302, 51 S.E. 387 (1905); *Fisher v. Darsey*, 21 Ga. App. 583, 94 S.E. 839 (1918).

Where one with knowledge of the agent's authority to bind the agent's principal deals with the agent directly, and not with the principal, one cannot hold the principal liable. *Morgan v. Georgia Paving & Constr. Co.*, 40 Ga. App. 335, 149 S.E. 426 (1929); *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

If an agent buys in the agent's own name, without disclosing the principal, and the seller subsequently discovers that the purchase was in fact made for another, the seller may, at the seller's choice, look for payment either to the agent or the principal, and that too, notwithstanding the title had been made to the agent, and the agent debited with the account. On the other hand, if at the time of the sale, the seller knows not only the person who is nominally dealing with the seller is not the principal but the agent, and also knows who the principal really is, and, notwithstanding all the knowledge, chooses to make the agent the seller's debtor, dealing with the agent and the agent alone, the seller must be taken to have abandoned the seller's recourse against the principal and

cannot afterwards, upon failure of the agent, turn around and charge the principal, having once made the seller's election at the time when the seller had the power of choosing between the one and the other. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**Credit given exclusively to agent.** — To constitute an election by the seller between a principal and agent, so that giving credit to the agent will prevent the seller from afterward demanding payment of the principal under this section, it should appear that the credit was given exclusively to the agent. *Fontaine v. Eagle & Phenix Mfg. Co.*, 52 Ga. 31 (1874).

**Principal is liable if agent not dealt with alone.** — When a travel agent was defendant's disclosed agent in making arrangements for hotel accommodations with plaintiff, defendant paid the agent for the hotel charges, but the agent failed to pay plaintiff, defendant was bound for the unpaid debt since it did not appear that plaintiff had chosen to make the agent its debtor, dealing with the agent alone, and that exclusive credit was given to the agent. *Southeastern Foam Prods., Inc. v. Hilton Hotels Corp.*, 149 Ga. App. 372, 254 S.E.2d 494 (1979).

**When extrinsic evidence admissible concerning whether agent is party to contract.** — If it appears unambiguously in an integrated contract that the agent is a party or is not a party, extrinsic evidence is not admissible to show a contrary intent, except for the purpose of reforming the contract. If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that the agent is not a party except: (a) for the purpose of reforming the contract; or (b) to establish that the agent's name was signed as the business name of the principal and that it was so agreed by the parties. *Kingsberry Homes v. Findley*, 242 Ga. 362, 249 S.E.2d 51 (1978).

**Cited in** *Henderson v. Citizens First Nat'l Bank*, 151 Ga. 62, 106 S.E. 549 (1921); *Dinkler Mgt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 272.

**C.J.S.** — 2A C.J.S., Agency, § 409.

**ALR.** — Principal's payment to or settle-

ment with agent as affecting former's liability to third person with respect to contract negotiated by agent, 71 ALR2d 911.

## 10-6-56. When principal bound by agent's representations or concealment.

The principal shall be bound by all representations made by his agent in the business of his agency and also by his willful concealment of material facts, although they are unknown to the principal and known only by the agent. (Orig. Code 1863, § 2177; Code 1868, § 2173; Code 1873, § 2199; Code 1882, § 2199; Civil Code 1895, § 3026; Civil Code 1910, § 3598; Code 1933, § 4-307.)

## JUDICIAL DECISIONS

**Sections 10-6-51 and 10-6-64 merely amplify this section.** — Former Code 1933, § 4-302, providing that the principal shall be bound by all the acts of the principal's agent within the scope of the principal's authority, was a mere amplification of former Code 1933, § 4-307, and the same was true of former Code 1933, § 4-315, insofar as it referred to scope of authority. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Principal bound by agent's fraudulent conduct in its business.** — Under this section, a corporation is bound by the fraudulent conduct of the corporation's agents engaged in the corporation's business and on that line of the business where it puts such agent to work. All deceit, misrepresentations, falsehoods occurring in the course of business, whereby anybody is cheated, are the responsibility of the corporation. *Scofield Rolling Mill Co. v. State*, 54 Ga. 635 (1875).

**Fraudulent conduct in obtaining contract principal accepts.** — A principal who accepts a contract procured by fraudulent conduct of an agent, regardless of such agent's authority, is bound by such fraudulent conduct of the agent in procuring such contract. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

**Representations by agent exceeding authority, if benefits are retained.** — If one purporting to act as agent exceeds the agent's authority, the principal cannot ratify in part and repudiate in part, and therefore the principal cannot accept and retain the

fruits of a contract so made by another in the principal's behalf without becoming bound by the representations of the person so purporting to act for the principal in consummating the agreement. *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930); *Hawthorne Indus. v. Attaway Assocs.*, 153 Ga. App. 155, 264 S.E.2d 663 (1980).

**Representation of each partner when employing partnership.** — When an owner of property employs a partnership as the owner's agent to sell the property, the owner will be bound by the acts and representations of each of the partners within the real or apparent scope of the agency, although the owner may have dealt with the partnership through one of the partners only. *Lancaster v. Neal*, 41 Ga. App. 721, 154 S.E. 386 (1930).

**Agent to sell may agree principal will repay purchase money.** — An agent authorized to sell mules on behalf of a principal has authority to agree with a purchaser that if a mule which appears to be sick does not recover, the seller will repay the purchase money. *Turner Bros. v. Manley*, 14 Ga. App. 215, 80 S.E. 680 (1914).

**Right to presume insurance companies dealing through agents follow usual rules.** — Under former Code 1868, §§ 2168 and 2173, those who deal with agents of foreign insurance companies have a right to presume that the companies conform to the usual rules. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660 (1871).

**Agent has duty to communicate material facts.** — Since knowledge of an agent is

imputed to the principal by law and only by agent's performance of this duty can principal acquire actual knowledge and govern or protect oneself, an agent is under a duty to communicate to the principal all pertinent and material facts concerning any transaction entered into on behalf of the principal. *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267 (1980).

**Effect of dual representation by agent.** — The rule set out in O.C.G.A. § 10-6-56 is not negated by the equally well-established rule that neither principal is civilly liable to the other for the tortious acts of the dual agent of both unless there is collusion or participation in that conduct by the principal. Although the principal may be relieved of liability in tort, equity will not allow the principal to be relieved of responsibility for misrepresentations of the dual agent upon which the other principal relied to the principal's detriment when the action is in contract. *Home Materials, Inc. v. Auto Owners Ins. Co.*, 250 Ga. 599, 300 S.E.2d 139 (1983).

**One who issued and procured insurance held dual agent.** — The acts of an individual in procuring liability insurance for a company, of which the individual was the chairman, and issuing liability insurance policies on behalf of an insurer of which the individual was the president, had been occurring and recurring for more than 30 years with the knowledge and consent of all parties, and made the individual a dual agent. The

individual's misconduct in procuring a policy which did not cover certain acts of employees could not be imputed to either of the principals, who were not actually at fault. *Edwards-Warren Tire Co. v. Cole, Sanford & Whitmire*, 188 Ga. App. 395, 373 S.E.2d 83 (1988).

**Question of fraud is a jury question in action on agent's false and fraudulent representations to induce purchase of mules.** *Johnson v. Renfroe & McCrary*, 73 Ga. 138 (1884).

**Instruction as to agent's representations held not erroneous.** — Charge of the court that "if in the prosecution of the master's business, the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Cited in** *Williams v. Toomey*, 173 Ga. 199, 159 S.E. 866 (1931); *Equitable Bldg. & Loan Ass'n v. Brady*, 175 Ga. 43, 164 S.E. 674 (1932); *Lankford v. Holton*, 195 Ga. 317, 24 S.E.2d 292 (1943); *Puckett v. Reese*, 203 Ga. 716, 48 S.E.2d 297 (1948); *Nelson Realty Co. v. Joiner*, 230 Ga. 36, 195 S.E.2d 441 (1973); *Georgia-Pacific Corp. v. Corbin*, 137 Ga. App. 37, 222 S.E.2d 862 (1975).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 185, 262, 264, 270.

**C.J.S.** — 2A C.J.S., Agency, §§ 382, 386.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Acceptance by collection agent authorized to receive money only, of something else upon which he realizes money, as binding principal, 94 ALR 784.

Misrepresentations by one party's agent, who was not authorized in that regard, as

ground of rescission by other party, 95 ALR 763.

Liability of infant for torts of his employee or agent, 103 ALR 487.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 ALR 535.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Insurance company's responsibility for torts of agent causing physical injury to person or damage to property, 116 ALR 1389.

Responsibility of bank for fraud of officer or agent inducing customer or debtor of

bank to enter into transaction with such officer or agent personally or with third person, 117 ALR 389.

Profession at time of act or contract to be acting for another as a necessary condition of its ratification by latter, 124 ALR 893.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Implied or apparent authority of agent selling personal property to make warranties, 40 ALR2d 285.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 ALR2d 10.

Broker's liability for damages or losses sustained by vendor of real property to

vendee because of broker's misrepresentations, 61 ALR2d 1237.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 ALR3d 1135.

Insurer's statements as to amount of dividends, accumulations, surplus, or the like as binding on insurer or merely illustrative, 17 ALR3d 777.

Insured's responsibility for false answers inserted by insurer's agent in application following correct answers by insured, or incorrect answers suggested by agent, 26 ALR3d 6.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.

### **10-6-57. Payment to agent not producing obligation made at debtor's risk; proving agent's authority.**

Where money is due on a written evidence of debt, payment to an agent of the creditor who fails to produce the obligation shall be at the risk of the debtor. Nonproduction of the security shall rebut the implication of authority arising from the agent's employment, and it must be otherwise established. (Civil Code 1895, § 3006; Civil Code 1910, § 3578; Code 1933, § 4-308.)

**History of Code section.** — This Code section is derived from the decisions in *Howard v. Soule*, 54 Ga. 52 (1875), and *Bank*

of Univ. v. Tuck, 96 Ga. 456, 23 S.E. 467 (1895).

## **JUDICIAL DECISIONS**

**Payment to payee without notice of payee's lack of authority is valid defense.** — If the maker pays an installment to the payee without notice that the payee had no authority to accept payment, in a suit by the transferee the maker can set up as a defense the payment made, even though the transferor has not remitted it to the transferee. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969).

**Careless maker may have to pay twice.** — The holder, notwithstanding the previous

payment of a note by the maker to the original payee, may collect it again, unless one of three things appears: first, that the payee was the holder's general agent for the collection of such papers; or, second, had special authority to collect in the particular instance; or, third, that the money collected by the payee in fact reached the holder's hands. If the payee collected for the holder under the payee's authority, either general or special, or if the holder actually received the money collected by the payee upon the note, this should be an end to the matter.



Otherwise, the law renders the careless maker liable to pay a second time. *Bank of Univ. v. Tuck*, 96 Ga. 456, 23 S.E. 467 (1895).

**Maker may have to pay twice if note is not produced, unless payee is agent for holder or money reaches holder.** — If the maker of a negotiable promissory note pays it to the original payee without requiring the production and surrender of the note, the maker is liable to pay it again to an innocent holder who acquired title to it in good faith and for value before maturity, unless the payee was the holder's general agent for the collection of the note and had special authority to collect it, or the money collected thereon in fact reached the hands of the holder of the note. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969).

**Debtor should verify that agent possesses security.** — If the debtor on a promissory note makes a payment thereon to one claiming to be an agent for collection, it is incumbent on the debtor to see that the agent is in possession of the security, for if the agent is not, the debtor will be liable to pay again, unless the person making the collection had authority to collect the sums due the principal or the money actually reached the owner. *Walton Guano Co. v. McCall*, 111 Ga. 114, 36 S.E. 469 (1900); *Baker v. Armour Fertilizer Works*, 18 Ga. App. 611, 90 S.E. 171 (1916).

**Ordinary prudence in requiring production of note protects maker.** — The general rule set out in this section will injure no one who exercises the ordinary degree of prudence in requiring the production of the note before one pays the note. *Howard & Soule v. Rice*, 54 Ga. 52 (1875).

**Holder not in due course is subject to defense of payment in full.** — One who acquires a promissory note, but is not a holder in due course, is subject to the defense of payment in full. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969).

**One who is not a holder cannot utilize this section.** — Plaintiff, who is not a holder in due course, cannot avail itself of the provisions of this section. *Northside Bldg. & Inv. Co. v. Finance Co. of Am.*, 119 Ga. App. 131, 166 S.E.2d 608 (1969).

**Section is inapplicable if note to partnership is paid to partner.** — This section has no application where payment on a note pay-

able to a partnership is made to one partner. *Brady v. Phillips Mule Co.*, 27 Ga. App. 444, 108 S.E. 809 (1921).

**Production of written evidence of debt implies agent has authority to collect.** — If payment is made on a written evidence of debt to a person as agent for another, the production of the written evidence of debt raises an implication of the person's authority as agent to receive the payment. *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

**If evidence of debt not produced, payor must prove such authority.** — Under this section, if payment on a written evidence of debt is made to a person as agent for another, the production of the written evidence of debt raises an implication of the person's authority to receive the payment as agent, but when it is not produced there is no such implication, and the burden is upon the person making the payment to establish such authority. *Dibble v. Law*, 141 Ga. 364, 80 S.E. 999 (1914); *Sherrod v. Springfield Baptist Church*, 21 Ga. App. 200, 93 S.E. 1009 (1917); *Brady v. Phillips Mule Co.*, 27 Ga. App. 444, 108 S.E. 809 (1921).

**Proof that payment reached owner.** — Under this section, in a suit upon a promissory note, if the debtor shows that the debtor paid a part of it to a supposed agent of the holder of the note, but fails to show that the supposed agent produced the note at the time of payment, or that the money so collected ever reached the owner of the note, or that the alleged agent had specific authority to collect the note, no valid defense of partial payment is shown. *Lane v. Bank of Thomasville*, 23 Ga. App. 275, 97 S.E. 884 (1919).

If a debtor makes a payment to a supposed agent of a note creditor, without requiring the production of the note at the time of payment, so as to create by such production an implication of the agent's authority, the burden is upon the debtor to show: (1) that the payment actually reached the hands of the creditor; or (2) that the payee was a general agent of the creditor for the collection of such paper; or (3) that the payee had special authority from the creditor to collect the particular payment. *Prudential Ins. Co. of Am. v. Franklin*, 51 Ga. App. 496, 180 S.E. 869 (1935).

**Section does not limit proof of authority.** — This section does not preclude the debtor

from establishing express or implied authority to collect otherwise than by showing production of the evidence of debt, nor from showing the subsequent ratification of the act by the creditor as principal. *Roberts v. Bank of Eufaula*, 20 Ga. App. 221, 92 S.E. 1015 (1917).

Regardless of whether an implication of authority to collect a debt before maturity may arise if creditor's agent has possession of an instrument which is evidence of the debt, the debtor who has made a payment before maturity is not precluded from otherwise establishing the authority of the agent receiving such payment. *Commercial Credit Corp. v. Noles*, 85 Ga. App. 392, 69 S.E.2d 309 (1952).

**Authority may be shown by course of dealing.** — One who has held another out as one's lawful agent is estopped to deny the agent's acts within the apparent scope of the agent's authority and about the agent's principal's business; such authority may be established by proof of a long course of dealing by such agent in a similar manner for the principal. *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

**Customary collection of similar notes.** —

In a suit on a promissory note, if the debtor shows that the debtor has paid a part of the note to a duly authorized agent of the holder of the note, who has possession of the note, and who also had specific authority to collect the note, by customarily collecting such notes for the holder, a valid defense of partial payment is shown. *Futch v. F.S. Royster Guano Co.*, 51 Ga. App. 305, 180 S.E. 368 (1935).

**Declarations of the alleged agent are insufficient** to establish agency and authority to collect. *Baker v. Armour Fertilizer Works*, 18 Ga. App. 611, 90 S.E. 171 (1916).

**Production, not just possession, must be shown.** — An affidavit of a witness setting forth newly discovered evidence did not furnish sufficient ground for the grant of a new trial since it merely stated that the alleged agent had the note "in his possession" but did not state that it was produced. *Schaefer v. Schaefer*, 46 Ga. App. 789, 169 S.E. 256 (1933).

**Cited in** *Oslin v. State*, 161 Ga. 967, 132 S.E. 542 (1926); *Osborn v. War Fin. Corp.*, 39 Ga. App. 42, 145 S.E. 917 (1928); *Star Furn. Co. v. Dubberly*, 46 Ga. App. 178, 167 S.E. 207 (1932).

## RESEARCH REFERENCES

**ALR.** — Making paper payable to agent as charging drawer with loss due to agent's misappropriation, 8 ALR 304.

Trustee in mortgage securing bonds as agent of obligor or holder of bonds as regards deposit or payment in respect of principal or interest, 90 ALR 467; 96 ALR 1233.

Payment to payee, indorser, or guarantor of bill or note not in possession thereof, 103 ALR 653.

Authority, or apparent authority, of agent to receive payment for commodities which he has authority, or apparent authority, to sell, or for which he is authorized, or appar-

ently authorized, to find a market, 105 ALR 718.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 ALR 578.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Payment to broker or agent authorized to sell real property, as payment to principal, 30 ALR2d 805.

## 10-6-58. Notice to agent.

Notice to the agent of any matter connected with his agency shall be notice to the principal. (Orig. Code 1863, § 2178; Code 1868, § 2174; Code 1873, § 2200; Code 1882, § 2200; Civil Code 1895, § 3027; Civil Code 1910, § 3599; Code 1933, § 4-309.)

## JUDICIAL DECISIONS

## ANALYSIS

GENERAL CONSIDERATION  
APPLICATION  
EVIDENCE

## General Consideration

**Agent's notice of fact connected with agency is notice to principal.** — Notice to an agent of a fact connected with the subject matter of the agency is notice to the agent's principal. *Whitten v. Jenkins*, 34 Ga. 297 (1866).

Notice to an agent in the business for which the agent is employed is notice to the principal. *Wilensky v. Martin*, 4 Ga. App. 187, 60 S.E. 1074 (1908).

When notice of a fact is communicated to a general agent, or to a special agent in absolute charge of a particular business, knowledge of all the facts suggested by the notice is imputable to the principal. *Fireman's Fund Ins. Co. v. Davis*, 42 Ga. App. 49, 155 S.E. 105 (1930).

Notice to an agent of any matter within the scope of the agency is notice to the principal. *Hartford Accident & Indem. Co. v. Hartley*, 275 F. Supp. 610 (M.D. Ga. 1967), *aff'd*, 389 F.2d 91 (5th Cir. 1968).

If agents, as attorneys of claimant, were making an investigation in the interest of their client, then the claimant is chargeable with whatever notice such agents had. *Deveney, Hood & Co. v. Burton*, 110 Ga. 56, 35 S.E. 268 (1900).

If an attorney for a mortgagee had knowledge of an adverse claim to the property which was subsequently bought at an execution sale by the attorney as agent for the attorney's spouse, if the notice of the claim was still in the mind of the attorney at the time of the execution sale, such knowledge would be imputable to the attorney's spouse, notwithstanding that the attorney acted in the dual capacity of attorney for the mortgagee and of agent for the spouse. *Faircloth v. Taylor*, 147 Ga. 787, 95 S.E. 689 (1918).

**Knowledge of a dual agent is imputable to both principals.** *Carlton v. Moultrie Banking Co.*, 170 Ga. 185, 152 S.E. 215 (1930).

**Agent who proves false to principal.** — The rule of this section is modified when an agent proves false to the principal. *Loftin v.*

*Great S. Home Benevolent Ass'n*, 9 Ga. App. 121, 70 S.E. 353 (1911); *Hartford Accident & Indem. Co. v. Hartley*, 275 F. Supp. 610 (M.D. Ga. 1967), *aff'd*, 389 F.2d 91 (5th Cir. 1968).

**Conspiracy with other party keeps section from applying.** — The rule of former Civil Code 1910, § 3599 does not apply if an agent conspires with the other party. In such a case the principal is not bound thereby nor charged with knowledge of the facts thus acquired by the agent under former Civil Code 1910, § 3600. *Terry v. International Cotton Co.*, 138 Ga. 656, 75 S.E. 1044 (1912).

**Imputation imposes duty on agent to disclose material facts.** — Since knowledge of an agent is imputed to the principal by law and only by agent's performance of this duty can principal acquire actual knowledge and govern or protect oneself, an agent is under a duty to communicate to the agent's principal all pertinent and material facts concerning any transaction entered into on behalf of the principal. *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267 (1980).

**Proof of agency is indispensable for section to apply.** — While notice to the agency is notice to the principal, proof of the agency is indispensable; and the fact that one as father or friend gives information or advice in reference to a land trade does not make such friend the agent in the sense of the rule stated in this section. *McNamara v. McNamara*, 62 Ga. 200 (1879).

**Knowledge acquired during authorized duties is imputable.** — The knowledge of an agent which is imputable to a principal is the knowledge which is acquired during the performance of authorized duties. *Estes v. Standard Fire Ins. Co.*, 66 Ga. App. 775, 19 S.E.2d 35 (1942).

**Subject matter of notice must be connected with agency.** — Under this section, in order that notice to an agent may operate as notice to the principal, the subject matter of the notice must be connected with the



agency. *Pursley v. Stahley*, 122 Ga. 362, 50 S.E. 139 (1905); *Central of Ga. Ry. v. Americus Constr. Co.*, 133 Ga. 392, 65 S.E. 855 (1909).

If the person receiving notice is not the agent of the adverse party, or when the notice is on a matter in no wise connected with the agency, no implication that the party has received such notice arises. *Cloud v. Bagwell*, 83 Ga. App. 769, 64 S.E.2d 921 (1951).

**Cited in** *Exchange Bank v. Pate*, 41 Ga. App. 1, 151 S.E. 823 (1930); *Veal v. Veal*, 50 Ga. App. 445, 178 S.E. 456 (1935); *Ohio Hdwe. Mut. Ins. Co. v. Northeast Ga. Land Co.*, 79 F.2d 753 (5th Cir. 1935); *Leakey v. Duke*, 77 Ga. App. 431, 48 S.E.2d 709 (1948); *Walker v. State*, 89 Ga. App. 101, 78 S.E.2d 545 (1953); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *United States v. One 1955 Model Buick Coupe Auto.*, 145 F. Supp. 72 (S.D. Ga. 1956); *Yale & Towne, Inc. v. Sharpe*, 118 Ga. App. 480, 164 S.E.2d 318 (1968); *Wright v. Dilbeck*, 122 Ga. App. 214, 176 S.E.2d 715 (1970); *Butler v. Moore*, 125 Ga. App. 435, 188 S.E.2d 142 (1972); *Miller v. Thurmond*, 128 Ga. App. 228, 196 S.E.2d 366 (1973); *Commercial Union Ins. Co. v. Taylor*, 169 Ga. App. 177, 312 S.E.2d 177 (1983); *Millan v. Residence Inn by Marriott, Inc.*, 226 Ga. App. 826, 487 S.E.2d 431 (1997); *Gustafson v. Cotton States Mut. Ins. Co.*, 230 Ga. App. 310, 496 S.E.2d 346 (1998); *Johnson v. Atlanta Hous. Auth.*, 243 Ga. App. 157, 532 S.E.2d 701 (2000).

### Application

**Notice to person whose actions are accepted by principal.** — Where H, holding a deed as security for a debt, sold the land under a power of sale and had it struck off to H, approached B, a money lender, and told B that H had bought B a farm, and B, being satisfied with the transaction, let H have the money and took a deed to the land, executing a title bond to H, B was put upon inquiry and chargeable with knowledge of facts invalidating the sale, by the sudden and unexpected communication from H and also by reason of the fact that H acted as H's own agent within this section. *Wright v. Harris*, 221 F. 736 (S.D. Ga.), *aff'd*, 228 F. 1021 (5th Cir. 1915), *cert. denied*, 241 U.S. 658, 36 S. Ct. 287, 60 L. Ed. 1225 (1916).

**Notice to traveling salesperson for dealer.** — If, after dissolution of a partnership, a former member of the firm, on being approached and offered goods for sale by a traveling salesperson for a dealer who, before the dissolution had sold goods to the firm, tells the salesperson that the member is no longer a member of the firm, this is notice of the dissolution to the dealer represented by the salesperson. *Franklin Buggy Co. v. Carter*, 21 Ga. App. 576, 94 S.E. 820 (1918).

**Notice to agent is imputed to carrier.** — General liability insurers of a contractor were held to have a duty to defend the owner of a real estate project because their agent had the actual or apparent authority to issue certificates of insurance to the owner, and to bind their obligations to the owner, under Georgia agency law. *Sumitomo Marine & Fire Ins. Co. of Am. v. S. Guar. Ins. Co.*, 337 F. Supp. 2d 1339 (N.D. Ga. 2004).

**Notice to agent for landlord dealing with tenant.** — Notice of the defective condition of the property when given to the agent with whom the tenant dealt, under the instructions of the landlord, when the premises were rented and to whom the rents were paid is notice to the landlord. *Wall Realty Co. v. Leslie*, 54 Ga. App. 560, 188 S.E. 600 (1936).

**Knowledge of employees of tourist camp operator failing to register guests.** — It is not required that the owner or operator of a tourist camp be personally in actual charge of the register; if the owner's agents, servants, or employees are in charge thereof and fail to secure from the occupants of the cabins or rooms the registration and information required by Ga. L. 1945, p. 326, § 6, the owner or operator is responsible therefore under former Code 1933, §§ 4-309 and 4-311. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

**Notice to a partner is notice to the partnership** of which the partner is a member, and service upon the partner is service upon the firm. *Render & Hammett v. Hartford Fire Ins. Co.*, 33 Ga. App. 716, 127 S.E. 902 (1925).

**Notice to officer is notice to corporation.** — Notice to an officer of a corporation, acting for it in connection with its business and within the scope of its agency, is notice to the principal. *Holland v. McRae Oil &*

**Application** (Cont'd)

Fertilizer Co., 134 Ga. 678, 68 S.E. 555 (1910).

Ordinarily, a corporation is presumed to have notice of any material fact disclosed to any agent authorized to act in its behalf in the peculiar circumstances or with reference to the particular business or undertaking at hand. *Wallis v. Heard*, 16 Ga. App. 802, 86 S.E. 391 (1915).

Knowledge of the officers of a corporation is knowledge to that corporation, and the corporation is bound thereby. *Stein Steel & Supply Co. v. Franco*, 148 Ga. App. 186, 251 S.E.2d 74 (1978).

Notice of a law firm's potential conflict of interest was directly imputable to a company as the company's president signed conflict letters while acting in connection with the company's business as well as the president's own. Accordingly, whether or not the company was a party to the original conflict letter, the company was charged with knowledge of the conflict of interest and of the law firm's role in the transactions at issue. *Smith v. Morris, Manning & Martin, LLP*, 293 Ga. App. 153, 666 S.E.2d 683 (2008).

**Notice to president of bank.** — The knowledge of a president of a bank that certain stock had not been fully paid up is imputable to the bank, if the president, acting for the bank and in the bank's behalf, accepted a transfer of the stock to the bank, and the bank thereunder retained the stock. *Fouche & Fouche v. Merchants Nat'l Bank*, 110 Ga. 827, 36 S.E. 256 (1900).

**Notice to cashier.** — The cashier of a bank is held out as the bank's general agent for the management of the bank's notes and other securities. Therefore, the same rule applies as to notice as in the case of other agents. *Bank of St. Marys v. Mumford & Tyson*, 6 Ga. 44 (1849); *Lessee of Veasey v. Graham*, 17 Ga. 99, 63 Am. Dec. 228 (1855).

Actual notice of a dissolution given by one partner to the cashier of a bank, which sues upon a note thereafter executed at the instance of such cashier as the bank's representative by the other alleged partner in the name of the partnership, and payable to the plaintiff, is sufficient notice to the bank. *Bennett v. Watson*, 31 Ga. App. 367, 120 S.E. 802 (1923).

**Notice to real estate agent.** — In an action involving a defect in a home's septic system,

the home buyers' agent was not entitled to summary judgment on a Brokerage Relationship in Real Estate Transactions Act (BRETA), O.C.G.A. § 10-6A-1 et seq., claim because while notice to the buyers' agent was notice to the buyers under O.C.G.A. § 10-6-58, a disputed issue existed as to whether the buyers' agent actually disclosed the information regarding the second pumping of the septic tank to the buyers. *Davis v. Silvers*, 295 Ga. App. 103, 670 S.E.2d 805 (2008).

**Notice to officer entering into contract with corporation.** — If a director or other officer of a corporation is dealing in his the director's behalf or in conjunction with others in making a contract with the corporation, the director becomes an adverse party, and notice to the director is not notice to the corporation. *Wallis v. Heard*, 16 Ga. App. 802, 86 S.E. 391 (1915).

**Agent acting on own behalf.** — While it is true that notice to the agent of any matter connected with the agency is notice to the principal under this section, a corporation is not charged with notice to the corporation's officer or agent while the officer or agent is acting in the officer's or agent's private capacity and for the office's or agent's own benefit with third persons. *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935).

Notice or knowledge of failure of consideration of a negotiable promissory note which the director of a bank sells to it before the maturity of the paper, is not imputable to the bank, when in the transaction the seller did not act for it at all, but exclusively for the seller, and the bank was represented by another of its officials, who alone acted for it. *English-American Loan & Trust Co. v. Hiers*, 112 Ga. 823, 38 S.E. 103 (1901).

A banking corporation is not charged with notice of facts which became known to its president while the president is dealing in the president's private capacity and in the president's own behalf with third persons. *Peoples Bank v. Exchange Bank*, 116 Ga. 820, 43 S.E. 269 (1902); *Alsabrooks v. Bank of Sparta*, 22 Ga. App. 693, 97 S.E. 111 (1918).

**Knowledge of insurance agent is imputable to company.** — If an agent knew the status of the title to property insured at the time of issuance of the policy, such knowledge will be notice to the company. *Atlas*



*Assurance Co. v. Kettles*, 144 Ga. 306, 87 S.E. 1 (1915).

In the absence of anything in the policy limiting insurance agent's authority, the agent's knowledge that the insured had a hernia condition which was not disabling to any extent prior to the issuance of the policy was imputed to the company, and the insured would not be barred from a recovery for sickness caused by the aggravation of such hernia after the policy was issued merely because of its preexistence. *American Life Ins. Co. v. Stone*, 78 Ga. App. 98, 50 S.E.2d 231 (1948).

When an authorized agent of an insurance company has actual knowledge of the existence of a fact concerning the status of the potential policyholder or prospect, which fact would have the effect of voiding the policy, but the insurance company issues a policy which contains a provision that the policy is void upon the existence of such fact, the insurance company is deemed to have waived such provision. The knowledge of the agent is imputed to the principal. *Fireman's Fund Ins. Co. v. Standridge*, 103 Ga. App. 442, 119 S.E.2d 585 (1961).

Unless there is a limitation on the authority of the agent in the application itself sufficient to put the proposed insured on notice of the limitation on the authority of the agent, the general rule applies that the knowledge of the agent is the knowledge of the principal. *Canal Ins. Co. v. Bryant*, 166 Ga. App. 483, 304 S.E.2d 565 (1983).

An insurance company had actual knowledge of an applicant's misrepresentation about prior cancellation of a policy because its own agency had secured the policy; the "agent" for purposes of application of this section was the insurance agency, not merely the individuals working for the agency. *Graphic Arts Mut. Ins. Co. v. Pritchett*, 220 Ga. App. 430, 469 S.E.2d 199 (1995).

**Where authority of insurance agent has been circumscribed by policy.** — Knowledge of local agents as to the fact that premium was not paid by the insureds before the loss was not imputable to the company, where the policy had been delivered at the time of the payments to the agents and the more comprehensive authority of the local agents had been reduced and circumscribed by the terms of the policy. *Estes v. Standard Fire Ins. Co.*, 66 Ga. App. 775, 19 S.E.2d 35 (1942).

**Employer is not insurer's agent in selecting insurer, policy, and coverage for employees.** — In selecting a group insurer, in selecting a policy, and in selecting coverages to be afforded by the insurer, for contributing employees, employers act not as agents of the insurer but for their employees or for themselves. *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267 (1980).

**Employer's knowledge is imputed to insurer as agent for making policy effective.** — Where employer obtains group insurance policy covering its employees, the employee acts as agent of the insurance company for every purpose necessary to make effective the group policy, and the insurance company has imputed knowledge of facts which the employer knows. *Dawes Mining Co. v. Callahan*, 246 Ga. 531, 272 S.E.2d 267 (1980).

**Notice imputed to principal is actual, not constructive, notice.** — Under this section, actual notice to an agent of any matter connected with the agency is also actual notice to the agent's principal and is not merely constructive notice to the latter. *Prater v. Cox*, 64 Ga. 706 (1880), overruled on another point, *Rodgers v. Elder*, 108 Ga. 26, 33 S.E. 663 (1899); *Hillyer v. Brogden*, 67 Ga. 24 (1881); *Deveney, Hood & Co. v. Burton*, 110 Ga. 56, 35 S.E. 268 (1900); *Union Sav. Bank & Trust Co. v. Ellis*, 110 Ga. 494, 35 S.E. 780 (1900).

Actual notice to an agent can be imputed to the principal, but, even then, though the principal's information rests only on the implication that the agent has imparted the agent's knowledge, it is impliedly actual knowledge. *Wiley v. Rome Ins. Co.*, 12 Ga. App. 186, 76 S.E. 1067 (1913).

Actual notice to the agent is imputed actual notice to the principal. *Mumford v. Sears, Roebuck & Co.*, 44 Ga. App. 623, 162 S.E. 661 (1931).

Actual notice to an agent of any matter connected with the agent's agency is also actual notice to the agent's principal and is not merely constructive notice to the latter. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

The expression, "constructive notice," used in *Atlas Assurance Co. v. Kettles*, 144 Ga. 306, 87 S.E. 1 (1915), was not used in its strict sense, but as meaning that knowledge of the agent at the time of the issuance of the



**Application (Cont'd)**

policy would be imputed to the agent's principal. *Liverpool & London & Globe Ins. Co. v. Hughes*, 145 Ga. 716, 89 S.E. 817 (1916).

**Agent must have been acting in course of employment.** — If the officer or agent at the time of the alleged knowledge or notice was not acting for the corporation or in pursuance of the corporation's business and in the course of the agent's employment and duties, it is not bound or affected. *Georgia Power Co. v. Kinard*, 47 Ga. App. 483, 170 S.E. 688 (1933).

**Evidence****How principal proves no notice to agent.**

— Under former Civil Code 1895, §§ 3027 and 5160, if it was sought to charge a principal with notice, the principal was only required to offer the agent to whom the opposite party claimed the party gave the notice. The principal need not undertake to

prove a negative by producing all of the principal's agents, in order to show that each did not receive the notice. *Travelers Ins. Co. v. Thornton*, 119 Ga. 455, 46 S.E. 678 (1904).

**Effect of proving want of notice to agent.** — Proof that there was want of notice of a judgment against the principal on the part of an agent is not proof of want of such notice on the part of the principal. *Eason v. Vandiver*, 108 Ga. 109, 33 S.E. 873 (1899).

**Jury questions were presented**, in pleading alleging sickness resulting from the aggravation of a preexisting hernia, as to whether the disability was a sickness within the meaning of the insurance policy and as to whether the company had waived the defense that the hernia existed before the policy was written or was estopped from defending on that ground, since it appeared that the company had knowledge of such hernia through the company's agent taking the application for the insurance. *American Life Ins. Co. v. Stone*, 78 Ga. App. 98, 50 S.E.2d 231 (1948).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 273 et seq.

**C.J.S.** — 2A C.J.S., Agency, §§ 446, 456.

**ALR.** — Imputation of attorney's knowledge of facts to his client, 4 ALR 1592; 38 ALR 820.

Notice to salesman as chargeable to principal, 43 ALR 745.

Knowledge of agent as imputable to prin-

cipal in respect of transaction subsequent to agency, or transaction with which agent had no connection, 73 ALR 420.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 ALR 535.

Imputation of knowledge of agent acting for both parties to transaction, 4 ALR3d 224.

**10-6-59. Principal not bound by agent conspiring with third person.**

Where an agent shall conspire with the other party, his principal shall not be bound thereby nor charged with knowledge of facts thus acquired by his agent. (Civil Code 1895, § 3028; Civil Code 1910, § 3600; Code 1933, § 4-310.)

**History of Code section.** — This Code section is derived from the decision in *Free-*

*man v. Mutual Building & Loan Ass'n*, 90 Ga. 190, 15 S.E. 758 (1892).

**JUDICIAL DECISIONS**

**When agent acts for the agent, reason for O.C.G.A. § 10-6-58 ceases.** — When the agent departs from the scope of the agency and begins to act for the agent and not for

the principal, when the agent's private interest is allowed to outweigh the agent's duty as a representative, and when to communicate the information would prevent the accom-

plishment of the agent's fraudulent scheme, the agent becomes an opposite party, not an agent. The reason for the rule enunciated in former Code 1933, § 4-309 then ceases. *Pursley v. Stahley*, 122 Ga. 362, 50 S.E. 139 (1905).

**Former Code 1933, § 4-309 was modified when an agent proves false** to the agent's principal. *Hartford Accident & Indem. Co. v. Hartley*, 275 F. Supp. 610 (M.D. Ga. 1967), aff'd, 389 F.2d 91 (5th Cir. 1968).

**When agent is false.** — The rule enunciated in former Civil Code 1910, § 3599 was modified when an agent proves false to the agent's principal and at the instance of a third party aids in the communication of false reports as to the insurability of an applicant, for the purpose of benefiting the applicant and of defrauding the agent's principal. *Loftin v. Great S. Home Benevolent Ass'n*, 9 Ga. App. 121, 70 S.E. 353 (1911).

The rule of former Civil Code 1910, § 3599 did not apply when an agent conspired with the other party. In such a case the principal was not bound thereby nor charged with knowledge of the facts thus acquired by the agent. *Terry v. International Cotton Co.*, 138 Ga. 656, 75 S.E. 1044 (1912).

**When notice to agent will not be imputed to principal.** — Notice to the agent will not be imputed to the principal: (1) where it is such as it is the agent's duty not to disclose; (2) where the agent's relations to the subject matter, or the agent's previous conduct, render it uncertain that the agent will not disclose it; and (3) where the person claiming the benefit of the notice, or those whom the agent represents, colluded with the agent to cheat or defraud the principal. *Faircloth v. Taylor*, 147 Ga. 787, 95 S.E. 689 (1918).

A could read and write, but was inexperienced in business. B had been A's attorney, and A owed B \$50. At B's request, and to enable B to raise the money, A agreed to give a note therefor. The agent fraudulently made a note for \$500, instead of \$50, and procured A to sign it. The note was made payable to X, who had money to lend and who was a client of B. The money was advanced on the note to B, but none was paid over by X to A. It was held, that the lender was not charged with notice of the agent's fraud. *Pursley v. Stahley*, 122 Ga. 362, 50 S.E. 139 (1905).

Notice to the agent will not be imputed to the principal where the person claiming the benefit of the notice colluded with the agent to cheat or defraud the principal. *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935).

When an agent ceases to act for the agent's principal and begins to act in the agent's own best interest or conspire with another to the detriment of the agent's principal, the agent's knowledge is no longer imputed to the agent's principal. *Hartford Accident & Indem. Co. v. Hartley*, 275 F. Supp. 610 (M.D. Ga. 1967), aff'd, 389 F.2d 91 (5th Cir. 1968).

**Conspiracy with agent not proved.** — Defense set up by the defendant insurer, that the plaintiff conspired with the agent of the insurance company to obtain the policies, was not supported by any evidence. *Guaranty Life Ins. Co. v. Brown*, 92 Ga. App. 847, 90 S.E.2d 97 (1955).

**Cited in** *Henderson v. Citizens First Nat'l Bank*, 151 Ga. 62, 106 S.E. 549 (1921); *First Nat'l Bank v. Cooper*, 252 Ga. 215, 312 S.E.2d 607 (1984).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 280 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 452 et seq.

**ALR.** — Imputation of attorney's knowledge of facts to his client, 4 ALR 1592; 38 ALR 820.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Notice to salesman as chargeable to principal, 43 ALR 745.

Imputing to principal knowledge of agent having adverse interest or acting antagonistically to principal, 104 ALR 1246.

Agent's knowledge of his own embezzlement or other misconduct as imputable to principal in latter's suit on fidelity bond or insurance, 105 ALR 535.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Imputation of knowledge of agent acting for both parties to transaction, 4 ALR3d 224.

## 10-6-60. Principal bound for neglect and fraud of agent.

The principal shall be bound for the care, diligence, and fidelity of his agent in his business, and hence he shall be bound for the neglect and fraud of his agent in the transaction of such business. (Orig. Code 1863, § 2179; Code 1868, § 2175; Code 1873, § 2201; Code 1882, § 2201; Civil Code 1895, § 3029; Civil Code 1910, § 3601; Code 1933, § 4-311.)

### JUDICIAL DECISIONS

#### ANALYSIS

GENERAL CONSIDERATION  
SPECIFIC EXAMPLES

#### General Consideration

**O.C.G.A. § 10-6-60 must be construed in pari materia with O.C.G.A. § 10-6-61;** the distinction is that under § 10-6-60 the principal is liable for fraud or neglect of the principal's agent "in the transaction of the principal's business." The "assent" of the principal which under O.C.G.A. § 10-6-61 binds the principal to the willful trespass is deemed to exist implicitly where the act was "in the transaction of the principal's business." There is no conflict in these two statutes. *Sasser v. Mixon Contracting, Inc.*, 181 Ga. App. 710, 353 S.E.2d 525 (1987).

**Common law.** — This section, which lays down the general rule, also follows the common law. *Robinson v. Huidekoper*, 98 Ga. 306, 25 S.E. 440 (1896).

**Gratuitous bailments.** — Former Code 1882, §§ 2201 and 2961 did not vary the rule in respect to gratuitous bailments, inasmuch as the degree of diligence touching such bailments is no higher under these sections than at common law. *Merchants Nat'l Bank v. Guilmartin*, 88 Ga. 797, 15 S.E. 831, 14 L.R.A. 322 (1892).

**Principal is responsible for the torts of the agent** when the agent is acting on behalf of the principal. *DeDaviss v. U-Haul Co.*, 154 Ga. App. 124, 267 S.E.2d 633 (1980).

**Agent's acts in line of duty.** — What an agent did in the line of duty devolved upon the agent by the superior will make the superior responsible under former Code 1873, §§ 2194 and 2201. *Maddox & Rucker*

*v. Cunningham*, 68 Ga. 431, 45 Am. R. 500 (1882).

In determining the liability of the master for the negligent or willful acts of a servant, the test of liability is not whether the act was done during the existence of the employment, but whether it was done within the scope of the actual transaction of the master's business for accomplishing the ends of the servant's employment. *McGhee v. Kingman & Everett, Inc.*, 49 Ga. App. 767, 176 S.E. 55 (1934).

In order to hold an automobile dealer liable for injuries inflicted by an automobile while being operated by a salesperson, the relation of master and servant must exist and the servant must, at the time, have been acting within the scope of the servant's employment in performing an act for the master's benefit. *Nichols v. G.L. Hight Motor Co.*, 63 Ga. App. 155, 10 S.E.2d 439 (1940) (nonsuit granted dealer reversed), commented on in 3 Ga. B.J. 63 (1940).

No matter how much authority a general agent may have, it is not to be presumed that the agent has authority to commit a tort, and in order to hold the defendant corporation liable for the act of the corporation's officer, such tort must have been committed during the prosecution of the business of the corporation as a part thereof or by authority of the corporation or be ratified by the corporation or assented to. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Principal responsible if principal accepts contract procured by agent.** — A principal



who accepts a contract procured by fraudulent conduct of an agent, regardless of such agent's authority, is bound by such fraudulent conduct of the agent in procuring such contract. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

**When command or assent need not be shown.** — A principal may be liable for the willful tort of the principal's agent, done in the prosecution and within the scope of the principal's business, although it is not expressly shown that the principal either commanded the commission of the willful act or assented to the act. *Planters Cotton Oil Co. v. Baker*, 181 Ga. 161, 181 S.E. 671 (1935).

If the tort of the agent is committed in the prosecution and within the scope of the principal's business, it is done with the implied command or assent of the principal, and in such case it is unnecessary to make proof of an express command or assent. *Planters Cotton Oil Co. v. Baker*, 181 Ga. App. 161, 181 S.E. 671 (1935).

**General rule applies to either agent or servant.** — Whether tort-feasor was an agent or a servant makes no difference in applying the doctrine of respondeat superior; if the servant's or agent's wrongful acts were in the prosecution of the defendant's business and within the scope of the employment, then the defendant is liable for such tortious conduct of the servant or agent, as the case may be. *Prince v. Brickell*, 87 Ga. App. 697, 75 S.E.2d 288 (1953).

**To end general employer's liability, new employment must clearly appear.** — To show that the general employee or agent of one person has become the employee of another, with the effect of ending the general employer's responsibility for the acts of the agent, the new relation of the parties must clearly appear. *Fleming v. E.I. Du Pont De Nemours & Co.*, 89 Ga. App. 837, 81 S.E.2d 529 (1954).

**Agent's nonfeasance.** — If the appellant's agent for any reason fails to perform the agent's duty, the fault is chargeable to the principal and inures to the benefit of the opposite party. *Broussard v. Brandenburg*, 8 Ga. App. 795, 70 S.E. 159 (1911).

**Agent's misfeasance.** — While an agent is personally liable to those injured by the agent's misfeasance, the agent is not ordinarily liable for mere nonfeasance, under former Code 1933, §§ 4-311 and 4-409.

*Kimbrough v. Boswell*, 119 Ga. 201, 45 S.E. 977 (1903).

**Liability where duty is owed by principal.**

— An agent is not liable to third persons for the failure of the principal to discharge affirmative duties which the principal may owe. *Verddier v. Neal Blun Co.*, 128 Ga. App. 321, 196 S.E.2d 469 (1973).

**Only fraud preventing reading what is signed will relieve party.** — The only fraud which would relieve a party from an obligation which the party has signed, where that party can read and write and is not otherwise under any disability, is that fraud which prevents the party from reading what the party signed. *Wall v. Federal Land Bank*, 156 Ga. App. 368, 274 S.E.2d 753 (1980).

**Blind reliance unjustified.** — No actionable fraud was demonstrated because as a matter of law the defendant's blind reliance upon any representation about the principal without any attempt whatsoever at direct contact with the principal was unjustified. *B & W Pipeline, Inc. v. Newton County Bank*, 181 Ga. App. 684, 353 S.E.2d 829 (1987).

**Alleging principal by principal's agent committed wrongful act sufficiently pleads agency.** — One of the ways of pleading that agency existed so as to make alleged principal responsible for the wrongful acts of the agent is to allege by a simple direct statement that the defendant principal by the principal's agent committed the wrongful act. *Garver v. Smith*, 90 Ga. App. 892, 84 S.E.2d 693 (1954).

**Connection of act with employment must be alleged.** — A principal or master being responsible for the negligent acts of the agent or servant only when done by command or within the scope of the employment, it is necessary, in an action seeking to charge one for the acts of another upon the theory that the latter was agent for the former, that the plaintiff's pleading should disclose, either expressly or by necessary implication, not only the existence of the agency, but also the connection of the act with the employment. *Bates v. Southern Ry.*, 52 Ga. App. 576, 183 S.E. 819 (1936).

**Agent's false parol representations may be shown.** — Statements and representations in parol made by an agent of one of the parties to a contract, which are offered for the purpose of showing that they were falsely and fraudulently made for the purpose of

**General Consideration (Cont'd)**

procuring the execution of the contract and that therefore no valid contract is in existence, are not subject to the objection that they are matters in parol in contradiction to the terms of a written instrument. *Edge v. Alertox, Inc.*, 47 Ga. App. 598, 171 S.E. 181 (1933).

**Error not to vacate nonsuit.** — Since there was evidence that defendant's explosives sales agent, in advising and instructing a county engineer as to the method of detonation and the quantities of explosives necessary to blast rock from the county's quarry, was acting in the scope of the agent's employment and in the prosecution of the defendant's business, and was not subject to the county's control in the performance of the agent's duties connected with the sales of explosives, and that, as a result of the negligence of the defendant's agent in instructing the county engineer to use a large quantity of explosives, to be detonated in a short time, a blast was performed in the county's quarry according to the instructions given, thereby causing the damage to the plaintiff's house as alleged, the court erred in refusing to vacate judgment on nonsuit and reinstate plaintiffs' case. *Fleming v. E.I. Du Pont De Nemours & Co.*, 89 Ga. App. 837, 81 S.E.2d 529 (1954).

**Instruction based on section proper where agent's act was unintentional.** — If a trespass committed by an agent for the agent's principal is not denied, but is claimed to have been unintentional, it is proper to instruct the jury, on this issue, that "the principal is bound for the care, diligence, and fidelity of his agent in his business". *Crockett Bros. v. Sibley*, 3 Ga. App. 554, 60 S.E. 326 (1908).

**Cited in Equitable Bldg. & Loan Ass'n v. Brady**, 175 Ga. 43, 164 S.E. 674 (1932); *Jordan v. Belvin*, 57 Ga. 719, 196 S.E. 132 (1938); *Malcom v. Webb*, 211 Ga. 449, 86 S.E.2d 489 (1955); *United States v. One 1955 Model Buick Coupe Auto.*, 145 F. Supp. 72 (S.D. Ga. 1956); *Mitchell v. Gay*, 111 Ga. App. 867, 143 S.E.2d 568 (1965); *Miller v. Thurmond*, 128 Ga. App. 228, 196 S.E.2d 366 (1973); *International Bhd. of Elec. Workers v. Briscoe*, 143 Ga. App. 417, 239 S.E.2d 38 (1977); *Garden of Eden, Inc. v. Eastern Sav. Bank*, 244 Ga. 63, 257 S.E.2d 897 (1979); *Fountainhead Dev. Corp. v.*

*Dailey*, 263 Ga. App. 677, 588 S.E.2d 768 (2003).

**Specific Examples**

**Independent contractor.** — Principle of law that a master or employer is liable for a tort committed by the master's or employer's servant or employee about the master's business or within the course of the employee's employment is not applicable in a case where the relation between the parties is that of principal or employer and independent contractor. *Whitehall Chevrolet Co. v. Anderson*, 53 Ga. App. 406, 186 S.E. 135 (1936).

**Conductor of train is alter ego of carrier.** — Under this section, the conductor of the train is the alter ego of the carrier with respect to the care of passengers on a railroad train and the duty of making contracts for passage, between points on the conductor's run, with persons who are permitted to board the train without tickets. *Williamson v. Central of Ga. Ry.*, 127 Ga. 125, 56 S.E. 119 (1906).

**Operator of tourist camp is liable for nonregistration of guests by employees.** — It was not required that the owner or operator of a tourist camp be personally in actual charge of the register; if the owner's agents, servants, or employees were in charge thereof, and fail to secure from the occupants of the cabins or rooms the registration and information required by Ga. L. 1945, p. 326, § 6, the owner or operator was responsible therefor under former Code 1933, §§ 4-309 and 4-311. *Copeland v. Leathers*, 206 Ga. 280, 56 S.E.2d 530 (1949).

**Seller of explosives is liable for agent's negligence in instructing use.** — If a company by the company's agent gives instructions for the use of the company's explosive products, the company is liable for the company's negligence in giving such instructions, in connection with the sale of the company's products. *Fleming v. E.I. Du Pont De Nemours & Co.*, 89 Ga. App. 837, 81 S.E.2d 529 (1954).

**Bank officer cannot release debtors short of payment of debt.** — Despite this section, a bank officer, with or without apparent authority, cannot compromise the institution the officer represents by promising proposed debtors of the bank that they will be granted a release from the debtor's obliga-



tions short of payment of the debt. *Wall v. Federal Land Bank*, 156 Ga. App. 368, 274 S.E.2d 753 (1980).

**Special trust in bank or officers does not allow reliance on oral communications.** — Even if a party places special trust and confidence in a bank or the bank's officers, this does not create a confidential or fidu-

ciary relationship which would entitle the party seeking to avoid an obligation to the bank by alleging reliance upon oral communications between the bank officers and that party which might otherwise vitiate the transaction. *Wall v. Federal Land Bank*, 156 Ga. App. 368, 274 S.E.2d 753 (1980).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 262, 264.

**C.J.S.** — 2A C.J.S., Agency, § 419 et seq.

**ALR.** — Liability for misconduct or negligence of messenger not directly related to the service, 18 ALR 1416.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Liability of bank in respect to funds of third persons misappropriated by bank officer or employee and used to cover his own overdraft or defalcation, 48 ALR 464.

Liability of bailee for damage to or destruction of subject of bailment by servant acting for his own purposes or in violation of his instructions, 52 ALR 711.

Waiver of fraud by principal's performance of contract with third person, or by payment of commissions to broker with knowledge of fraud, 69 ALR 1082.

Necessity of alleging fact of agency in declaring upon contract made by party through agent, 89 ALR 895.

Liability of infant for torts of his employee or agent, 103 ALR 487.

Responsibility of bank for fraud of officer or agent inducing customer or debtor of bank to enter into transaction with such officer or agent personally or with third person, 117 ALR 389.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

Fraud or misrepresentation by insured's agent after loss as within provision avoiding policy for fraud or attempted fraud of insured, 24 ALR2d 1220.

Employer's liability for negligence of em-

ployee in piloting his own airplane in employer's business, 46 ALR2d 1050.

Real estate broker's power to bind principal by representations as to character, condition, location, quantity, or title of property, 58 ALR2d 10.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on floor, 61 ALR2d 6.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on floor, 61 ALR2d 110.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of litter or debris on stairway, 61 ALR2d 174.

Liability of proprietor of store, office, or similar business premises for injury from fall due to presence of obstacle placed or dropped on steps, 61 ALR2d 205.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 ALR2d 15; 93 ALR3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Physician giving medical examination to insurance applicant as agent of insured or of insurer, 94 ALR2d 1389.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Insurance agent's statement or conduct indicating that insurer's cancellation of policy shall not take effect as binding on insurer, 3 ALR3d 1135.

Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 ALR3d 1055.

Liability of bank, to other than party whose financial condition is misrepresented, for erroneous credit information furnished by bank or its directors, officers, or employees, 77 ALR3d 6.



Spouse's acceptance or retention of benefits of other spouse's fraudulent act as ratification of transaction, 82 ALR3d 625.

Principal's liability for punitive damages because of false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

Hospital's liability for negligence in failing to review or supervise treatment given by doctor, or to require consultation, 12 ALR4th 57.

### 10-6-61. When principal liable for agent's willful trespass.

The principal shall not be liable for the willful trespass of his agent unless done by his command or assented to by him. (Orig. Code 1863, § 2181; Code 1868, § 2177; Code 1873, § 2203; Code 1882, § 2203; Civil Code 1895, § 3031; Civil Code 1910, § 3603; Code 1933, § 4-312.)

**Law reviews.** — For note discussing the doctrine of respondeat superior, see 2 Ga. St. B.J. 478 (1966).

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION  
EVIDENCE  
APPLICATION

#### General Consideration

**Meaning of "trespass".** — In its broader sense, a "trespass" comprehends any misfeasance, transgression, or offense which damages another person's health, reputation, or property. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Any abuse of, or damage done to, the personal property of another, unlawfully, is a "trespass" for which damages may be recovered. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Summary judgment for a lender in an owner's suit claiming that the lender trespassed on the owner's property was proper because the security deed provided that the lender was allowed to take action to preserve the lender's interest in the property in the event of a default on the payments, and the owners admitted the owners were in default of those payments; further, both of the owners admitted that the owners had no evidence that the lender authorized anyone to remove the personal property for the home. *Tacon v. Equity One, Inc.*, 280 Ga. App. 183, 633 S.E.2d 599 (2006).

**This section and § 51-2-2 should be con-**

**strued together**, so as to harmonize the statutes and allow both to remain of force, in the cases to which the statutes are applicable. *Western & Atl. R.R. v. Turner*, 72 Ga. 292, 53 Am. R. 842 (1884); *Toole Furn. Co. v. Ellis*, 5 Ga. App. 271, 63 S.E. 55 (1908); *Mason v. Nashville, C. & St. L. Ry.*, 135 Ga. 741, 70 S.E. 225, 33 L.R.A. (n.s.) 280 (1911); *Southeastern Fair Ass'n v. Wong Jung*, 24 Ga. App. 707, 102 S.E. 32 (1920), *aff'd*, 151 Ga. 85, 105 S.E. 847 (1921).

Former Code 1933, §§ 4-312 and 105-108, being in *pari materia*, must be construed together. *Planters Cotton Oil Co. v. Baker*, 181 Ga. 161, 181 S.E. 671 (1935).

Former Code 1933, § 4-312 was in *pari materia* with former Code 1933, § 105-108, and must be construed therewith and the two sections harmonized. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

O.C.G.A. § 10-6-61 must be construed in *pari materia* with § 51-2-2 and, so construed, means that the principal may be liable if trespass was committed by the principal's implied command or implied assent; and if committed within scope of agency, implication will arise as a matter of law. *Melton v.*

LaCalamito, 158 Ga. App. 820, 282 S.E.2d 393 (1981).

**O.C.G.A. § 10-6-61 must be construed in pari materia with O.C.G.A. § 10-6-60;** the distinction is that under O.C.G.A. § 10-6-60 the principal is liable for fraud or neglect of the principal's agent "in the transaction of the principal's business." The "assent" of the principal which under § 10-6-61 binds the principal to the willful trespass is deemed to exist implicitly if the act was "in the transaction of the principal's business." There is no conflict in these two statutes. *Sasser v. Mixon Contracting, Inc.*, 181 Ga. App. 710, 353 S.E.2d 525 (1987).

**Master liable for servant's willful torts if done in prosecution of master's business.** — While former Code 1933, § 4-312 declared that "the principal is not liable for the willful trespass of his agent, unless done by his command or asserted to by him," § 51-2-2 makes a person liable "for torts committed by his servant, by his command or in the prosecution and within the scope of his business, whether the same is by negligence or voluntary." Thus, a master is deemed to have impliedly "assented" to and becomes liable for the willful torts of the master's servant only when the torts are committed "in the prosecution and within the scope of his business," and notwithstanding that, under common law and earlier decisions, an employer was not liable for the malicious and intentional torts of an employee, although committed while forwarding the employer's business; the rule is that a master is liable for the willful torts of the master's servant, committed in the course of the servant's employment, just as though the master had personally committed the torts. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

**Master is not liable for act done wholly for servant's purpose.** — If the servant acts not in the prosecution of the master's business or within the scope of such business, the master cannot be held liable, no matter how wanton or willful the conduct of the servant, so that if the servant, wholly for a purpose of the servant's own, disregarding the object for which the servant is employed, and not intending by the servant's act to execute it, does an injury to another not within the scope of the servant's employment, the master is not liable. But if the act is done in the

execution of the authority given the servant by the servant's master and for the purpose of performing what the master has directed, the master will be responsible, whether the wrong done is occasioned by negligence or by a wanton or reckless purpose to accomplish the master's business in an unlawful manner. *Gomez v. Great Atl. & Pac. Tea Co.*, 48 Ga. App. 398, 172 S.E. 750 (1934).

**Principal is liable for agent's willful trespass if principal commands or assents to trespass.** — While a principal is not, as a general rule, liable for the willful trespass of the principal's agent, yet, if the trespass is committed by the principal's command, or if it is assented to by the principal, the principal is liable under this section. *Byne v. Hatcher*, 75 Ga. 289 (1885); *Crockett Bros. v. Sibley*, 3 Ga. App. 554, 60 S.E. 326 (1908).

**Principal's command or assent is implied as matter of law.** — Former Code 1933, § 105-108 was not contrary to former Code 1933, § 4-312, because former Code 1933, § 4-312, properly construed did not mean the principal was not liable for the willful trespass of the principal's agent unless done by the principal's express command or assent, but the principal may be liable if the trespass was committed by the principal's implied command or implied assent, and if committed within the scope of the agency, the implication will arise as a matter of law. *Planters Cotton Oil Co. v. Baker*, 181 Ga. 161, 181 S.E. 671 (1935); *Conney v. Atlantic Greyhound Corp.*, 81 Ga. App. 324, 58 S.E.2d 559 (1950).

If the tort of the agent is committed in the prosecution and within the scope of the principal's business, it is done with the implied command or assent of the principal, and in such case it is unnecessary to make proof of an express command or assent. *Planters Cotton Oil Co. v. Baker*, 181 Ga. App. 161, 181 S.E. 671 (1935).

If an agent commits a trespass in the prosecution of the corporation's business, it is by implication of law committed by command of the principal or with the principal's consent. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

Since the determinative question in a case of a principal's liability is whether the act of the agent is done in the prosecution and within the scope of the principal's business, either command or assent can be implied.

**General Consideration (Cont'd)**

*Greenbaum v. Brooks*, 110 Ga. App. 661, 139 S.E.2d 432 (1964).

If an agent commits a trespass in the prosecution of the principal's business, it is by implication of law committed by command of the principal or with the principal's consent. *Chrysler Corp. v. Wilson Plumbing Co.*, 132 Ga. App. 435, 208 S.E.2d 321 (1974).

**Same rules apply to agent and servant.** — There should not be made any distinction between the relationships of principal and agent and that of master and servant, so as to make different rules of liability apply, according to the nature of the relationship. *Planters Cotton Oil Co. v. Baker*, 181 Ga. 161, 181 S.E. 671 (1935).

Whether tort-feasor was an agent or a servant makes no difference in applying the doctrine of respondeat superior; if the tort-feasor's wrongful acts were in the prosecution of the defendant's business and within the scope of the employment, then the defendant is liable for such tortious conduct of the defendant's servant or agent, as the case may be. *Prince v. Brickell*, 87 Ga. App. 697, 75 S.E.2d 288 (1953).

**Cited in** *Ogletree v. MacDougald Constr. Co.*, 45 Ga. App. 128, 163 S.E. 320 (1932); *Personal Fin. Co. v. Loggins*, 50 Ga. App. 562, 179 S.E. 162 (1935); *Wren Mobile Homes, Inc. v. Midland-Guardian Co.*, 117 Ga. App. 22, 159 S.E.2d 734 (1967); *Sisk v. Carney*, 121 Ga. App. 560, 174 S.E.2d 456 (1970).

**Evidence**

**Jury charge on ratification.** — It was not error for the court, in giving in charge to the jury the language of this section, to add, after the words "by his command or assented to by him," the words "or ratifies it." *Crockett Bros. v. Sibley*, 3 Ga. App. 554, 60 S.E. 326 (1908).

**Command or assent need not be expressly shown.** — A principal may be liable for the willful tort of the principal's agent, done in the prosecution and within the scope of the principal's business, although it is not expressly shown that the principal either commanded the commission of the willful act or assented to the act. *Planters Cotton Oil Co. v. Baker*, 181 Ga. 161, 181 S.E. 671 (1935).

**Application**

**Fact tort-feasor is director or officer does not make corporation liable.** — The mere fact that one who commits a tort is a director in a corporation does not, without more, render the corporation liable therefor. *Strickland v. Bank of Cartersville*, 141 Ga. 565, 81 S.E. 886 (1914).

The mere fact that one who commits a tort is a director and officer of a corporation does not, without more, render the corporation liable. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Corporation liable when tort-feasor acted in prosecution of corporation's business or with corporation's authority or act was ratified.** — No matter how much authority a general agent may have, it is not to be presumed that the agent has authority to commit a tort, and, in order to hold the defendant corporation liable for the act of the corporation's officer, such tort must have been committed during the prosecution of the business of the corporation as a part thereof or by authority of the corporation or be ratified by the corporation or assented to. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Liability of corporation when acts in themselves violate duty owed by corporation.** — A corporation is not liable for the malicious acts of the corporation's agent or officer unless the acts are authorized, or were within the scope of the agent's duties, or were in themselves a violation of a duty owed by the corporation to the party injured, or such acts were ratified by the corporation. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Liability of corporation for slander.** — A corporation may only be liable for slander expressly ordered or directed, and in slander situations only for those words spoken by the corporation's command. *Church of God, Inc. v. Shaw*, 194 Ga. App. 694, 391 S.E.2d 666, cert. denied, 194 Ga. App. 911, 391 S.E.2d 666 (1990).

**No liability if principal neither owes duty nor negligently fails to prevent servant's act.** — Neither a carrier nor one who furnishes to a carrier terminal facilities for taking on passengers, owing a duty to one who is a passenger, violates that duty through any act of a servant towards passenger, where servant committing the act has not been in-



trusted with the performance of any duty owing by master to passenger and where master is not negligent in failing to anticipate, or to prevent, the performance of the act of servant. *Massengale v. Atlanta, Birmingham & Coast Line R.R.*, 46 Ga. App. 484, 168 S.E. 111 (1933).

**Principal is liable in a proper case for malicious prosecution**, if the prosecution is conducted by the agent in furtherance of the business of the principal and within the scope of the agent's authority. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Principal is liable for malicious prosecution only if agent acted within scope of employment or at principal's command.** — If it is alleged in a suit for damages for malicious prosecution that the prosecution was instituted by the agent of the defendant, it must be proved that the agent was at that time acting within the scope of the agent's employment or at the direction or command of the agent's principal. The plaintiff having failed to prove plaintiff's case as laid in plaintiff's pleading the court did not commit error in granting a nonsuit. *Glass v. Brittain Bros. Co.*, 21 Ga. App. 634, 94 S.E. 814 (1918).

In order for a bank to be held liable for a malicious prosecution instigated by a false statement made by the bank's agent or the bank's executive vice-president, it must appear that the bank authorized such malicious prosecution and that the same was done by the officer and agent, acting within the scope of officer's or agent's employment or at the discretion or command of the bank. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Authority to agent must affirmatively appear.** — A bank is not liable for a malicious prosecution in which the bank's vice-president participated, encouraged and aided, and purported to act for the corporation, since it does not affirmatively appear that the bank authorized the vice-president to engage in such prosecution or aid and abet therein or that the bank assented thereto or ratified the prosecution. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

A banking corporation is not liable for damages resulting from a false statement maliciously and willfully made by the bank's

executive vice-president, thereby inducing another to institute without probable cause and maliciously a criminal prosecution against another, even where in making such false statement the officer of the corporation was acting in the officer's capacity as such officer and for the corporation, and within the scope of the officer's agency with the corporation, unless it affirmatively appears that such officer had authority from the corporation to make such false statement. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Liability of principal for malicious arrest by agent.** — A principal is not liable for a malicious arrest by an agent, which was beyond the scope of the agent's authority and neither authorized or ratified by the principal. *Fire Ass'n v. Fleming*, 78 Ga. 733, 3 S.E. 420 (1887).

**Liability of principal for assault and battery by agent.** — If the agent of a corporation engaged in the business of selling certain commercial products manufactured by the corporation committed an unprovoked assault and battery upon the plaintiff, inflicting upon the plaintiff severe personal injuries, the plaintiff could not maintain a suit for damages against the corporation on this account, although it knew that the agent was a person of violent temper and in fact had employed agent because it knew that the agent was a man prone to make unprovoked attacks upon others; it not appearing that the corporation authorized the assault or that it assented to the tort complained of. *Murphey v. New S. Brewery & Ice Co.*, 145 Ga. 561, 89 S.E. 704 (1916).

It appearing from the plaintiff's pleading that the alleged injury arose from an assault by a person alleged to be the manager of the defendant corporation; that the plaintiff approached the office of the corporation, not for the purpose of transacting any sort of business, but from mere idle curiosity, to hear a conversation between the manager and a third person; that the assault did not arise from business of the corporation or in connection with the assailant's duties as manager, but arose from a merely personal altercation; and that the assailant left the corporation's place of business and struck the plaintiff on steps, which, though alleged to have been used jointly by the corporation and by a hotel company as an entrance, are

**Application** (Cont'd)

not alleged to have been a part of the defendant's premises, the pleading does not

show liability on the part of the corporation. *Daniel v. Excelsior Auto Co.*, 31 Ga. App. 621, 121 S.E. 692 (1924).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 262, 264.

**C.J.S.** — 2A C.J.S., Agency, § 419 et seq.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Liability of infant for torts of his employee or agent, 103 ALR 487.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 ALR2d 1282.

Principal's liability for false arrest or imprisonment caused by agent or servant, 92 ALR2d 15; 93 ALR3d 826.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Principal's liability for punitive damages for false arrest or imprisonment, or malicious prosecution, by agent or employee, 93 ALR3d 826.

### **10-6-62. When principal to benefit from agent's contract; defenses against undisclosed principal.**

The principal shall have advantage of his agent's contracts in the same manner as he shall be bound by them, so far as they come within the scope of his agency. If, however, the agency shall have been concealed, the party dealing with him may set up any defense against the principal which he has against the agent. (Orig. Code 1863, § 2182; Code 1868, § 2178; Code 1873, § 2204; Code 1882, § 2204; Civil Code 1895, § 3032; Civil Code 1910, § 3604; Code 1933, § 4-313.)

**JUDICIAL DECISIONS**

**Undisclosed principal is entitled to benefits of agent's contracts and acts.** — The governing principle is that an undisclosed principal, as the ultimate party in interest, is entitled, against third persons, to all advantages and benefits of acts and contracts of the principal's agent. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

**Injury to other party by substitution.** — If an agent makes a contract for the agent's principal but conceals the fact that the agent is an agent, the principal may claim the benefits of the contract so far as the principal can do so without injury to the other party by the substitution of the principal for the agent. *Planters Gin & Whse. Co. v. Pitts*

*Banking Co.*, 24 Ga. App. 731, 102 S.E. 183, cert. denied, 24 Ga. App. 817 (1920).

**Undisclosed principal may sue upon simple contract made in agent's name.** — If a simple contract, oral or written was made with an agent in the agent's own name, and the principal was undisclosed, the latter may claim its fruits and sue upon it under former Code 1873, §§ 2197 and 2204, even though the agent also might sue. *Spain v. W.H. Beach & Son*, 52 Ga. 494 (1874); *Atlanta & W. Point R.R. v. Texas Grate Co.*, 81 Ga. 602, 9 S.E. 600 (1888).

**Suit on contract disclosing agency but not principal's name.** — A principal may sue for breach of a written contract entered into by the principal's agent, if the instrument dis-



closed on the instrument's face that the agent was contracting as such and fails to disclose the name of the principal. *Washington Mfg. Co. v. Callaway*, 144 Ga. 89, 86 S.E. 225 (1915).

**Undisclosed principal may recover damages for delay in delivery of telegram sent by agent.** — If an agent sends a telegram for an undisclosed principal, the principal may maintain an action in the principal's own name for damages resulting from unreasonable delay in the telegram's transmission or delivery. *Ruan v. Gunn*, 77 Ga. 53 (1886); *Rosser, Armistead & Co. v. Darden*, 82 Ga. 219, 7 S.E. 919 (1888); *Dodd Grocery Co. v. Postal Telegraph-Cable Co.*, 112 Ga. 685, 37 S.E. 981 (1901); *Propeller Tow-Boat Co. v. Western Union Tel. Co.*, 124 Ga. 478, 52 S.E. 766 (1905); *Seifert v. Western Union Tel. Co.*, 129 Ga. 181, 58 S.E. 699, 21 Am. St. R. 210, 11 L.R.A. (n.s.) 1149 (1907).

**Undisclosed principal's rights are subject to claims against agent.** — Rights of an undisclosed principal are subject to claims acquired in good faith against the agent. *Standard Brick & Tile Co. v. Posey*, 56 Ga. App. 686, 193 S.E. 613 (1937).

**Defenses.** — If the agency has been concealed, the party dealing with the agent may set up any defense against the principal which the party has against the agent. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

A third person who contracts in ignorance of the existence of a principal, can set up against the principal, who sues upon the contract, any defenses and equities which the third person could have set up against the agent, had the agent's been in reality the principal suing on the principal's own behalf. *Standard Brick & Tile Co. v. Posey*, 56 Ga. App. 686, 193 S.E. 613 (1937).

**Third person must have no notice of agency for application of defenses.** — In a suit by principal, in order for third person to avail oneself of any equities, defenses, set-offs, or counterclaims one has against agent only, one must be innocent of any knowledge of facts and circumstances which would put a reasonably prudent person on inquiry that one is dealing with an agent; and, although the agent acts in the agent's own name, if the third person knows or has reason to believe that the third person is

dealing with one who is agent of another, the third person cannot successfully set up such a defense or setoff. *Standard Brick & Tile Co. v. Posey*, 56 Ga. App. 686, 193 S.E. 613 (1937).

**If principal gives indicia of authority to sell, principal cannot follow property.** — Under this section, if one gives to another such evidence of the right of selling the goods of the former as, according to the custom of trade or the common understanding of the world, usually accompanies the authority of disposal, or has given the external indicia of the right of disposing of the property, one loses the right of following it; a sale to a fair purchaser divests the first title, and the authority to sell, whether real or apparent, is good against the party who gave it, though the confidence of the principal is abused by the possessor of such indicia. *Rosser, Armistead & Co. v. Darden*, 82 Ga. 219, 7 S.E. 919 (1888).

**Payment to a principal will discharge an obligation assumed by another to the agent of such principal.** *Trust Co. v. Mobley*, 40 Ga. App. 468, 150 S.E. 169 (1929).

**Payment to third person nominal payee must remit to.** — If a mere nominal payee is bound on receiving money to pay it over to a third person, the debtor may be relieved by making payment directly to such third person. *Trust Co. v. Mobley*, 40 Ga. App. 468, 150 S.E. 169 (1929).

**Sale of intoxicating liquors to an agent may be alleged as a sale to the principal.** *Kemp v. State*, 120 Ga. 157, 47 S.E. 548 (1904).

**Proof of undisclosed principal by parol evidence.** — If fact of agency is concealed, it is necessary ordinarily to prove by parol evidence the existence of the undisclosed principal. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

Although parol evidence is inadmissible to add to, take from, or vary a written contract, parol evidence may be used in cases involving undisclosed principals in ordinary contracts which are not under seal; if the rule were otherwise, this section, which provides that the principal shall have advantage of its agent's contracts in the same manner as the principal shall be bound by them, could not be applied in all cases. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).



If there was nothing in the record to show that the contract for the purchase of a car was under seal, the testimony of the agent that the agent was acting for an undisclosed principal was properly admitted; thus, the fact that the agency was not disclosed at the time of the contract would not prevent the principal from enforcing the contract in the principal's own name. *United States Fid. & Guar. Co. v. Coastal Serv., Inc.*, 103 Ga. App. 133, 118 S.E.2d 710 (1961).

Cited in *Savannah Trust Co. v. National*

*Bank*, 16 Ga. App. 706, 86 S.E. 49 (1915); *Continental Guar. Corp. v. Smoke*, 29 Ga. App. 483, 116 S.E. 14 (1923); *Lovell v. Reliable Garage*, 33 Ga. App. 289, 125 S.E. 877 (1924); *Smith v. Harvey-Given Co.*, 182 Ga. 410, 185 S.E. 793 (1936); *Berger v. Noble*, 81 Ga. App. 34, 57 S.E.2d 844 (1950); *Collins v. Levine*, 156 Ga. App. 502, 274 S.E.2d 841 (1980); *Crisp Pecan Co. v. Wiggins Produce Co.*, 222 Ga. App. 747, 476 S.E.2d 60 (1996).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 316 et seq., 328 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 460 et seq.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Liability of undisclosed principal on sealed contract, 32 ALR 162.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract, 53 ALR 414.

Concealment of fact that party to contract

was acting for undisclosed principal as fraud which will toll statute of limitations, 114 ALR 864.

Right to join agent and undisclosed principal in same action, 118 ALR 701.

Exceptions to rule which permits suit by or against undisclosed principal, 130 ALR 664.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Agency: Anti-assignment clause in contract as precluding enforcement by undisclosed principal, 75 ALR3d 1184.

Rights to expirations as between insurer and insurance agent or broker, 88 ALR3d 1142.

## 10-6-63. When principal may recover money or goods illegally or mistakenly paid or wrongfully transferred by agent.

The principal may recover back money paid illegally or by mistake of his agent or goods wrongfully transferred by the agent, the party receiving the goods having notice of the agent's want of authority or willful misconduct. (Orig. Code 1863, § 2183; Code 1868, § 2179; Code 1873, § 2205; Code 1882, § 2205; Civil Code 1895, § 3033; Civil Code 1910, § 3605; Code 1933, § 4-314.)

## JUDICIAL DECISIONS

**Section introduces no new rule.** — It authorizes a principal to recover back goods wrongfully transferred by the principal's agent, in cases where the transferee had notice, but it does not change the rules regulating the rights of principals against parties dealing with special agents, or with general agents, who act beyond the scope of

their agency. *First Nat'l Bank v. Charles Nelson & Co.*, 38 Ga. 391, 95 Am. Dec. 400 (1868); *Hawthorne v. Pope*, 48 Ga. App. 239, 172 S.E. 574 (1934).

**Knowledge of conversion.** — This section applies in all cases when the third person knew and participated in the illegal or unauthorized act of conversion. *First Nat'l*

Bank v. Charles Nelson & Co., 38 Ga. 391, 95 Am. Dec. 400 (1868); Hawthorne v. Pope, 48 Ga. App. 239, 172 S.E. 574 (1934).  
**Cited in** Bank of Oglethorpe v. Brooks, 33

Ga. App. 84, 125 S.E. 600 (1924); First Nat'l Bank v. Cooper, 252 Ga. 215, 312 S.E.2d 607 (1984).

RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 320, 326.

**C.J.S.** — 2A C.J.S., Agency, § 339.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Notice to salesman as chargeable to principal, 43 ALR 745.

Necessity and sufficiency of notice of termination of authority of agent to purchase goods for mercantile business to charge one who has previously dealt with him, 43 ALR 1219.

Agent's liability to principal on account of money or property received on latter's ac-

count, as affected by his restoration of same to, or his application thereof for benefit of, third person, 98 ALR 1429.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 ALR 578.

Drawing of check on bank account of principal or employer payable to accused's creditor as constituting embezzlement, 88 ALR2d 688.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

10-6-64. Agent may be witness; credibility; admissibility of agent's declarations.

The agent shall be a competent witness either for or against his principal. His interest shall go to his credit. The declarations of the agent as to the business transacted by him shall not be admissible against his principal unless they were a part of the negotiation constituting the *res gestae*, or else the agent is dead. (Orig. Code 1863, § 2184; Code 1868, § 2180; Code 1873, § 2206; Code 1882, § 2206; Civil Code 1895, § 3034; Civil Code 1910, § 3606; Code 1933, § 4-315.)

**Cross references.** — Admissibility against principal of admissions by agent, § 24-3-33.

**Law reviews.** — For article surveying the law in Georgia on admissions, see 8 Mercer

L. Rev. 252 (1957). For annual survey of evidence law, see 58 Mercer L. Rev. 151 (2006).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION  
PROVING AGENCY

General Consideration

**Section declares existing law.** — This section is merely declaratory of the law existing at the time the 1863 Code was adopted. *Turner v. Turner*, 123 Ga. 5, 50 S.E. 969

(1905); *Southern Express Co. v. Cohen*, 13 Ga. App. 174, 78 S.E. 1111 (1913).

**Section lays down the general rule.** *Winter v. Southern Sec. Co.*, 155 Ga. 590, 118 S.E. 214 (1923).

**General rule originated in necessity of**

**General Consideration (Cont'd)**

**case.** — The well-settled rule of law embodied in this section, which makes an agent a competent witness either for or against the agent's principal, originated in the necessity of the case. *Lowrys v. Candler*, 64 Ga. 236 (1879).

**Section amplifies § 10-6-56.** — Former Code 1933, § 4-302, providing that the principal shall be bound by all the acts of the principal's agent within the scope of the agent's authority, was a mere amplification of former Code 1933, § 4-307, and the same was true of former Code 1933, § 4-315, insofar as it referred to scope of authority. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Former Code 1933, §§ 4-315 and 38-406** and the second effectively limited the scope of the first. *Southern Ry. v. Allen*, 118 Ga. App. 645, 165 S.E.2d 194 (1968); *Brooks v. Kroger Co.*, 194 Ga. App. 215, 390 S.E.2d 280 (1990).

**Section has reference only to the admissibility of declarations as evidence.** *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Established rules as to declarations of decedents incorporated in section.** — The words "or else the agent is dead" in this section refer to entries made by an agent since deceased in the regular course of the business of the principal, or declarations made by a person since deceased against interest, or other instances where, under the established rules of evidence, the declarations of a deceased person might be admitted in evidence. *Turner v. Turner*, 123 Ga. 5, 50 S.E. 969 (1905).

**Admission by agent must come within one of exceptions.** — An admission on the part of the agent which had the effect of imputing negligence to the principal when not coming within one of the exceptions stated in former Code 1933, §§ 4-315 and 38-406 and not made by authority of the principal was erroneously admitted in evidence. *Southern Ry. v. Allen*, 118 Ga. App. 645, 165 S.E.2d 194 (1968).

Trial court's exclusion of a report by an emergency vehicle operator's supervisor regarding a collision that occurred between the emergency vehicle and a driver's vehicle was proper in the driver's personal injury action arising therefrom pursuant to

O.C.G.A. §§ 10-6-64 and 24-3-33, as even if the statements contained in the report were part of the *res gestae*, the statements were inadmissible as admissions against interest because neither declarant was a party to the litigation; further, as the statements at issue were cumulative of other testimony that was admitted, the driver could not show prejudice by the trial court's exclusion thereof. *Wynn v. City of Warner Robins*, 279 Ga. App. 42, 630 S.E.2d 574 (2006).

**Declaration admissible if part of res gestae.** — The first portion of the last sentence of the section was intended to declare the well-settled rule, that the declaration of an agent, to be admissible, must be a part of the *res gestae*. *Turner v. Turner*, 123 Ga. 5, 50 S.E. 969 (1905).

If the admission is made *dum fervet opus* and accompanies the agent's act, or is so nearly connected therewith in time as to be free from all suspicion of device or afterthought, it is admissible in evidence as part of the *res gestae*. *National Bldg. Ass'n v. Quin*, 120 Ga. 358, 47 S.E. 962 (1904); *Southern Express Co. v. Cohen*, 13 Ga. App. 174, 78 S.E. 1111 (1913); *Atlantic Coast Line R.R. v. Williams*, 21 Ga. App. 453, 94 S.E. 584 (1917), overruled on another point, *Atlantic Coast Line R.R. v. Daugherty*, 111 Ga. App. 144, 141 S.E.2d 112 (1965); *William-Hester Marble Co. v. Walton*, 22 Ga. App. 433, 96 S.E. 269 (1918); *Willingham v. Benton*, 25 Ga. App. 412, 103 S.E. 497 (1920); *Jolly v. Chattahoochee Fertilizer Co.*, 28 Ga. App. 194, 110 S.E. 639 (1922).

Under former Code 1933, §§ 4-315 and 38-406, declarations of an agent as to business transacted by the agent, in order to be admissible against the principal, must have been made by the agent while representing the principal in the transaction in controversy, and must also have been a part of the negotiation, and constituting the *res gestae*. *National Bldg. Ass'n v. Quin*, 120 Ga. 358, 47 S.E. 962 (1904).

As a general rule, the declarations of an agent, to affect the agent's principal, must be a part of the *res gestae*. *Robert R. Sizer & Co. v. G. T. Melton & Sons*, 129 Ga. 143, 58 S.E. 1055 (1907).

To allow the introduction of an extrajudicial statement made by employee in evidence for the purpose of charging employer with the plaintiff's damage, the state-



ment must have been made as a part of the *res gestae*. *A.K. Adams & Co. v. Homeyer*, 87 Ga. App. 301, 73 S.E.2d 581 (1952).

In a premises liability action, the declaration of an employee tending to admit negligence that would be imputable to the employer made four years after the fact was not a part of the *res gestae* and was not admissible in evidence as an admission against interest inasmuch as the employee was not a party to the litigation. *Harris v. Inn of Lake City*, 285 Ga. App. 521, 647 S.E.2d 277 (2007).

**Statements of one agent to another.** — The statements of an agent of one company to the agent of another, exchanged in the course of the agent's employment, regarding the business of the two, is admissible pursuant to O.C.G.A. §§ 10-6-64 and 24-3-33. *Coffee Butler Serv., Inc. v. Sacha*, 208 Ga. App. 4, 430 S.E.2d 149 (1993).

**Declarations of general agent and manager concerning business.** — Declarations made by one shown by some testimony to have been a general agent and manager of a particular business institution, concerning matters relating to that business, are admissible to bind the agent's principal during the continuance of the agency, though made in reference to a particular act of negotiation previously completed and not constituting a part of the *res gestae* thereof. *Citizens Bank v. Timmons*, 15 Ga. App. 815, 84 S.E. 232 (1915).

**Letter written by general agent.** — A letter written by a general agent relating to matters apparently within the scope of the agent's agency is, when pertinent to the issue under investigation, competent evidence in the trial of an action against the principal. *Louisville & Nashville R.R. v. Tift*, 100 Ga. 86, 27 S.E. 765 (1896); *Chero-Cola Bottling Co. v. Southern Express Co.*, 29 Ga. App. 656, 116 S.E. 325 (1923).

**Memorandum for suit of general freight agent.** — The defendant may introduce in evidence a memorandum made by the general freight agent of the plaintiff for the purpose of instituting suit against a third party, indicating the agent's understanding of a contract, the agent who made the memorandum having been authorized to do so in the prosecution of the plaintiff's claim and having acted within the scope of the agent's authority in making it. In this trans-

action, the agent was the alter ego of the plaintiff. *Georgia R.R. v. Smith*, 76 Ga. 634 (1886).

**Proof of agency required.** — Before the declarations of an agent are admissible, some proof of the agency should be submitted. *J.B. Colt Co. v. Wheeler*, 31 Ga. App. 427, 120 S.E. 792 (1923); *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

**Declaration in scope of employment is declaration of principal.** — The admission or declaration of an agent, when acting within the scope of the agent's authority, is to be considered as the admission or declaration of the agent's principal. *Williams v. C. & G.H. Kelsey & Halsted*, 6 Ga. 365 (1849); *Krogg v. Atlanta & W. Point R.R.*, 77 Ga. 202, 4 Am. St. R. 79 (1886); *Cable Co. v. Walker*, 127 Ga. 65, 56 S.E. 108 (1906); *Chero-Cola Bottling Co. v. Southern Express Co.*, 29 Ga. App. 656, 116 S.E. 325 (1923); *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

Admission made through an agent during the existence and in pursuance of the agent's power is no less evidence against the principal than if made by the principal in person. *William-Hester Marble Co. v. Walton*, 22 Ga. App. 433, 96 S.E. 269 (1918).

**Declaration is inadmissible if not made in business of principal.** — Under this section, the declaration of an agent is not competent evidence against the agent's principal if it does not appear that such declaration was made while engaged in the business of the master or principal. *Newton Mfg. Co. v. White*, 53 Ga. 396 (1874); *Evans & Ragland v. Atlanta & W. Point R.R.*, 56 Ga. 498 (1876); *National Bldg. Ass'n v. Quin*, 120 Ga. 358, 47 S.E. 962 (1904); *Gainesville Midland Ry. v. Jackson*, 1 Ga. App. 632, 57 S.E. 1007 (1907), overruled on another point, *Seaboard A.L. Ry. v. Brewton*, 25 Ga. App. 168, 102 S.E. 920 (1920); *Lott v. Banks*, 21 Ga. App. 246, 94 S.E. 322 (1917).

Under former Civil Code 1895, §§ 3034 and 5192, as declarations made by a shipping agent of a railroad company, to the effect that certain goods had been delivered at the point of destination, are not within the scope of such an agent's employment and relate to a past transaction, they are not admissible in evidence against the company. The more especially is this true when it is

**General Consideration (Cont'd)**

apparent that the agent's information as to the matter of delivery must necessarily have been derived from hearsay. *Southern Ry. v. Kinchen & Co.*, 103 Ga. 186, 29 S.E. 816 (1897).

If, although it appeared that the person whose admissions were introduced was the agent of the defendant "from 1917 to 1924," there was nothing to show when such admissions were made or that the admissions were made during the existence of the agency and within the scope of the agent's authority, a verdict in the plaintiff's favor was without evidence to support the verdict as to such items. *Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co.*, 37 Ga. App. 271, 139 S.E. 916 (1927).

**Testifying as a witness in a lawsuit is no part of the res gestae** of the transaction involved in the litigation. *Robert R. Sizer & Co. v. G. T. Melton & Sons*, 129 Ga. 143, 58 S.E. 1055 (1907).

**Answers in another case by "vice-president and southern manager" are not admissible.** — The mere fact that a lumber company sued out interrogatories for its "vice-president and southern manager" in one case would not render the answers admissible in another case as admissions of the company; testifying as a witness is not such a normal part of lumber business that testimony given by "the vice-president and southern manager" as a witness is impliedly an admission of the lumber company. *Robert R. Sizer & Co. v. G. T. Melton & Sons*, 129 Ga. 143, 58 S.E. 1055 (1907).

**Only declaration by agent against principal is excluded by section.** — There was nothing in the evidence rejected to make the evidence objectionable under this section since the evidence was not in the nature of a declaration of an agent "against his principal." The agent was the party to the suit, and not the principal. *Shippey Bros. & White v. Owens*, 17 Ga. App. 127, 86 S.E. 407 (1915).

**Admission of past wrongful act by employee may not be used against employer.** — An admission of a past wrongful act by a servant or employee, while evidence against the servant or employee, may not be used to charge the master or employer. *A.K. Adams & Co. v. Homeyer*, 87 Ga. App. 301, 73 S.E.2d 581 (1952).

**Rules apply to corporations.** — A corporation can only make admissions through the corporation's agents, and the admissions of such agents, acting within the scope of the agent's powers and about the business of the agency, are admissible. *Timeplan Loan & Inv. Corp. v. Moorehead*, 221 Ga. 648, 146 S.E.2d 748 (1966); *White v. Front Page, Inc.*, 133 Ga. App. 749, 213 S.E.2d 32 (1975); *Gorlin v. Halpern*, 184 Ga. App. 10, 360 S.E.2d 729 (1987), rev'd on other grounds, 258 Ga. 127, 365 S.E.2d 405 (1988).

Admissions of the alleged agent of a corporation are not admissible to bind the corporation unless the agency is shown. *Ninth Dist. Agrl. & Mechanical School v. Wofford Power Co.*, 37 Ga. App. 271, 139 S.E. 916 (1927).

**Declarations as to injury made after accident held inadmissible.** — On the trial of a suit against a railroad company for damages to the plaintiff (who was an employee of the company) caused by the negligence of the coemployees, it was error in the court to permit the plaintiff to testify before the jury that an assistant supervisor had told the plaintiff, after the injury was done, that the company felt itself under obligations to support the plaintiff and the plaintiff's family during the plaintiff's life. *East Tenn., Va. & Ga. R.R. v. Duggan*, 51 Ga. 212 (1874).

Under this section, reports to the general manager of a company touching a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employees, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring them or under special orders for the particular occasion, no question of notice to the company being involved in the controversy. *Carroll v. East Tenn., Va. & Ga. Ry.*, 82 Ga. 452, 10 S.E. 163, 6 L.R.A. 214 (1889).

Statements of the engineer three days after plaintiff was hurt as to the condition of the plaintiff's engine, not being part of the res gestae, were clearly inadmissible as declarations or admissions against the railroad company. *Central R.R. & Banking Co. v. Maltby*, 90 Ga. 630, 16 S.E. 953 (1892).

**Declaration of insurance agent as to notice of insured's condition held inadmissible.** —



The declaration of an insurance agent that the agent knew the insured had a heart condition and notified the company was not admissible because the admission covered a transaction which did not constitute a part of the *res gestae* of the negotiation of the sale of insurance to the insured. *National Life & Accident Ins. Co. v. Hullender*, 86 Ga. App. 438, 71 S.E.2d 754 (1952).

**Invoice as declarations against interest.** — Trial court properly charged a jury regarding the O.C.G.A. § 24-3-36 evidentiary presumption arising from a limited liability company's (LLC's) agent's failure to reply to a corporation's invoices because the LLC admitted receiving some of the corporation's goods and services, only disputing the amount due, and the failure to respond to an invoice was not a declaration against the LLC's interest pursuant to O.C.G.A. § 10-6-64; in addition, the charge was supported by O.C.G.A. § 24-4-23. *Forrest Cambridge Apts., LLC v. Redi-Floors, Inc.*, 295 Ga. App. 840, 673 S.E.2d 318 (2009).

**Court decides whether declaration part of *res gestae*.** — It is for the trial court to determine whether a given declaration constitutes a part of the *res gestae*, and nothing more appearing, it is not an abuse of the court's discretion to exclude a declaration by defendant's employee made some 15 or 20 minutes after the event to which it is alleged to relate. *A.K. Adams & Co. v. Homeyer*, 87 Ga. App. 301, 73 S.E.2d 581 (1952).

**Instruction held not erroneous.** — Charge of the court that "if in the prosecution of the master's business, the agent makes any representation with reference to the master's business, then such statements are imputable to the master," reasonably construed, restricted the statements of the agent to such portions of the master's business as came within the scope of the agency, and was not error for the assigned reason that the charge did not contain such a restriction. *Grant v. Hart*, 197 Ga. 662, 30 S.E.2d 271 (1944).

**Cited in** *George v. Rothstein & Nelson*, 35 Ga. App. 126, 132 S.E. 414 (1926); *Bennett v. Barr*, 49 Ga. App. 831, 176 S.E. 681 (1934); *Thornton v. King*, 81 Ga. App. 122, 58 S.E.2d 227 (1950); *Allgood v. Dalton Brick & Tile Corp.*, 81 Ga. App. 189, 58 S.E.2d 522 (1950); *Life & Cas. Ins. Co. v. Monday*, 91 Ga. App. 656, 86 S.E.2d 689 (1955); *Atlantic Coast Line R.R. v. Marshall*, 93 Ga. App. 134,

91 S.E.2d 96 (1955); *General Oglethorpe Hotel Co. v. Woods*, 103 Ga. App. 622, 120 S.E.2d 327 (1961); *Crown Carpet Mills, Inc. v. C.E. Goodroe Co.*, 108 Ga. App. 327, 132 S.E.2d 824 (1963); *Early v. Ramey*, 119 Ga. App. 621, 168 S.E.2d 629 (1969); *J.D. Jewell, Inc. v. Hancock*, 226 Ga. 480, 175 S.E.2d 847 (1970); *Schulz v. Hickok Mfg. Co.*, 358 F. Supp. 1208 (N.D. Ga. 1973); *Skinner v. Humble Oil & Ref. Co.*, 145 Ga. App. 372, 243 S.E.2d 732 (1978); *Mulherin v. Globe Oil Co.*, 173 Ga. App. 790, 328 S.E.2d 406 (1985); *Sarantis v. Kroger Co.*, 201 Ga. App. 552, 411 S.E.2d 758 (1991); *Hassell v. First Nat'l Bank*, 218 Ga. App. 231, 461 S.E.2d 245 (1995); *Eubanks v. CSX Transp., Inc.*, 223 Ga. App. 616, 478 S.E.2d 387 (1996); *Hagan v. Goody's Family Clothing, Inc.*, 227 Ga. App. 585, 490 S.E.2d 107 (1997).

### Proving Agency

**Agent may testify as to fact of agency.** — Agency is a fact, and one who is in fact the agent of another is as competent to testify that one is such agent as the principal personally would be to testify to the fact of such agency. *Lawhon v. Henshaw*, 63 Ga. App. 683, 11 S.E.2d 846 (1940).

**Agent may testify as to agency despite death of principal.** — An agent not a party to a suit is a competent witness to show the agent's agency, not disclosed at the time of the transaction in controversy, although the agent's principal may be dead, and although the effect of establishing the agency may be to make the estate liable instead of the agent individually. *Lowrys v. Candler*, 64 Ga. 236 (1879).

**Agent's declarations, standing alone, do not establish agency.** — Under this section, declarations of an agent, although made as part of the *res gestae* of the transaction, are not competent, standing alone, to prove agency, and a charge being susceptible of this construction, and moreover not being adjusted to the evidence, was harmful error. *Swint v. Milner Banking Co.*, 30 Ga. App. 733, 119 S.E. 336 (1923); *J.B. Colt Co. v. Wheeler*, 31 Ga. App. 427, 120 S.E. 792 (1923).

The declaration of the alleged agent, standing alone, without other evidence of a corroborative nature, is insufficient to establish the fact of agency. *Franklin Cars, Inc. v.*



**Proving Agency (Cont'd)**

Horton, 44 Ga. App. 718, 162 S.E. 876 (1932).

Agency cannot be proved by the mere declarations of a person purporting to act as agent for another; and under former Civil Code 1910, § 3595, one who dealt with such a person was bound to inquire into one's authority, or take the risk of ascertaining, when it was too late, that one was not authorized to bind the alleged principal. *Carter v. Pembroke Nat'l Bank*, 11 Ga. App. 479, 75 S.E. 824 (1912); *Barrett v. Butler*, 52 Ga. App. 704, 184 S.E. 433 (1936).

The fact of agency cannot be proved by mere unsworn declarations of one assuming to be an agent. *Lawhon v. Henshaw*, 63 Ga. App. 683, 11 S.E.2d 846 (1940).

Even if an alleged declaration made by an agent who has been made a party was part of the *res gestae*, standing alone it was not competent to prove agency. *King v. Bonnerman*, 93 Ga. App. 210, 91 S.E.2d 196 (1956), commented on in 18 Ga. B.J. 492 (1956).

A declaration of an agent as to agency, if not a part of the *res gestae* or accompanying the transaction and in corroboration of other evidence or circumstances tending to prove the agency, is hearsay and is of no probative value, whether objected to or not. *King v. Bonnerman*, 93 Ga. App. 210, 91 S.E.2d 196 (1956), commented on in 18 Ga. B.J. 492 (1956).

In prosecution for malicious prosecution, fact that executive vice-president of bank testified in prosecuting the plaintiff at the committal hearing, at which the plaintiff was discharged, and stated that the executive vice-president was appearing in court for the bank and was testifying for the bank was not enough to show authority from the bank to maliciously prosecute the plaintiff, or that the bank maliciously prosecuted the plaintiff or aided therein or instigated the prosecution; this would be a declaration by the agent and officer that the agent and officer was acting for the defendant bank, and while it may be considered along with other evidence, it would not of itself be sufficient. *King v. Citizens Bank*, 88 Ga. App. 40, 76 S.E.2d 86 (1953).

**Agent's mere declarations as to agency are inadmissible.** — While the sworn testimony

of an agent is competent evidence of such agency, the mere declarations of such a person are not admissible to prove such agency. *Augusta Roofing & Metalworks, Inc. v. Clemmons*, 97 Ga. App. 576, 103 S.E.2d 583 (1958).

An agent certainly cannot confer authority upon the agent, and evidence of the agent's own statements or admissions, therefore, is not admissible against the agent's principal for the purpose of establishing, enlarging, or renewing the agent's authority, nor can the agent's authority be established by showing that the agent acted as agent, or that the agent claimed to have the powers which the agent assumed to exercise. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

**Other evidence tending to establish agency required.** — Where extraneous circumstances, independently of and without regard to the declarations of the alleged agent personally, clearly tend to establish the fact of an agency, the agent's declarations may be admitted and considered as a part of the *res gestae* of the transaction; but the declarations of an alleged agent, when standing alone, are never admissible to prove the agent's agency. *Waddington v. Stores Mut. Protective Ass'n*, 52 Ga. App. 331, 183 S.E. 143 (1935).

**Evidence of alleged agent's conduct as agent and benefit to principal.** — The declarations of one alleged to be an agent or one assuming to be an agent would not, by themselves, be admissible to prove agency, yet when such declarations of the alleged agent are accompanied by other evidence as to the conduct of the person in the character of agent and an acceptance by the alleged principal of the fruits of the agency, such declarations are admissible in evidence as a part of the *res gestae*, and as such may be considered in the establishment of the agency. *Lawhon v. Henshaw*, 63 Ga. App. 683, 11 S.E.2d 846 (1940).

**Agent's declarations are part of *res gestae*.** — The declaration of an agent is not competent to prove the agency unless it accompanies the transaction or is a part of the *res gestae* and there is other evidence, direct or circumstantial, which tends to prove the agency, in which event such declaration is admissible in corroboration. *King v. Bonnerman*, 93 Ga. App. 210, 91 S.E.2d 196

(1956), commented on in 18 Ga. B.J. 492 (1956).

**Declaration held not part of res gestae.** — Statement of a city clerk that the city accepted responsibility for an accident on a sidewalk was not part of the res gestae and

was not admissible evidence creating a genuine issue of material fact as to the city's duty to maintain the sidewalk. *Williams v. City of Social Circle*, 225 Ga. App. 746, 484 S.E.2d 687 (1997).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 347.

**C.J.S.** — 3 C.J.S., Agency, § 550 et seq.

**ALR.** — Competency of agent, with whom transaction by person since deceased was had, to testify adversely to estate, 21 ALR 928; 54 ALR 264.

Admissibility of declarations by one involved in an accident in relation to his employment by or agency for other person, 67 ALR 170; 150 ALR 623.

Extrajudicial declarations of agent as ad-

missible in action against principal for personal injuries for purpose of showing knowledge of relevant fact or condition at or prior to time of injury, 141 ALR 704.

Competence, as against principal, of statements by agent to prove scope, as distinguished from fact, of agency, 3 ALR2d 598.

Admissibility and probative value of admissions of fault by agent on issue of principal's secondary liability, where both are sued, 27 ALR3d 966.

## ARTICLE 4

### RIGHTS AND LIABILITIES OF AGENT AS TO THIRD PERSONS

#### 10-6-80. Agent may prosecute legal remedies for principal; parol authority; liability if act repudiated.

Any act authorized or required to be done under this Code by any person in the prosecution of his legal remedies may be done by his agent; and for this purpose he is authorized to make an affidavit and execute any bond required, though his agency shall be created by parol. In all such cases, if the principal shall repudiate the act of the agent, the agent, together with his sureties, shall be personally bound. (Orig. Code 1863, § 2185; Code 1868, § 2181; Code 1873, § 2207; Code 1882, § 2207; Civil Code 1895, § 3035; Civil Code 1910, § 3607; Code 1933, § 4-402.)

## JUDICIAL DECISIONS

**Right to repudiate distinguishes § 10-6-80 from § 9-13-123.** — If the agent had no authority to make an affidavit, former Code 1882, § 2207 allowed the principal to repudiate the action of the agent, and in that event the agent and the agent's securities become liable; and this is the difference between this section and former Code 1882, § 3670, which said an affidavit of illegality with respect to an execution may be filed by an attorney in fact or an executor, adminis-

trator, or other trustee. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

**"Parol" defined.** — The word "parol" means a verbal creation of the agency. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

**When verbal appointment authorized.** — Under this section, any person, in the prosecution of the person's legal remedies may appoint verbally an agent to act for the person therein, unless it is apparent that the agent cannot make the affidavit required by

law, i.e., cannot conscientiously depose to the same facts to which the principal could, or where the Code provides elsewhere that the appointment shall be in writing. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

**Agent may verify application for ne exeat.** — Under this section, an agent may verify the application for a ne exeat, provided the agent can, of the agent's own knowledge, state the facts as positively and distinctly as is required of the complainant personally. *Orme v. McPherson*, 36 Ga. 571 (1867).

**Execution of forthcoming bond.** — Under this section, an agent interposing a claim in behalf of the agent's principal may execute the forthcoming bond required by statute whether the agency is created in writing or by parol. This section supplies the legislative authority which was wanting when the case of *Gilmer v. Allen*, 9 Ga. 208 (1850), was decided. *Head v. Woods*, 92 Ga. 548, 17 S.E. 928 (1893); *United States Fid. & Guar. Co. v. Murphy*, 4 Ga. App. 13, 60 S.E. 831 (1908).

**Affidavit of illegality of execution without written appointment.** — Under this section, an agent may make an affidavit of illegality when an execution has been issued and levied, and it is not necessary that the agency should be created in writing. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

**Agent cannot interpose claim upon pauper's affidavit.** — A claim can be interposed under former Code 1887, § 3733 upon an affidavit in forma pauperis made by the claimant personally, but not under former Code 1882, § 2202 upon a like affidavit made by the claimant's agent. *Hadden v. Larned*, 83 Ga. 636, 10 S.E. 278 (1889).

**Agent cannot enter appeal where not authorized in writing.** — An agent created by parol under former Code 1882, § 2207 cannot enter an appeal, because former Code 1882, § 3615 expressly required that if an agent enters an appeal, the agent must be authorized in writing and the writing filed in the court in which the case is pending. *Cook v. Buchanan*, 86 Ga. 760, 13 S.E. 83 (1891).

**Action in agent's own name not authorized.** — If the claim of right to a private way is founded upon an uninterrupted use of the way for more than seven years by the owners of a certain plantation, their agents, servants, and tenants, the right is not in the agents or servants themselves, but in the owners who alone are the persons injured by an unlawful obstruction of the way, as against agents and servants, in violation of the right. While their agent, by virtue of former Code 1882, § 2207, may commence and carry on a proceeding in their names to remove such obstruction, under former Code 1882, §§ 738, 739, and 740, the agent cannot institute and carry on a proceeding for that purpose in the agent's own name, either individually or as an agent. *Cunningham v. Elliott*, 92 Ga. 159, 18 S.E. 365 (1893).

**Local special agent without authority to bind surety company by renewal certificate.** — The power of a local agent to bind the agent's surety company by a renewal certificate, contrary to the express terms of the indemnity bond itself, was not within the real or the apparent authority of the local special agent. *National Sur. Co. v. Moore*, 42 Ga. App. 582, 157 S.E. 108 (1930).

**Cited in Georgia Fla. & Ala. Ry. v. Sizer & Co.**, 121 Ga. 801, 49 S.E. 737 (1905).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 18.

**C.J.S.** — 2A C.J.S., Agency, § 4.

**ALR.** — Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.

#### 10-6-81. Recovery of money paid to or by agent by mistake.

If money shall be paid to an agent by mistake and he in good faith shall pay it over to his principal, he shall not thereafter be personally liable therefor. In all other cases he shall be liable for its repayment. If money shall be paid by an agent by mistake, he may recover it in his own name. (Orig. Code 1863, § 2186; Code 1868, § 2182; Code 1873, § 2208; Code 1882,



§ 2208; Civil Code 1895, § 3036; Civil Code 1910, § 3608; Code 1933, § 4403.)

### JUDICIAL DECISIONS

**Remedy for mistaken payment reaching principal is action against principal.** — If money is paid to an agent as the result of a mistake and the agent in turn pays the money in good faith to the agent's principal, the correct remedy of the payor is an action against the principal and not the agent. *John L. Burns, Inc. v. Gulf Oil Corp.*, 268 F. Supp. 222 (N.D. Ga. 1967).

**Question in suit against agent is whether agent has possession of money.** — In a suit against an agent to recover money voluntarily paid to the agent by mistake in fact, the controlling question in determining the agent's individual liability to repay the money is whether the agent still has the money in the agent's possession at the time of the suit or whether the agent had, before the suit was brought and before the agent had any notice of the mistake, paid over to

the agent's principal the money received by mistake. *Rogers v. Durrence*, 10 Ga. App. 657, 73 S.E. 1083 (1912).

**Agent not liable if subagents have paid it to principal.** — When there was testimony tending to show that the amount paid by a purchaser was paid in consequence of a mistake of fact, in that the plaintiff understood that the plaintiff was buying land, and it appears that the defendants acted in good faith, and the amount voluntarily paid to and received by their subagents or employees was in good faith paid over by the latter to the principal, before any notice of the alleged mistake was brought home to them, there was no personal liability on the part of the defendants. *Pratt v. Foster*, 18 Ga. App. 765, 90 S.E. 654 (1916).

**Cited in** *Endicott v. Grogan*, 86 Ga. App. 149, 70 S.E.2d 879 (1952).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 320, 336.

**C.J.S.** — 2A C.J.S., Agency, § 339.

**ALR.** — Authority of agent to receive payment for commodities which he is authorized to sell, or for which he is to find market, 8 ALR 203; 105 ALR 718.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 ALR 387.

Personal liability of agent in respect of

funds received from third person and turned over to principal not entitled thereto, 82 ALR 307.

Good faith in receiving payment made under mistake of fact as affecting its recovery, 87 ALR 649.

Implied or ostensible authority to receive payments of principal of one who has authority to receive payments of interest, 111 ALR 578.

Authority of agent who delivers commercial paper or other obligation to third person for collection, to receive payment of proceeds from the latter, so as to preclude principal's right to enforce payment of proceeds, 163 ALR 1209.

### 10-6-82. Agent's right of action on principal's contracts.

Generally, an agent shall have no right of action on contracts made for his principal. The following are exceptions:

(1) A factor contracting on his own credit;

(2) Where promissory notes or other evidences of debt are made payable to an agent of a corporation;

- (3) In all cases where the contract is made with the agent in his individual name, though his agency be known;
- (4) Auctioneers may sue in their own names for goods sold by them;
- (5) In cases of agency coupled with an interest in the agent, known to the party contracting with him.

In all these cases, payment to the principal before notice of the agent's claim is a good defense. (Orig. Code 1863, § 2187; Code 1868, § 2183; Code 1873, § 2209; Code 1882, § 2209; Civil Code 1895, § 3037; Civil Code 1910, § 3609; Code 1933, § 4404.)

### JUDICIAL DECISIONS

**An "agency coupled with an interest in the agent"** is similar to "a power coupled with an interest." The latter is a power which accompanies, or is connected with, an interest. The power and the interest are united in the same person. But if we are to understand by the word "interest," an interest in that which is to be produced by the exercise of the power, then they are never united. The power, to produce the interest, must be exercised and by its exercise, is extinguished. The power ceases when the interest commences and, therefore, cannot, in accurate law language, be said to be "coupled" with it. *United States Epperson Underwriting Co. v. Jessup*, 22 F.R.D. 336 (M.D. Ga. 1958), *aff'd*, 260 F.2d 355 (5th Cir. 1958).

**Suit on principal's contract.** — Nothing is better settled than that an agent has no right of action on contracts made for the agent's principal except in specific instances. *Henry Darling, Inc. v. Harvey-Given Co.*, 40 Ga. App. 771, 151 S.E. 518 (1930).

An agent is not liable for the agent's principal's contract where the agency is disclosed, and an agent has no right to sue on a contract made by the agent for the principal. *R.C. Craig, Ltd. v. Ships of Sea, Inc.*, 345 F. Supp. 1066 (S.D. Ga. 1972).

**Merely instructing agent to sue.** — Instruction by principal to agent to institute litigation in the agent's name is not one of the exceptions of this section to the general rule. *Rowland v. Gregg & Son*, 122 Ga. 819, 50 S.E. 949 (1905).

Generally, an agent has no authority to enforce in the agent's own name the rights of the agent's principal. To this rule there are certain exceptions. But for an agent to

be merely instructed by a principal to institute litigation in the agent's own name is not one of them. *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

If a person has a legal right, it does not follow that the person may delegate to another the power to litigate in the name of such other in respect to it. *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

The mere direction by an owner of property to another that the latter should file a claim in one's own name would not make such proceeding lawful. *A.J. Evans Mktg. Agency v. Federated Fruit & Vegetable Growers, Inc.*, 170 Ga. 30, 152 S.E. 49 (1930).

**Agent may not sue in agent's name for illegal levy upon principal's property.** — Plaintiff agent cannot maintain an action in plaintiff's own name for actual damages to principal's automobile, or for the malicious abuse of process, or for any interference with plaintiff's right of possession of the automobile resulting from illegal levy. *Andrew v. George Muse Clothing Co.*, 44 Ga. App. 291, 161 S.E. 296 (1931).

**General rule requires action on contract in name of party with legal interest.** — While an agent has a right of action in the agent's own name on a contract made with the agent in the agent's individual name, though the agent's agency is known, and, in cases of agency coupled with an interest in the agent, known to the party contracting with the agent, the agent may, in the agent's own name, maintain an action on the contract, as a general rule an action on a contract must be brought in the name of the party in

whom the legal interest in the contract is vested. *Whitfield v. Boykin*, 48 Ga. App. 141, 172 S.E. 82 (1933).

**Either corporation or agent may sue on note payable to agent.** — A promissory note, payable to the order of an agent of a corporation (the principal as well as the agent being specified by name) is, in legal effect, payable to the corporation, and while the agent can maintain an action thereon by virtue of this section, so can the principal. *Martin v. Lamb & Co.*, 77 Ga. 252, 3 S.E. 10 (1886); *Young v. Murray*, 3 Ga. App. 204, 59 S.E. 717 (1907).

**Contract for rent made in agent's name.** — Under this section, if one rents land from the agent of the owner, the contract being made with the agent in the agent's individual name, the latter may maintain an action on such contract, though the fact of the agent's agency was known by the renter; and accordingly, the payment of such rent may be enforced by a distress warrant sued out by the agent in the agent's own name. *Spence v. Wilson*, 102 Ga. 762, 29 S.E. 713 (1897).

An executor, administrator, guardian, or trustee can sue out a distress warrant in an individual capacity under paragraph (3) of this section, and terms indicating a representative capacity, if used, may be treated and disregarded as surplusage. *Dean v. Donalson*, 2 Ga. App. 462, 58 S.E. 679 (1907).

Under this section, if a rent contract is made with A, "trustee," as landlord, A may foreclose a lien in A's own name for money furnished the tenant by A, as landlord, with which to make the crop upon the rented premises, though the land and such money belong to another person whom A represented in the transaction. *Fargason v. Ford*, 119 Ga. 343, 46 S.E. 431 (1904).

**Agent may sue carrier where contract of shipment does not disclose agency.** — A person who having in charge as agent the goods of another makes with a common carrier a contract to ship such goods in which the agency is not disclosed may maintain by virtue of this section an action in the person's own name for a breach of such contract. *Carter v. Southern Ry.*, 111 Ga. 38, 36 S.E. 308, 50 L.R.A. 354 (1900).

**Broker with option to buy for clients may sue for breach.** — An agreement to give a real estate agent the option of purchasing land for the agent's clients gives the agent

individually a right of action for breach of the contract. *Pearson v. Horne*, 139 Ga. 453, 77 S.E. 387 (1913).

**Agent buying in own name may sue for breach of warranty.** — When one buys personally in one's own name that person may maintain an action in one's own name, under this section, for a breach of a warranty in regard to the quality of the goods, although one may have been the agent of another in making the purchase. *King v. Dobbs*, 30 Ga. App. 441, 118 S.E. 428 (1923).

**Agent's action upon contract in agent's name generally subject to defenses against principal.** — If an agent sues in the agent's own name upon a contract so made for the benefit of the agent's principal, the action will be subject to any defenses which the defendant could lawfully assert against the principal if the action had been brought in the name of the latter. *Hollingsworth v. Georgia Fruit Growers, Inc.*, 185 Ga. 873, 196 S.E. 766 (1938).

The rule that an agent's action in the agent's own name upon a contract made for the benefit of the agent's principal is subject to any defenses which the defendant could assert against the principal can have no application if the instrument sued on is a sealed instrument and the principal does not appear to be a party thereto. *Hollingsworth v. Georgia Fruit Growers, Inc.*, 185 Ga. 873, 196 S.E. 766 (1938).

**Agent may sue in own name on whole contract if agent has interest.** — While it was the settled rule at common law that an agent who made a contract for an agent's principal could not sue upon it in the agent's own name, yet the rule had exceptions. One of these was, that if the agent had an interest, as for commissions, etc., the agent might sue on the whole contract in the agent's own name. *Stevens v. Hunt*, 61 Ga. App. 265, 6 S.E.2d 591 (1939).

**Suit for agent's commission.** — There is an exception to the rule that generally an agent cannot maintain an action on a contract which the agent has made on behalf of the agent's principal when the agency is coupled with an interest in the agent, such as commissions. *Sheriff v. Moore*, 105 Ga. App. 833, 125 S.E.2d 729 (1962) (action by insurance agents for insurance premium); *Pendley v. Jesse*, 134 Ga. App. 138, 213 S.E.2d 496 (1975) (owners acting as real estate brokers for other owners).



**Exception authorizing suit must be alleged if agency appears.** — Under this section, if the plaintiff's pleading discloses agency on the part of the plaintiff, the plaintiff cannot maintain the action without alleging that the plaintiff was a factor and contracted on the plaintiff's own credit, or that the contract was made in the plaintiff's individual name, or that the plaintiff's agency was coupled with an interest in the agent known to the party contracting with the plaintiff, unless it appears that the action is founded on a promissory note or other evidence of debt payable to the plaintiff as agent of a corporation or joint stock company, or upon the sale of goods made by the plaintiff as an auctioneer. *Richmond & Danville R.R. v. Bedell & Bowers ex rel. Orr & Hunter*, 88 Ga. 591, 15 S.E. 676 (1892); *Burg v. Malone*, 22 Ga. App. 175, 95 S.E. 739 (1918).

**If agent contracted in own name, principal's name may be inserted by amendment.** — When a suit for rent is instituted by the

party with whom the actual contract of tenancy was made, it is permissible for the plaintiff to amend plaintiff's pleading by setting out the name of the true owner for whose use the suit is brought. The rule would be otherwise, and such an amendment is not permissible, if the plaintiff acts not in plaintiff's own behalf as landlord, but merely as an agent of the true owner. *Clark v. Long*, 25 Ga. App. 807, 105 S.E. 654 (1920).

**Cited in** *Layton v. Central of Ga. Ry.*, 40 Ga. App. 330, 149 S.E. 431 (1929); *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930); *Hill Aircraft & Leasing Corp. v. Simon*, 122 Ga. App. 524, 177 S.E.2d 803 (1970); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Sturdivant v. Chapman*, 146 Ga. App. 26, 245 S.E.2d 311 (1978); *Brevard, Inc. v. Broadwater Mgt., Inc.*, 235 Ga. App. 496, 508 S.E.2d 747 (1998).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 303, 331.

**Am. Jur. Pleading and Practice Forms.** — 2C Am. Jur. Pleading and Practice Forms, Auctions and Auctioneers, § 2.

**C.J.S.** — 2A C.J.S., Agency, § 378 et seq. 3 C.J.S., Agency, §§ 471, 486, 487, 496.

**ALR.** — Validity of contract by agent for compensation from third person for negotiating loan or sale with principal, 14 ALR 464.

Right of a factor, commission merchant, or produce broker to sell property to protect advances, 40 ALR 387.

Validity of contract negotiated by agent acting for both parties, 48 ALR 917.

Contract for development and sale of land as creating a power coupled with interest or supporting an equitable lien, 65 ALR 1080.

When attorney's power deemed coupled with an interest so as to prevent discharge or revocation, 97 ALR 923.

Statute of limitations: action by one secondarily liable on negotiable instrument against others secondarily liable, or against principal, as an action on such instrument, or an action on an implied promise, or a similar action, 143 ALR 1062.

Agent's disregard of principal's instructions where power coupled with an interest, 162 ALR 1182.

## 10-6-83. Right of action by agent for interference with his possession.

An agent having possession, actual or constructive, of the property of his principal shall have a right of action for any interference with that possession by third persons. (Orig. Code 1863, § 2188; Code 1868, § 2184; Code 1873, § 2210; Code 1882, § 2210; Civil Code 1895, § 3038; Civil Code 1910, § 3610; Code 1933, § 4-405.)

## JUDICIAL DECISIONS

**History of section.** — The provisions of this section appeared for the first time in the statute law of this state in the Code of 1863. It has been embodied in the same language

in every Code since adopted. *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760, 36 S.E. 971, 51 L.R.A. 622 (1900).

**Section applies only to agent with property interest.** — The word “agent” as used in this section is to be construed as meaning an agent who has a property, either general or special, in the personalty in the agent’s possession. *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760, 36 S.E. 971, 51 L.R.A. 622 (1900).

This section has been construed as referring only to an agent who has a property either general or special in the personalty in the agent’s possession. *Central of Ga. Ry. v. George P. Greene & Co.*, 41 Ga. App. 794, 154 S.E. 809 (1930).

**Section does not contravene requirement**

**that possession must be in plaintiff’s own right.** — While at common law and under former Civil Code 1895, § 3886, mere possession of a chattel will give a right of action for any interference therewith, such possession must be in the plaintiff’s own right, and not as agent of another. This rule was not contravened by former Civil Code 1895, § 3038. *Mitchell v. Georgia & Ala. Ry.*, 111 Ga. 760, 36 S.E. 971, 51 L.R.A. 622 (1900).

**Agent’s possession will support principal’s possessory warrant.** — Possession of personalty by an agent is actual, not constructive, possession by the principal and will support a possessory warrant by the latter against one who wrongfully and fraudulently takes possession thereof. *Hillyer v. Brogden*, 67 Ga. 24 (1881).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 331.

**C.J.S.** — 3 C.J.S., Agency, § 471.

**ALR.** — Right of purchaser from agent or

dealer in possession of article for purpose of demonstration or solicitation, without actual authority to sell, 57 ALR 393.

## 10-6-84. When agent exceeding authority may enforce contract.

When the agent shall exceed his authority so that the principal is not bound, the agent may not enforce the contract in his own name against the person with whom he deals unless the contract shall have been fully executed upon the part of the agent or the credit was originally given to the agent. (Orig. Code 1863, § 2192; Code 1868, § 2188; Code 1873, § 2214; Code 1882, § 2214; Civil Code 1895, § 3042; Civil Code 1910, § 3614; Code 1933, § 4408.)

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 87.

**C.J.S.** — 2A C.J.S., Agency, §§ 156, 157.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Duty of principal to discover and notify third persons of wrongful disposal of property by agent not assuming to act for principal, 35 ALR 325.

Liability on the contract of one who without authority assumes to contract for another, 42 ALR 1310; 60 ALR 1348.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

## 10-6-85. Individual liability of agent by undertaking, when exceeding authority, and for tort; negligence of underservant.

All agents, by an express undertaking to that effect, may render themselves individually liable. Every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals; so, also, for his own tortious act, whether acting by command of his principal or not, he shall be responsible; for the negligence of his underservant, employed by him in behalf of his principal, he shall not be responsible. (Orig. Code 1863, § 2191; Code 1868, § 2187; Code 1873, § 2213; Code 1882, § 2213; Civil Code 1895, § 3041; Civil Code 1910, § 3613; Code 1933, § 4-409.)

**Cross references.** — Imputing of negligence of one person to another person generally, § 51-2-1.

### JUDICIAL DECISIONS

#### ANALYSIS

##### GENERAL CONSIDERATION

##### AGENT'S INDIVIDUAL LIABILITY

1. GENERALLY
2. UPON CONTRACT
3. FOR TORT
4. AS TO UNDERSERVANT

##### General Consideration

**Existence and extent of agency are questions of fact.** — Questions of the existence and extent of an agent's authority are generally for the triers of fact. *Allen & Bean, Inc. v. American Bankers Ins. Co.*, 153 Ga. App. 617, 266 S.E.2d 295 (1980).

**Summary judgment improper.** — Because the question of authorization could not be decided on summary judgment since a jury question existed as to whether the resolution of the county board of education authorized the county school superintendent to enter into a contract with the plaintiff on the board's behalf, the trial judge erred in entering summary judgment for the superintendent in the superintendent's individual capacity. *Knight v. Troup County Bd. of Educ.*, 144 Ga. App. 634, 242 S.E.2d 263 (1978).

**Cited in** *Johnson v. Varnum*, 43 Ga. App. 737, 159 S.E. 908 (1931); *Austin-Western Rd. Mach. Co. v. Veal*, 115 F.2d 112 (5th Cir. 1940); *Childs v. Hampton*, 80 Ga. App. 748, 57 S.E.2d 291 (1950); *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980).

##### Agent's Individual Liability

##### 1. Generally

**This section states the law of Georgia as to the individual liability of agents**, in three instances: (1) by "express undertaking; (2) by exceeding the scope of his authority; and (3) for his own tortious acts"; and then the section states when the agent is not liable: "for the negligence of his underservant, employed by him in behalf of his principal, he is not responsible." *Pan-American Petro. Co. v. Williams*, 174 Ga. 875, 164 S.E. 759, answer conformed to, 45 Ga. App. 490, 165 S.E. 473 (1932).

**This section neither changes nor adds to old law.** — This section does not change or add to the old law as to the liability of an agent. *Reid v. Humber*, 49 Ga. 207 (1873).

##### 2. Upon Contract

**Agent may bind agent by express undertaking.** — Even though one employing another to perform services is acting in the capacity of agent and for the sole benefit of the agent's principal, the agent may nevertheless by ex-



press undertaking bind oneself personally. *Willingham, Wright & Covington v. Glover*, 28 Ga. App. 394, 111 S.E. 206 (1922); *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926).

A county warden who offered a certain amount to the plaintiff to return a convict rendered the warden individually liable under the first sentence of this section. *King v. Lewis*, 32 Ga. App. 110, 122 S.E. 633 (1924).

**If agent acts within authority, only express agreement binds agent.** — An agent who, acting within the scope of the agent's authority, enters into contractual relations for a principal whom the agent discloses does not bind the agent, in the absence of an express agreement to do so. *Echols v. Howard*, 17 Ga. App. 49, 86 S.E. 91 (1915).

An agent acting within the scope of the agent's authority is liable only on the agent's own express undertaking. *Allstate Ins. Co. v. Reynolds*, 138 Ga. App. 582, 227 S.E.2d 77 (1976).

**Failure of agent to disclose agency.** — To avoid individual liability, it is the agent's duty to disclose the agent's agency, and failing to do so, even if acting within the agent's authority, the party with whom the agent deals may proceed against the agent. *Maslia v. Kilgore*, 119 Ga. App. 769, 168 S.E.2d 857 (1969).

If an agent does not disclose to the other party with whom the agent is dealing that the agent is acting on behalf of a principal, the agent is personally liable and responsible. *Hodges-Ward Assocs. v. Ecclestone*, 156 Ga. App. 59, 273 S.E.2d 872 (1980).

**If an agent wishes to avoid personal liability,** the duty is on the agent to disclose the agency, and not on the party with whom the agent deals to discover it. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. App. 300, 145 S.E.2d 294 (1965); *Hodges-Ward Assocs. v. Ecclestone*, 156 Ga. App. 59, 273 S.E.2d 872 (1980).

**If agent lacks or exceeds authority, only agent is liable.** — If in point of fact one employing another to perform services has acted without or beyond the authority of an alleged principal, the agent alone becomes personally liable. *Willingham, Wright & Covington v. Glover*, 28 Ga. App. 394, 111 S.E. 206 (1922); *Davis v. Menefee*, 34 Ga. App. 813, 131 S.E. 527 (1926).

**Agent must pay damages if agent knows of want of authority.** — If one has knowledge of

agent's want of authority, and, without intending any wrong or by making false representations as to the agent's authority, executes a contract as the agent of another, the agent is personally liable to the person with whom the agent is dealing, and the third party, not learning the facts, has the right to repudiate the contract and hold the assumed agent immediately responsible for damages. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

**Agent's bona fide belief of authority.** — If an assumed agent bona fide believes the agent has authority, but in fact has none, and injury results to a third person who has honestly relied on the correctness of the agent's position as agent in making a contract in behalf of the agent's apparent principal, the agent will be personally liable for such injury. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

If one has no authority and acts bona fide, still one does a wrong to the other party, and if that wrong produces injury to the latter, owing to one's confidence in the truth of an express or implied assertion of authority by the purported agent, it is perfectly just that one who makes such assertion should be personally responsible for the consequences, rather than that the injury should be borne by the other party who has been misled by it. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

**Breaching implied warranty of authority.** — If an agent executes, without authority from the agent's principal, a bond in the name of the agent's principal as surety, and fails to disclose the agent's lack of authority to the other parties to the instrument, and the other parties have no knowledge of such lack of authority, and no ratification by the principal appears, and the principal is without knowledge of the agent's failure to comply with the specific requirements of a written power of attorney, which furnishes the agent's sole authority to bind the principal, and, on account of the implied representation as to the agent's authority to bind the principal in the manner attempted, a beneficiary in the instrument suffers injury, the injured person may recover damages from the agent individually. *Peebles v. Perry*, 18 Ga. App. 369, 89 S.E. 461 (1916).

The doctrine of the liability of a purported agent for the breach of an agent's

**Agent's Individual Liability (Cont'd)****2. Upon Contract (Cont'd)**

implied warranty of authority proceeds upon a plain principle of justice, for every person so acting for another, by a natural, if not a necessary implication, holds oneself out as having competent authority to do the act, and one thereby draws the other party into a reciprocal engagement. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

If one assumes, as the agent of a named corporation, to contract with a real estate broker to procure a purchaser for certain corporate realty at a stated price, and the broker, within the time specified, finds a purchaser who is ready, willing, and able to purchase the realty in the terms of the contract and who actually offers to so purchase, the broker may, when the purported agent was without authority to contract for the corporation, maintain an action against the purported agent individually for the breach of the implied warranty of authority. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

**Other party's ignorance of agent's want of authority.** — To give a party a right of action against a professed agent, the party must have been ignorant of the want of authority on the part of the latter and have acted upon the faith of the representations, express or implied, that the professed agent had the authority assumed; hence, if the party complaining is fully cognizant of all the facts touching the agent's authority, the latter will not be liable. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

**Section embodies only general rule of agency.** — The provision of this section, that "every agent exceeding the scope of his authority shall be individually liable to the person with whom he deals," embodies only a general rule of agency. *Hill v. Daniel*, 52 Ga. App. 427, 183 S.E. 662 (1936).

**Section does not authorize action against agent on unauthorized instrument.** — This section creates no authority for an action ex contractu against the agent on the unauthorized instrument itself, save perhaps, for peculiar reasons, in cases of executors, administrators, and guardians. *Hill v. Daniel*, 52 Ga. App. 427, 183 S.E. 662 (1936).

**Contract not purporting to bind agent personally.** — An action ex contractu on the

instrument itself ordinarily will not lie against the agent individually on a contract made by the agent in the name of the principal, unless it contains apt words binding the agent personally. While the instrument is not the contract of the principal, because the principal did not authorize or ratify the acts of the alleged agent, neither is it the contract of the alleged agent, because in seeking to bind the principal the agent used no language binding the agent, and therefore the law cannot create an undertaking which was not made by the parties themselves. *Hill v. Daniel*, 52 Ga. App. 427, 183 S.E. 662 (1936).

**Language not binding agent of corporation personally.** — If a replevy bond, given in a laborer's lien foreclosure, was signed by corporate officer with the name of the corporation followed by the word "by" and the officer's own name as secretary, the instrument as thus executed contained no language which as a matter of contract or as a matter of law would bind the corporate officer personally. *Hill v. Daniel*, 52 Ga. App. 427, 183 S.E. 662 (1936).

**Agent for principal with no legal status.** — One who assumes to act as agent for a nonexistent principal or one having no legal status renders that one individually liable in contracts so made. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

If the evidence supports a finding that the purported corporation is not a valid corporate entity, there is no doubt that the agent is bound by the agent's purchases on an open account. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

**Measure of damages against agent acting without authority.** — The damages to be recovered against a purported agent for acting without authority must, in general, be compensation for the loss which the other party has naturally and proximately sustained by reason of the lack of authority. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

In the case of a contract, the measure of damages to be recovered against a purported agent for acting without authority will usually be compensation for the loss sustained by not obtaining a then binding contract. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).



The measure of damages against a purported agent for acting without authority is what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had the authority the defendant professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made. *Weinstein v. Rothberg*, 87 Ga. App. 94, 73 S.E.2d 106 (1952).

**Summary judgment improper.** — Summary judgment for an engineer in a concrete company's suit for services and materials provided to a construction project was error because the evidence could have authorized a jury to have found that the engineer obtained the concrete company's agreement to provide services and material to the construction project without disclosing that the concrete company was dealing with the engineer, not directly, but only as an agent of the developer for purposes of O.C.G.A. §§ 10-6-53 and 10-6-85; a jury could have found that the concrete company reasonably understood that the engineer was binding itself as well as the developer. *Action Concrete, Inc. v. Focal Point Eng'g, Inc.*, 296 Ga. App. 567, 675 S.E.2d 303 (2009).

### 3. For Tort

**"Misfeasance" and "nonfeasance" defined.** — "Misfeasance" is a positive wrong, and means the improper doing of an act which the agent might lawfully do. It may also involve to some extent the idea of not doing, as if an agent engaged in the performance of an undertaking does not do something which it is the agent's duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires. *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932).

"Nonfeasance" on the part of an agent is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertaking which the agent has agreed with the principal to do. *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932).

"Nonfeasance" is the total omission or failure of the agent to enter upon the performance of some distinct duty or undertak-

ing which the agent has agreed with the principal to do. "Misfeasance" means the improper doing of an act which the agent might lawfully do, or, in other words, the performing of the agent's duty to the principal in such a manner as to infringe upon the rights and privileges of third persons. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

"Misfeasance" may involve, to some extent, the idea of not doing, as where an agent engaged in the performance of the agent's undertaking does not do something which it is the agent's duty to do under the circumstances, or does not take that precaution or does not exercise that care which a due regard to the rights of others requires; this is not the doing of that which is imposed upon the agent merely by virtue of the agent's relation, but of that which is imposed upon the agent by law as a responsible individual in common with all other members of society, and is the same not doing which constitutes actionable negligence in any relation. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

**Agent is personally responsible for own tortious act.** *Wadley v. Dooly*, 138 Ga. 275, 75 S.E. 153 (1912).

**Actions not constituting tort.** — O.C.G.A. § 10-6-85 did not apply in an action against a law firm for wrongfully and intentionally foreclosing on property since the firm was acting for a company that had legal title to the property under a deed to secure debt which was in default, and there was no impropriety in the notice, advertisement, or sale at foreclosure. *McCarter v. Bankers Trust Co.*, 247 Ga. App. 129, 543 S.E.2d 755 (2000).

**Agent personally responsible for conversion.** — Where A delivered to the defendant, a warehouseman, a certain bale of cotton and received a warehouse receipt, which A transferred in writing to the plaintiff, who has since retained its possession, and subsequently the defendant, without legal authority, delivered the cotton to one B, knowing that the latter did not own it, the alleged conduct of the defendant amounted to a conversion, and B was liable under this section for B's tortious act, though done in the capacity of agent. *Trippe v. Bell & Co.*, 139 Ga. 782, 78 S.E. 126 (1913).



**Agent's Individual Liability (Cont'd)****3. For Tort (Cont'd)**

**Trover lies against an agent**, even though the agent does not purport to act individually, but wholly for another. *Godwin v. Mitchell*, 60 Ga. App. 713, 4 S.E.2d 678 (1939); *Kelley v. Sheehan*, 61 Ga. App. 714, 7 S.E.2d 298 (1940); *Teper v. Weiss*, 115 Ga. App. 621, 155 S.E.2d 730 (1967).

Fact that defendant held possession of property in defendant's representative capacity (as administrator of estate) would afford the defendant no protection from a trover suit. *Godwin v. Mitchell*, 60 Ga. App. 713, 4 S.E.2d 678 (1939).

**Agent's liability is measured by duty to third persons agent has assumed.** — The agent's liability must be judged, not merely by a breach of the agent's contract to the principal, but by the extent of the duty and responsibility to third persons which the agent assumed coextensively with the contract. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

Agent's intervention into the relations between the principal and the others by the agent's assumption of the duty to the principal creates a duty to the others to use care either to perform the service or to see that no harm results from the agent's failure to do so. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

**Agent is liable if acts create unreasonable risk of harm to others.** — An agent is subject to liability if, by the agent's acts, the agent creates an unreasonable risk of harm to the interests of others protected against negligent invasion. *Crosby v. Calaway*, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

**Failure to take reasonable care in performing agency.** — When a servant enters upon the performance of a contract with a principal and in so doing fails to take reasonable care in the commission of some act which the servant should do in the performance of the servant's duty under the contract, and thereby a third person is injured, the servant is responsible therefor to the same extent as if the servant had committed the wrong in the servant's own behalf; his liability in such case is not based on the ground of the servant's agency, but on the ground that the servant is a wrongdoer and, as such, is responsible for any injury the

servant may cause. *Risby v. Sharp-Boylston Co.*, 62 Ga. App. 101, 7 S.E.2d 917 (1940).

If an agent fails to use reasonable care or diligence in the performance of the agent's duty, the agent will be personally responsible to a third person who is injured by such misfeasance; the agent's liability, in such cases, is not based upon the ground of the agent's agency, but upon the ground that the agent is a wrongdoer. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

If a landowner gives an agent sole authority to manage property, including renting and repairing, and if it is specifically alleged that the agent agreed to and did in fact assume such authority for the landowner, the agent may be held individually liable for a violation of this duty, not as an agent, but as an independent tort-feasor whose breach of duty owed to a third person is the actionable negligence. *Ramey v. Pritchett*, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

**Agent liable whether wrongful act is misfeasance or nonfeasance.** — If a servant has undertaken for the principal the performance of a duty owed a third person, the servant is personally liable to such third person when the servant's wrongful act in the course of the servant's employment is the direct and proximate cause of injury to the third person, whether the wrongful act is one of misfeasance or nonfeasance. It is not the servant's contract with the principal which exposes the servant to, or protects the servant from, liability to third persons, but the servant's common-law obligation to use that which the servant controls so as not to injure another. *Southern Ry. v. Smith*, 55 Ga. App. 689, 191 S.E. 181 (1937); *Crosby v. Calaway*, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

**Performance of duty to principal is no defense.** — In an action for damages founded on tort, it is no defense that the injury was caused while the defendant was acting in performance of a duty as agent of a firm of which the plaintiff was a member, if negligence of the defendant amounting to misfeasance produced the injury. *Owens v. Nichols*, 139 Ga. 475, 77 S.E. 635 (1913).

**Officer or agent of corporation is personally liable for torts.** — An officer or agent of a corporation is liable in damages for injuries suffered by third persons because of the

officer's or agent's torts, regardless of whether the officer or agent acted on the officer's or agent's own account or on behalf of the corporation, and regardless of whether or not the corporation is also liable. *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932).

**Misfeasance of corporate agent.** — The rule which makes officers or agents of a corporation liable for their torts to third persons who suffer injury thereby refers to misfeasance or positive wrong. *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932).

**Agent is not ordinarily liable for nonfeasance.** — Under former Civil Code 1895 §§ 3029 and 3041, while an agent was personally liable to those injured by the agent's misfeasance, the agent was not ordinarily liable for mere nonfeasance. *Kimbrough v. Boswell*, 119 Ga. 201, 45 S.E. 977 (1903).

An agent is not ordinarily liable to third persons for nonfeasance; an agent is, however, liable to third persons for misfeasance. *Coffer v. Bradshaw*, 46 Ga. App. 143, 167 S.E. 119 (1932); *Chambers v. Self*, 53 Ga. App. 437, 186 S.E. 203 (1936); *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

**Liability where duty to principal required performance.** — Before an agent becomes liable for an act of omission alleged to have constituted negligence with resultant injury, it must appear that such agent had agreed to perform such act for the agent's principal, or had assumed to perform the act. *Risby v. Sharp-Boylston Co.*, 62 Ga. App. 101, 7 S.E.2d 917 (1940).

**Agent in complete charge of business is liable for nonperformance.** — Nonperformance by an agent left in complete charge of the business in the absence of the owner entails liability, as do specific acts of negligence. *Warnock v. Elliott*, 96 Ga. App. 778, 101 S.E.2d 591 (1957).

**Liability for failing to keep premises safe.** — An agent who undertakes the sole and complete control and management of the principal's premises is liable to third persons, to whom a duty is owing on the part of the owner, for injuries resulting from the owner's negligence in failing to make or keep the premises in a safe condition. *Ramey v. Pritchett*, 90 Ga. App. 745, 84 S.E.2d 305 (1954).

**Agent with custody of property that may harm others.** — An agent who has the custody of land or chattels and who should realize that there is an undue risk that their condition will cause harm to the person, land, or chattels of others is subject to liability for such harm caused, during the continuance of the agent's custody, by the agent's failure to use care to take such reasonable precautions as the agent is authorized to take. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

**Failure to make repairs.** — Where the defendant had by contract assumed the duty of maintaining and repairing a building, which duty in the first instance devolved upon the owner, and actually entered upon such duty by repairing a part of the building, then the defendant's failure to repair another part of the building, resulting in injury to the plaintiff, rendered the defendant liable, not because the defendant had breached the defendant's contract with the defendant's principal, but because, by assuming the total duty of repair and maintenance, the defendant had caused the owner to rely upon the defendant and prevented the job from being done by others, and had therefore breached a duty owing to the public generally and the plaintiff in particular of maintaining the premises in a reasonably safe condition. *Sharp-Boylston Co. v. Bostick*, 90 Ga. App. 46, 81 S.E.2d 853 (1954).

**Employee canning food products not liable unless employee knows of defective condition.** — An employee aiding in canning food products that are then in a dangerously defective condition is liable to the person injured if such agent knows of that condition; the agent would not be liable unless the agent knew of the defect. *Crosby v. Calaway*, 65 Ga. App. 266, 16 S.E.2d 155 (1941).

**Retail clerk.** — An agent or clerk in a retail store who merely passes out the articles and receives the price for the principal is not liable for defects in the article sold unless the clerk has actual knowledge of the defect, or unless the clerk assumes the responsibility which the law places upon retailers and distributors of food, or unless the clerk owes some particular duty to the purchaser. *Crosby v. Calaway*, 65 Ga. App. 266, 16 S.E.2d 155 (1941).



**Agent's Individual Liability (Cont'd)****4. As to Underservant**

**Agent is not liable for subagent's negligence.** — Where an agent has authority to employ a subagent to do the work of the principal, the agent is not liable for the negligence of the subagent in the performance of the work, if due care has been used in the subagent's selection. *Morris v. Warlick*, 118 Ga. 421, 45 S.E. 407 (1903); *Henderson v. Nolting First Mtg. Corp.*, 184 Ga. 724, 193 S.E. 347 (1937).

**Failure to use due care in selecting or failing to remove subagent.** — An agent is liable for the negligence of the subagent if due care has not been used in the subagent's selection, and the same principle should be applied to negligence in failing to displace a subagent or an underservant where the agent appears to have had a duty and responsibility as to such matter. *Henderson v. Nolting First Mtg. Corp.*, 184 Ga. 724, 193 S.E. 347 (1937). But see *Pan-American*

*Petro. Corp. v. Williams*, 45 Ga. App. 490, 165 S.E. 473 (1932).

The negligence of an underservant in respect to the inspection of bottles and the soft drink was not attributable to agent of bottling company in charge of business's operation, who served as the company's executive and administrative head; the only negligence of which such agent could have been guilty under the circumstances would have been an original act of negligence in selecting or retaining an incompetent employee. *Schutle v. Pyle*, 95 Ga. App. 229, 97 S.E.2d 558 (1957).

**Employment by agent should be explicitly alleged.** — If plaintiff means to charge that an underservant was employed by an agent and that the agent was liable for the torts of the underservant because the agent had not exercised good faith and reasonable care in the selection of a suitable and proper subagent, the allegations of employment should be explicit and not inferential. *Pan-American Petro. Co. v. Williams*, 174 Ga. 875, 164 S.E. 759, answer conformed to, 45 Ga. App. 490, 165 S.E. 473 (1932).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 291 et seq.

**C.J.S.** — 2A C.J.S., Agency, §§ 240, 241, 272.

**ALR.** — Liability for misconduct or negligence of messenger not directly related to the service, 18 ALR 1416.

Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Duty of principal to discover and notify third persons of wrongful disposal of property by agent not assuming to act for principal, 35 ALR 325.

Personal liability of agent to third person for injuries or damages due to condition of principal's premises, 49 ALR 521.

Right of defendant in action by undisclosed principal to avail himself of defenses or setoffs that would have been available in an action by the agent in his own right on the contract, 53 ALR 414.

Right of purchaser from agent or dealer in possession of article for purpose of demon-

stration or solicitation, without actual authority to sell, 57 ALR 393.

Liability of agent for acts or omissions of subagent, 61 ALR 277.

Sole actor doctrine where officer or agent of corporation acting adversely to it is its sole representative in the transaction, 111 ALR 665.

Right to bring separate actions against master and servant, or principal and agent, to recover for negligence of servant or agent, where master's or principal's only responsibility is derivative, 135 ALR 271.

Liability of master or principal for servant's or agent's libel or slander of one other than servant or agent or former servant or agent, 150 ALR 1338.

Agent's disregard of principal's instructions where power coupled with an interest, 162 ALR 1182.

Doctrine of apparent authority as applicable where relationship is that of master and servant, 2 ALR2d 406.

Rights and remedies where broker or agent, employed to purchase personal property, buys it for himself, 20 ALR2d 1140.

Tenant's capacity to sue independent con-



tractor, as third-party beneficiary, for breach of contract between landlord and such contractor for repair or remodeling work, 46 ALR2d 1210.

Salesman's power to pledge employer's or principal's personal property, 49 ALR2d 1271.

Implied or apparent authority of agent to purchase or order goods or merchandise, 55 ALR2d 6.

Liability of vendor's real-estate broker or agent to purchaser or prospect for misrepresenting or concealing offer or acceptance, 55 ALR2d 342.

Broker's liability for damages or losses sustained by vendor of real property to vendee because of broker's misrepresentations, 61 ALR2d 1237.

Liability of auctioneer or clerk to buyer as to title, condition, or quality of property sold, 80 ALR2d 1237.

Status of gasoline and oil distributor or dealer as agent, employee, independent contractor, or independent dealer as regards responsibility for injury to person or damage to property, 83 ALR2d 1282.

Release of (or covenant not to sue) master or principal as affecting liability of servant or agent for tort, or vice versa, 92 ALR2d 533.

Agent's authority to execute warrant of attorney to confess judgment against principal, 92 ALR2d 952.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Products liability: Right of manufacturer or seller to contribution or indemnity from user of product causing injury or damage to third person, and vice versa, 28 ALR3d 943.

Liability of insurance agent, for exposure of insurer to liability, because of failure to cancel or reduce risk, 35 ALR3d 792.

Liability of insurance agent, for exposure of insurer to liability, because of failure to fully disclose or assess risk or to report issuance of policy, 35 ALR3d 821.

Liability of insurance agent, for exposure of insurer to liability, because of issuance of policy beyond authority or contrary to instructions, 35 ALR3d 907.

Liability for negligence of doorman or similar attendant in parking patron's automobile, 41 ALR3d 1055.

Criminal liability of member or agent of private club or association, or of owner or lessor of its premises, for violation of state or local liquor or gambling laws thereon, 98 ALR3d 694.

Liability of owner or operator of shopping center, or business housed therein, for injury to patron on premises from criminal attack by third party, 31 ALR5th 550.

Liability of insurance agent or broker on ground of inadequacy of liability-insurance coverage procured, 60 ALR5th 165.

## 10-6-86. Liability of person signing instrument as agent or fiduciary.

An instrument signed by one as agent, trustee, guardian, administrator, executor, or the like, without more, shall be the individual undertaking of the maker, except as otherwise provided with regard to negotiable instruments by Code Section 11-3-402, such words being generally words of description. (Civil Code 1895, § 2998; Civil Code 1910, § 3570; Code 1933, § 4-401; Ga. L. 1997, p. 143, § 10.)

**History of Code section.** — This Code section is derived from the decision in *Crusselle v. Chastain*, 76 Ga. 840 (1886).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION PLEADINGS AND EVIDENCE

### General Consideration

**This section lays down the general rule.** *Wadley v. Oertel*, 140 Ga. 326, 78 S.E. 912 (1913).

**Rule was not changed by NIL.** — The statutory rule in this section, first in the Code of 1895, was not altered but was given substantial effect with respect to negotiable instruments by the former Negotiable Instruments Law. *Hill v. Daniel*, 52 Ga. App. 427, 183 S.E. 662 (1936). See now § 11-3-403.

**Deposit without instrument.** — This section is not applicable where an administrator of an estate deposits funds of the estate (which were lost by failure of the bank), but where there was no instrument executed by the agent. *Gatewood v. Furlow*, 19 Ga. App. 74, 90 S.E. 973 (1916).

**Checks drawn by spouse.** — An instrument signed by one as agent, without more, is the individual undertaking of the maker, such words being generally words of description. So checks drawn by the husband and signed by him with the word "agent" added to his name, without more, were the individual checks of the husband, and did not put the payee upon notice that they were drawn on funds which did not belong to the husband, but which belonged to the wife. *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930).

**One adding "trustee" after name is individually liable.** — The addition of the word "trustee" after the name of the signer of a note, without more, is mere descriptio personae, and the debt is that of the maker individually. *Crusselle v. Chastain*, 76 Ga. 840 (1886); *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930).

**Adding "President" after name.** — One signing, "J. L. DeGive, President" was apparently individually liable. *Candler v. DeGive*, 133 Ga. 486, 66 S.E. 244 (1909).

**Adding "Treas." or "V.P." after name.** — The abbreviations and letters, "Treas.," and "V.P.," following the names respectively of two endorsers on a promissory note, are mere words of description, and the obligation incurred by such endorsers is personal under this section. *Morris v. Reed*, 14 Ga. App. 729, 82 S.E. 314 (1914).

**Adding "adm'r" after name.** — It is clear that under this section, if "F" had signed an instrument as "TMF, adm'r" it would have

been F's individual undertaking. *Gatewood v. Furlow*, 19 Ga. App. 74, 90 S.E. 973 (1916).

**Adding "with Power of Attorney" after name.** — Where endorsed on a note and mortgage were several names, the last of which was "H. A. Burge with Power of Attorney" and the power of attorney is not included in the record, at most this could only indicate an ordinary individual endorsement. *Hastey v. Roberts*, 149 Ga. 479, 100 S.E. 569 (1919).

**Adding "administrator" after name.** — A certiorari bond payable on its face to a named individual, followed by the word "administrator" which fails within itself to furnish the means whereby the actual principal for whose benefit the bond is executed can be ascertained with absolute and legal certainty, amounts to nothing more than an undertaking in favor of the named individual, and the word "administrator" is to be taken merely as descriptio personae under this section. *Metropolitan Life Ins. Co. v. Monroe*, 26 Ga. App. 332, 106 S.E. 209, cert. denied, 26 Ga. App. 801 (1921).

**Adding "agent" after name.** — If an agent signs a note with the agent's own name alone and adds to the agent's signature the word "agent," and if there is nothing in the note to indicate who is the principal, the agent will be personally liable, just as if the word agent was not added. *Harp v. First Nat'l Bank*, 173 Ga. 768, 161 S.E. 355 (1931).

**Checks drawn by husband.** — Two checks drawn by the plaintiff's husband and signed by him with the word "agent" added to his signature, without more, were the individual checks of the husband, and did not put the payee upon notice that they were drawn on funds which did not belong to the husband, nor did such signature to these checks impose upon the payee the duty of inquiring whether they were drawn on the funds of the drawer or upon someone else. *McRitchie v. Atlanta Trust Co.*, 170 Ga. 296, 152 S.E. 834 (1930).

**Action on note signed as administrator is action against individual.** — An action against "A, administrator," on a promissory note containing the words "I promise to pay," and signed "B Estate, A, administrator (L.S.)," is an action against A as an individual. *Glisson v. Weil & Co.*, 117 Ga. 842, 45 S.E. 221 (1903).

**Action by or against one adding "administrator" or "executor" to name is action by or**



**against individual.** — An action by one with the word “administrator” or “executor” added to one’s name, especially on a contract made by that one, will ordinarily be treated as being one’s individual action under this section; and likewise when the action is against that one. *Wadley v. Oertel*, 140 Ga. 326, 78 S.E. 912 (1913).

**Execution against one “as agent for” another is against former alone.** — An execution against SJW as agent for Mrs. MW is against SJW alone, the words, “as agent for,” etc., being merely descriptio personae under this section. *Wynn v. Irvine’s Ga. Music House*, 109 Ga. 287, 34 S.E. 582 (1899).

**Bond payable to city recorder individually is not city contract.** — Bond made payable to the city recorder who tried the case in which the defendant was convicted, or to the recorder’s successors in office, if given to the obligee in the obligee’s personal capacity only, would not be a valid contract with the city. *Soles v. City of Vidalia*, 92 Ga. App. 839, 90 S.E.2d 249 (1955) (bond construed as payable to obligee in official capacity).

**Application with “Agt.” after name is individual application.** — When an application to establish and lay out a public road is signed by a named person with the letters “Agt.” after the person’s name, without more, such instrument is the person’s individual application for such road. *Commissioners of Decatur County v. Curry*, 154 Ga. 378, 114 S.E. 341 (1922).

**Stock issued with “guardian” after name is individually owned.** — The legal title to bank stock purchased by and issued to W, “guardian,” was prima facie in W individually under this section and on W’s death descended to W’s personal representative; and W’s successor in the trust had no right, under the facts of this case, to recover from the bank money paid for the stock. *Williams v. Farmers State Bank*, 22 Ga. App. 656, 97 S.E. 249 (1918).

**Only principal is bound if agency specified and principal name in contract.** — Where in the body or on the face of the instrument the agency is distinctly specified and the principal indicated, and the contract is substantially in the name of such principal, the latter and not the agent is liable, though the instrument is signed by the agent only, provided, of course, the agent has authority to bind the principal. *Rawlings v. Robson*, 70 Ga. 595 (1883); *Bank*

*of Univ. v. Hamilton*, 78 Ga. 312 (1886); *Wadley v. Oertel*, 140 Ga. 326, 78 S.E. 912 (1913); *Ocilla S.R.R. v. Morton*, 13 Ga. App. 504, 79 S.E. 480 (1913); *Harp v. First Nat’l Bank*, 173 Ga. 768, 161 S.E. 355 (1931).

Trial court properly granted summary judgment to the relative after the home healthcare agency sued the relative for a balance due on a contract the relative signed to have nursing services provided to the relative’s father. The relative clearly signed in a representative capacity the contract that the home healthcare agency drafted and provided for the relative to sign, the principal, the relative’s father, was clearly named in the document as such, and it was evident that the contract was substantially in the name of the principal; accordingly, there was no issue for the jury to decide because the contract obligated the father, not the relative, to pay. *Associated Servs. of Accountable Prof’ls, Ltd. v. Workman*, 265 Ga. App. 348, 593 S.E.2d 882 (2004).

**Agent not personally liable for stock assessment.** — Where the trustee of a person non compos mentis, who succeeded to the trust upon the death of the original trustee, entered stock on the books of the bank in the name of “Billups Phinizy, Trustee Marion Daniel Phinizy,” the words “Trustee Marion Daniel Phinizy” were not merely descriptio personae, and therefore the trustee was not personally liable for the stock assessment. *Gormley v. Phinizy*, 46 Ga. App. 431, 167 S.E. 757 (1933).

**Principal must be party to sealed instrument to be liable thereon.** — When a contract is made by an agent under seal, no one but a party to the instrument is liable to be sued thereon; and therefore, if made by an agent or attorney, it must be in the name of the principal in order that the agent may be a party, because otherwise the agent is not bound by it. *Harp v. First Nat’l Bank*, 173 Ga. 768, 161 S.E. 355 (1931).

**Context may show agent signed in representative capacity.** — An executory contract between “FCM, administrator of the estate of EPM” and H, was an agreement by FCM in FCM’s representative capacity, under former Civil Code 1910, §§ 3570 and 3594. *Miller v. Hines*, 145 Ga. 616, 89 S.E. 689 (1916).

Where two attorneys in fact were expressly authorized by power of attorney to execute a



**General Consideration (Cont'd)**

security deed in the names of the principals "or otherwise" and the security deed executed refers to the heirs of an estate (the principals) the security deed would be construed to be a conveyance by them in behalf of themselves and as attorneys in fact for the other heirs at law. *Cocke v. Bank of Dawson*, 180 Ga. 714, 180 S.E. 711 (1935).

Deeds in which the named grantor was decedent's estate and which were signed in the name of the estate and of the two executors were deeds by the executors of the estate in their official capacity, and purported to convey properties belonging to the estate, and were not the personal deeds of the individuals designated as executors. *Harrison v. Harrison*, 214 Ga. 393, 105 S.E.2d 214 (1958).

While it is the general rule that a signature with the added word "administrator" or "executor" will ordinarily be treated as that of one in one's individual capacity, the added word being generally merely *descriptio personae*, this is not an inflexible rule where the context makes it clear that it is signed in a representative capacity, although the added words are not "as administrator" or "as executor." *Fisher v. Pair*, 69 Ga. App. 492, 26 S.E.2d 187 (1943); *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

**Words added to signature may take case out of section.** — Where the evidence discloses that the advertising contract was signed as follows: "Ann Zior, Sec.-Tres. authorized agent for Ejax Oil Stabilizer," the addition of the name of the purported principal to the agent's signature is *prima facie* sufficient to take the case beyond the purview of this section. *Radio Station WTMP v. Zior*, 102 Ga. App. 38, 115 S.E.2d 627 (1960).

**Cited in** *Terrell v. Harris*, 42 Ga. App. 760, 157 S.E. 387 (1931); *First Christian Church v. Jefferson Std. Life Ins. Co.*, 183 Ga. 167, 187 S.E. 729 (1936); *Higginbotham v. Adams*, 192 Ga. 203, 14 S.E.2d 856 (1941); *McCoy v. Sasnett*, 77 Ga. App. 819, 49 S.E.2d 913 (1948); *Harris v. Porter's Social Club, Inc.*, 215 Ga. 687, 113 S.E.2d 134 (1960); *Hill Aircraft & Leasing Corp. v. Simon*, 122 Ga. App. 524, 177 S.E.2d 803 (1970); *Jolly v. Egerton*, 132 Ga. App. 243, 207 S.E.2d 634 (1974).

**Pleadings and Evidence**

**Between immediate parties parol evidence may show only principal bound.** — As between the immediate parties, it may be shown by parol evidence that the instrument was, to the knowledge of the parties, intended to be the obligation of the principal and not of the agent and that it was given and accepted as such. *Ocilla S.R.R. v. Morton*, 13 Ga. App. 504, 79 S.E. 480 (1913). (See § 10-6-87 and notes thereto).

Where a promissory note was made payable to the order of a named person, followed merely by the word "trustee," and such payee in like manner endorsed the note and delivered it to a third person, in a suit on the note by the endorsee against the maker and the endorser, although under the rule of *descriptio personae* the manner of the endorser's signature indicated *prima facie* that the endorser signed as an individual and that the endorser's obligation as endorser was the endorser's individual undertaking, the endorser was nevertheless entitled to show by parol that the endorser in fact acted in the transaction merely as the trustee or agent of the plaintiff endorsee, and that the endorser's endorsement of the note, though in blank, was, under this agreement with the endorsee, made solely for the transfer of title as the true rightful owner. *Kaiser v. Simmons*, 52 Ga. App. 355, 183 S.E. 343 (1936). See § 10-6-87 and notes thereto.

**Only slight evidence of trust required.** — *Prima facie*, a judgment in favor of EJD, executor of MG, is EJD's individual property under this section, but this presumption may be removed by slight evidence tending to show that EJD holds the same in trust for the estate. *Dozier v. McWhorter*, 117 Ga. 786, 45 S.E. 61 (1903).

**Pleading may be amended to delete "agent".** — A pleading alleging that the contract, the breach of which is the wrong complained of, was made by the defendant as agent, without more, is amendable by striking the word "agent" therefrom. Such contract is the individual undertaking of the maker under this section. *Hearn v. Gower*, 1 Ga. App. 265, 57 S.E. 916 (1907).

**Mortgage held inadmissible where signer's authority not shown.** — Where a mortgage on realty was signed "Trustees North Ga. Col. School (Seal). H. A. Burge, Cor. Sect. (Seal)," it was erroneous to admit the mort-

gage in evidence on the trial of a claim to the property, over timely objection that "there was no evidence shown where H. A. Burge had any authority to sign any mortgage," the evidence failing to disclose any such authority. *Hastey v. Roberts*, 149 Ga. 479, 100 S.E. 569 (1919).

**If one undertakes obligation in fictitious**

**or trade name, such obligation is one's own individually.** *Horn v. Wright*, 157 Ga. App. 408, 278 S.E.2d 66 (1981).

**Action against "X, administratrix of estate of Y, deceased," is suit against X individually,** the additional words being merely descriptio personae. *Horn v. Wright*, 157 Ga. App. 408, 278 S.E.2d 66 (1981).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 168 et seq.

**C.J.S.** — 2A C.J.S., Agency, § 226 et seq.

**ALR.** — Personal liability of broker for breach of contract by his principal, 6 ALR 641.

Regulations, rules, custom, or usage of stock or produce exchange or of stock or

produce broker as affecting customers, 79 ALR 592.

Right to join agent and undisclosed principal in same action, 118 ALR 701.

Exceptions to rule which permits suit by or against undisclosed principal, 130 ALR 664.

## 10-6-87. When agent responsible for credit given; question for jury.

Where the agency is known and the credit is not expressly given to the agent, he shall not be personally responsible upon the contract. The question to whom the credit is given is a question of fact to be decided by the jury under the circumstances in each case. (Orig. Code 1863, § 2189; Code 1868, § 2185; Code 1873, § 2211; Code 1882, § 2211; Civil Code 1895, § 3039; Civil Code 1910, § 3611; Code 1933, § 4-406.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### PROOF OF AGENCY

#### QUESTIONS OF FACT

#### JURY INSTRUCTIONS

### General Consideration

#### Liability of agent if agency not disclosed.

— It is only when an agent is either expressly or impliedly dealing or acting for and in behalf of the agent's principal that a contract made by the agent with a third person having knowledge of this relationship is the contract of the principal and is not the personal contract of the agent. *Harris v. Southeastern Printers Supply Co.*, 59 Ga. App. 729, 2 S.E.2d 184 (1939).

Where the plaintiff, through a member of the firm, made an oral agreement with the defendant to install and repair a printing press on what is designated as "a time and

material basis," and the defendant did not at any time during the negotiations for the contract or during the progress of the work disclose to plaintiff's agent that the defendant was the agent of anyone or that the agent was contracting for the services, or that the agent accepted the services, as the agent for another, and, notwithstanding the fact that the plaintiff may have known beforehand that the defendant was "connected with" or was an officer in or agent for a corporation which was the owner of the printing press which was being repaired under the contract, the inference is authorized that the contract was with the defendant in the defendant's individual capacity.



**General Consideration (Cont'd)**

*Harris v. Southeastern Printers Supply Co.*, 59 Ga. App. 729, 2 S.E.2d 184 (1939).

An agent who makes a contract without disclosing that the agent is acting as an agent or without identifying the agent's principal will become individually liable on the contract. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

**Only principal is bound if agent names principal.** — Under former Code 1868, §§ 2169 and 2185, it was a general rule — standing on strong foundations, and pervading every system of jurisprudence — that where an agent was duly constituted, and named the agent's principal, and contracts in the agent's name, the principal was responsible, and not the agent. *Tiller v. Spradley*, 39 Ga. 35 (1869); *Gibbs v. Carolina Portland Cement Co.*, 50 Ga. App. 229, 177 S.E. 760 (1934).

When an agent in making a contract discloses to the other contracting party that the agent is acting for a named principal, the principal is responsible and not the agent. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

Where the owner of land employs a general agent to manage and operate the owner's farm, such agency being fully disclosed to the persons contracting with the agent to cultivate the land as croppers, no liability arises in favor of persons cultivating the land, as against the agent, by reason of the operation of the farm, and even though the agent may have authority from the agent's employer to make all contracts with croppers, superintend the operations of the farm, sell the products of the farm, and make all settlements with the croppers and tenants thereon, and may actually perform such duties, with the consent of a cropper on the premises, the agent's possession of crops grown on the premises is as agent for the agent's employer, and not in the agent's own right, and the agent is not subject to process of garnishment instituted by a creditor of such cropper. *Johnson v. Varnum*, 43 Ga. App. 737, 159 S.E. 908 (1931).

**Principal liable if other party knew of agency.** — Under this section, if the sheriff knew that the bidder purchased as the agent of others, and recognized and treated the

bidder as such, the sheriff's right of action would not be against the agent but against the principal. *Cureton v. Wright*, 73 Ga. 8 (1884).

A person who has obtained a diversion of a shipment of goods during transportation by a carrier is not liable for a resulting additional freight charge where, in ordering the diversion, the person was acting as agent for another and the carrier must have known of this fact. *B & O R.R. v. Johnson-Battle Lumber Co.*, 37 Ga. App. 729, 141 S.E. 678 (1928).

**Agent has duty to disclose principal to avoid liability.** — If the agent would avoid personal liability, the duty is on the agent to disclose the agent's principal, and the agent is individually liable if the agent fails to disclose the agent's agency and the identity of the agent's principal. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

Where an agent wishes to avoid personal liability, the duty is on the agent to disclose the agent's agency, and not on the party with whom the agent deals to discover it. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. App. 300, 145 S.E.2d 294 (1965); *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980).

**Agent has burden of proving agency and other party's knowledge thereof.** — If a person would relieve themselves from personal liability on the ground of agency, the person ordinarily has the burden of proving the fact of agency as well as knowledge thereof by the opposite party. *Citizens Nat'l Bank v. Jennings*, 35 Ga. App. 553, 134 S.E. 114 (1926); 2 C. J. 923; *B & O R.R. v. Johnson-Battle Lumber Co.*, 37 Ga. App. 729, 141 S.E. 678 (1928).

To relieve oneself of personal liability the agent ordinarily has the burden of proving by direct or circumstantial evidence the fact of agency as well as knowledge thereof by the opposite party. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Yarbrough & Co. v. Travis Pruitt & Assocs.*, 130 Ga. App. 49, 202 S.E.2d 227 (1973).

**Use of a tradename is not necessarily a sufficient disclosure** of the identity of the principal and the fact of agency so as to protect the agent against personal liability. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. App. 300, 145 S.E.2d 294 (1965).

**Agent may expressly or impliedly bind himself.** — An agent who makes a contract



with the express or implied understanding with the other party that the agent is binding oneself individually will become individually liable on the contract. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

**Personal liability of agent in addition to principal's liability.** — If an agent acts for a disclosed principal, within the scope of the agent's authority, the actions are those of the principal, who is alone liable unless the agent has assumed personal liability also. *Candler v. Clover Realty Co.*, 125 Ga. App. 278, 187 S.E.2d 318 (1972).

**Where agency is known.** — Where the agency is known but the credit is expressly given to the agent, the agent is personally responsible. *Verhey v. Cook*, 142 Ga. App. 280, 235 S.E.2d 678 (1977).

An agent may expressly contract on the agent's own credit and be bound, even though the agent's principal is known. *Brown & Huseby, Inc. v. Chrietberg*, 242 Ga. 232, 248 S.E.2d 631 (1978).

**Recording agency contract held not to give notice or relieve agent.** — In an action by a seller on an open account for goods sold against a defendant who alleges the defendant was acting as an agent, recording of the agency contract in the office of the clerk of the superior court was held not to give proper notice of the agency contract to the seller, and where the seller had no actual knowledge of the contents of the agency contract, the defendant agent is personally liable. *Babb v. Kersh*, 92 Ga. App. 346, 88 S.E.2d 432 (1955).

**Applicability in attorney-client relationship.** — An attorney could not be held solely liable to a court reporting service for \$851.10, representing court reporting fees owed, as the clients the attorney was representing at the time the services were rendered should have been joined in the litigation, pursuant to both O.C.G.A. §§ 9-11-14(a) and 9-11-19(a), given that: (1) the clients could have been liable to the attorney for all or part of the court reporting fees; and (2) the attorney's claim that the clients made partial payment for the court reporting services also rendered the clients necessary parties for adjudication of this dispute. *Free v. Lankford & Assocs., Inc.*, 284 Ga. App. 328, 643 S.E.2d 771 (2007), cert. denied, 2007 Ga. LEXIS 560 (Ga. 2007).

**Cited in** *Macomber v. Hudspeth*, 115 F.2d 114 (10th Cir. 1940); *Childs v. Hampton*, 80

Ga. App. 748, 57 S.E.2d 291 (1950); *Dinkler Mgt. Corp. v. Stein*, 115 Ga. App. 586, 155 S.E.2d 442 (1967); *Weaver v. Ralston Motor Hotel, Inc.*, 135 Ga. App. 536, 218 S.E.2d 260 (1975); *Dickey v. Planes, Inc.*, 138 Ga. App. 99, 225 S.E.2d 506 (1976); *Maughan v. Turner Communications Corp.*, 143 Ga. App. 262, 238 S.E.2d 262 (1977); *Southern Heritage Mgt. Co. v. Elrod's Custom Drapery Workroom, Inc.*, 144 Ga. App. 139, 240 S.E.2d 607 (1977); *Stasco Mechanical Contractors v. Williamson*, 127 Ga. App. 545, 278 S.E.2d 127 (1981); *Kessler v. Georgia Int'l Life Ins. Co.*, 165 Ga. App. 60, 299 S.E.2d 131 (1983); *Tunison v. Tillman Ins. Agency*, 184 Ga. App. 776, 362 S.E.2d 507 (1987); *Cuba v. Hudson & Marshall, Inc.*, 213 Ga. App. 639, 445 S.E.2d 386 (1994); *Carpenter v. Cordele Elec. Supply, Inc.*, 220 Ga. App. 548, 469 S.E.2d 799 (1996).

### Proof of Agency

**Agency may be proved by contract or extrinsic evidence.** — A contract signed by a person who adds after the person's signature the words "general manager" is not the individual undertaking of the person signing, if the contract shows on its face that it was made in behalf of another, or if, in an action for its breach, this fact appears by extrinsic evidence. *Raleigh & Gaston R.R. v. Pullman Co.*, 122 Ga. 700, 50 S.E. 1008 (1905).

If it does not appear from the face of the contract whether it is the signer's individual undertaking or is that of the signer's principal acting through the signer as the principal's agent, it may, especially where the contract is not executed under seal, be shown extrinsically that the contract is that of the principal, executed for and in the principal's behalf by the principal's agent. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Parol evidence.** — Under former Civil Code 1895, §§ 3022 and 3039, where a contract was signed by a person individually, parol evidence was admissible for the purpose of showing that the person was acting as agent for another. *Fitzgerald Cotton Oil Co. v. Farmers Supply Co.*, 3 Ga. App. 212, 59 S.E. 713 (1907).

**Proof where actual principal is not one indicated after agent's signature.** — Where the question as to who is the real contracting

**Proof of Agency (Cont'd)**

party is one of fact which can be extrinsically determined, it may be shown that the person signing a contract in the person's own name, with descriptive terms of agency after the person's signature, did so for and on behalf of another as the person's principal, by and through the person as agent, although the person's principal may be another and different person from the one indicated as the signer's principal in the descriptive terms attached to the signer's signature. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Contract reciting it was not signed on another's behalf.** — Where a contract recites that it represents the entire agreement between the parties, it cannot be shown by extrinsic parol evidence that one of the signatories did not sign, as recited therein, on the signatory's own behalf, but signed as agent of another. *Haas v. Koskey*, 138 Ga. App. 448, 226 S.E.2d 279 (1976).

**Introduction of extrinsic evidence where fact of agency not in contract.** — If the fact of agency does not appear in an integrated contract, an agent who appears to be a party thereto cannot introduce extrinsic evidence to show that the agent is not a party, except: (a) for the purpose of reforming the contract; or (b) to establish that the agent's name was signed as the business name of the principal and that it was so agreed by the parties. *Haas v. Koskey*, 138 Ga. App. 448, 226 S.E.2d 279 (1976).

**"Agent for" after signature does not alone bind principal.** — The expression "agent for" a designated person, following the name in a signature attached to a contract, is merely *descriptio personae*, and its presence in the signature does not of itself necessarily render the contract the undertaking of the designated principal, acting by and through the signer as the principal's agent. *Dorsey v. Rankin*, 43 Ga. App. 12, 157 S.E. 876 (1931).

**Use of trade name does not necessarily relieve agent.** — The use of a trade name is not necessarily a sufficient disclosure of the identity of the principal and the fact of agency so as to protect the agent against personal liability. *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980).

An employer was not representing the disclosed principal when the employer hired an employee where the employer contracted

with the employee personally and not as an agent, and the language of a letter of understanding supported the position that the employer was acting individually in asking the employee to work for the corporation. *Wojcik v. Lewis*, 204 Ga. App. 301, 419 S.E.2d 135 (1992).

**Questions of Fact**

**Disclosure or knowledge of agency is question of fact.** — Whether or not the fact of the agency and the identity of the principal were disclosed or known to the other contracting party is a question of fact which may be shown by direct or circumstantial evidence. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966).

The trier of fact should determine whether the agency was disclosed. *Yarbrough & Co. v. Travis Pruitt & Assocs.*, 130 Ga. App. 49, 202 S.E.2d 227 (1973).

**Parties' intention as to who will be bound.** — The intention of the parties as to who will be bound where the principal is disclosed is usually a question of fact for a jury. *Whitlock v. PKW Supply Co.*, 154 Ga. App. 573, 269 S.E.2d 36 (1980).

The question whether plaintiff received certain foreign bills of exchange drawn by the defendants, payable to plaintiff's order, from the defendants on their credit as the drawers thereof or on the credit of the proceeds of plaintiff's own cotton shipped and sold by defendants as plaintiff's agents was a question to be decided by the jury under the evidence in the case. *Jones v. J.W. Lathrop & Co.*, 44 Ga. 398 (1871).

The contract may, depending upon the facts and circumstances, be impliedly one with the agent in the agent's individual capacity. What was the understanding of both parties is a question of fact to be decided by the jury under the circumstances of each case. *Chambliss v. Hall*, 113 Ga. App. 96, 147 S.E.2d 334 (1966); *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

**Negotiable instruments after negotiation.** — This section does not control where a negotiable paper, complete on its face, appears to have been negotiated in the fair and usual course of trade; nor, on such a paper as this, is the question to whom credit was given one of fact to be decided by the jury. *Bedell v. Scarlett*, 75 Ga. 56 (1885).



**Sealed instruments or agreements to be individually bound.** — Under this section, omitting cases of contracts under seal, negotiable instruments, and those where there is an express declaration in writing of an intention and agreement on the part of an agent to be individually bound, usually where the agent contracts in the agent's own name, but with the agent's principal known, the question as to whether the principal or the agent individually is bound is one of fact. *Phinizy v. Bush*, 129 Ga. 479, 59 S.E. 259 (1907).

**Allegations not raising issue of who is bound.** — Under this section, where the plaintiff's pleading showed on its face that the agency of the president was known and that credit was extended to the principal, and there being no allegation that credit was expressly extended to the agent, there was no issue which required submission to the jury. *Bank of Univ. v. Hamilton*, 78 Ga. 312 (1886).

Where agency was shown, there was no issue which required submission to the jury in the absence of allegations that credit was expressly extended to the agent, or that the authority assumed by the agents was unauthorized. *Ross v. Grinalds*, 86 Ga. App. 180, 71 S.E.2d 294 (1952).

**Jury Instructions**

**Instruction on section should use "expressly" or refer to parties' understanding.** — In charging this section, the court neither used the word "expressly" nor any equivalent language, nor did the court refer in clear terms to the understanding of both parties. The amplification which was requested orally would have supplied the omission and ought to have been incorporated into the charge. *Fleming v. Hill*, 62 Ga. 751 (1879).

**Instruction substantially giving benefit of section.** — Failure to charge this section without request was not error where accommodation endorsers in an action on a renewal note were given substantially the benefit of this contention in a charge to the jury that, should the jury find from the evidence that the endorsers signed the note sued on as officers of a corporation and not as individuals, they should find in favor of them, even though no such representative capacity appears on the face of the note. *Franklin v. Sea Island Bank*, 111 Ga. App. 182, 141 S.E.2d 121 (1965).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, §§ 272, 352, 353.

**C.J.S.** — 3 C.J.S., Agency, §§ 537, 544.

**ALR.** — Personal liability of servant or agent to third person for injuries caused by the performance or nonperformance of his duties to his employer, 20 ALR 97; 99 ALR 408; 96 ALR2d 208.

Personal liability of auctioneer to owner or mortgagee for conversion, 96 ALR2d 208.

Attorney's personal liability for expenses incurred in relation to services for client, 66 ALR4th 256.

**10-6-88. When public agents not liable on public contract.**

Public agents contracting in behalf of the public shall not be individually liable on such contracts. (Orig. Code 1863, § 2190; Code 1868, § 2186; Code 1873, § 2212; Code 1882, § 2212; Civil Code 1895, § 3040; Civil Code 1910, § 3612; Code 1933, § 4-407.)

**JUDICIAL DECISIONS**

**Public officials are not personally liable on authorized contracts.** — Public officials

are not liable personally on contracts entered into by the officials within the scope of



the officials' authority. *Wilson v. Strange*, 235 Ga. 156, 219 S.E.2d 88 (1975).

**Justices of the inferior court.** — Justices of the inferior court contracting in behalf of the public are not individually liable for the payment of such contracts. *Ghent v. Adams*, 2 Ga. 214 (1847).

**Commissioners contracting for river improvement.** — Commissioners contracting for improvement on Coosa River are not individually liable for obligations assumed in that character. *Tucker v. Shorter*, 17 Ga. 620 (1855).

**Sheriffs.** — Where an action is against the defendant as sheriff, to recover on a contract made by the sheriff solely in the sheriff's capacity as sheriff and not in the sheriff's individual capacity, the plaintiff's pleading sets out no liability against the sheriff in the sheriff's individual capacity. *Bowden v. Eubanks*, 57 Ga. App. 414, 195 S.E. 582 (1938).

**Members of county board of education.** — Membership on a county board of education is a public office, and board members cannot be sued in their official capacity for breach of contract made on behalf of or in the name of the board. *Knight v. Troup County Bd. of Educ.*, 144 Ga. App. 634, 242 S.E.2d 263 (1978).

**County school superintendents.** — Where a county school superintendent's actions were authorized by the county board of education, the superintendent is immune from any individual liability on a contract made on behalf of or in the name of the board. *Knight v. Troup County Bd. of Educ.*, 144 Ga. App. 634, 242 S.E.2d 263 (1978).

**Contract showing intent to assume personal liability.** — Officials are not personally liable on contracts entered into by the officials within the scope of their official authority, unless the contract shows that the officials clearly intended to assume a personal liability. *Bowden v. Eubanks*, 57 Ga. App. 414, 195 S.E. 582 (1938).

**Public agent may stipulate to be personally responsible.** *Aven v. Beckom*, 11 Ga. 1 (1852).

**Reason for rule.** — There is a manifest distinction between contracts made with private agents and agents acting on behalf of the public, as it regards their personal responsibility. The reason for the distinction is that it is not to be presumed either that the public agent means to bind oneself personally in acting as a functionary of the public or that the party dealing with the public agent in the agent's public character means to rely on the agent's individual responsibility. If individuals acting for the public are to be held individually liable upon their official contracts, few would be willing to accept any public trust or office. *Ghent v. Adams*, 2 Ga. 214 (1847); *Aven v. Beckom*, 11 Ga. 1 (1852).

**Other provisions are applicable to public agents.** — That public agents fall within former Code 1873, § 2186, which prohibited an agent from buying if employed to sell or selling if employed to buy, and former Code 1882, § 2187, which prohibited an agent from making a profit out of the principal's property, appeared clearly from former Code 1873, § 2212; upon the principle "inclusio unius, exclusio alterius," it applies to them all other provisions applicable to all agents in common. *Mayor of Macon v. Huff*, 60 Ga. 221 (1878).

**Existence of oral contract held question of fact.** — Where the plaintiff contends that an oral contract existed between the plaintiff and the county school superintendent, acting either on behalf of the county board of education or individually, but the only evidence as to the oral contract is the contradicting testimony of the plaintiff and the superintendent, a question of fact exists which must be resolved by the jury. *Knight v. Troup County Bd. of Educ.*, 144 Ga. App. 634, 242 S.E.2d 263 (1978).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 63C Am. Jur. 2d, Public Officers and Employees, § 342 et seq.

**C.J.S.** — 73A C.J.S., Supp., Public Contracts, § 10.

**ALR.** — Liability of receiver in his official capacity for torts or negligence of receiver-ship employees, 10 ALR 1055.

## 10-6-89. Contract for nonexistent principal void; right of action against purported agent.

The contract of any person or corporation who purports as agent of a nonexistent principal to bind such nonexistent principal only shall be void. Any other party to such contract who is misled thereby to his injury shall have a right of action for damages against such purported agent individually. (Code 1933, § 4-410, enacted by Ga. L. 1955, p. 346, § 1.)

### JUDICIAL DECISIONS

**Section codifies case law.** — The rule holding an agent individually responsible where the agent acts for a nonexistent principal was derived from the case law and subsequently included in the statutes. *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, *aff'd*, 244 Ga. 396, 260 S.E.2d 89 (1979).

**Nonexistent legal entity can have no agent.** *Dixie Drive It Yourself Sys. v. Lewis*, 78 Ga. App. 236, 50 S.E.2d 843 (1948).

**Corporation acting under a trade name is not a nonexistent principal** as a matter of law. *West v. FDIC*, 149 Ga. App. 342, 254 S.E.2d 392, *aff'd*, 244 Ga. 396, 260 S.E.2d 89 (1979).

**Unauthorized foreign corporation.** — The fact that a foreign corporation was unauthorized within the meaning of the Georgia Business Corporation Code (see O.C.G.A. § 14-2-1501 *et seq.*) would not mean that the corporate agent was acting for a nonexistent principal. *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

**If one contracts as agent when in fact one has no principal, one will be personally liable.** *Dixie Drive It Yourself Sys. v. Lewis*, 78 Ga. App. 236, 50 S.E.2d 843 (1948).

One who assumes to act as agent for a nonexistent principal or one having no legal status renders oneself individually liable in contracts so made. *Brown-Wright Hotel Supply Corp. v. Bagen*, 112 Ga. App. 300, 145 S.E.2d 294 (1965); *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

If there was a nonexistent principal within the meaning of this section, the contract is void and the agent is rendered individually liable. *Evans v. Smithdeal*, 143 Ga. App. 287, 238 S.E.2d 278 (1977).

Where the evidence supports a finding that the purported corporation is not a valid corporate entity, there is no doubt that the agent is bound by the agent's purchases on an open account. *Don Swann Sales Corp. v. Echols*, 160 Ga. App. 539, 287 S.E.2d 577 (1981).

**Purported agent liable unless other party agrees to look to somebody else.** — One who professes to contract as agent for another, when one's purported principal is actually nonexistent, may be held personally liable on the contract, unless the other contracting party agrees to look to some other person for performance. *Hagan v. Asa G. Candler, Inc.*, 189 Ga. 250, 5 S.E.2d 739 (1939); *Dixie Drive It Yourself Sys. v. Lewis*, 78 Ga. App. 236, 50 S.E.2d 843 (1948).

**Other party's knowledge of principal's nonexistence.** — One who professes to contract as agent is personally liable on the contract if, unknown to the other party, one's purported principal is actually nonexistent; however, the agent is not liable where the third person has knowledge of the nonexistence of the principal or where there is an agreement or understanding to the contrary. *Hagan v. Asa G. Candler, Inc.*, 59 Ga. App. 587, 1 S.E.2d 693 (1939), *aff'd*, 189 Ga. 250, 5 S.E.2d 739 (1939).

Contract for rental of two automobiles, signed "Hapeville High School, John G. Lewis, Principal," where both parties knew that the high school had no legal entity, was the individual undertaking of the principal. *Dixie Drive It Yourself Sys. v. Lewis*, 78 Ga. App. 236, 50 S.E.2d 843 (1948).

**Cited in** *U.S.I.F. Atlanta Corp. v. Hagy*, 136 Ga. App. 350, 221 S.E.2d 227 (1975); *Hendrix v. Byers Bldg. Supply, Inc.*, 167 Ga. App. 878, 307 S.E.2d 759 (1983).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 3 Am. Jur. 2d, Agency, § 295.

**C.J.S.** — 2A C.J.S., Agency, § 369.

**ALR.** — Liability on the contract of one who without authority assumes to contract for another, 42 ALR 1310; 60 ALR 1348.

Personal liability of one who assumes to contract as agent for a principal who is fictitious or nonexistent, 126 ALR 114.

## ARTICLE 5

## AGENTS RECEIVING MONEYS FOR THIRD PERSONS

**Cross references.** — Duties and liabilities of banks and trust companies receiving money for transmission, § 7-1-354.

## RESEARCH REFERENCES

**ALR.** — Check on bank as payment of debts held by bank for collection, 18 ALR 537; 65 ALR 1151.

Liability of principal for amount of fraudulent excess collection by agent, 46 ALR 1212.

**10-6-100. Bond to be posted by agent in business of receiving cash for payment to third persons; exceptions.**

Any person, corporation, partnership, association, or any other entity which engages in the business of receiving cash from patrons as payment of obligations owed by such patrons to third parties, with the understanding that such person, corporation, partnership, association, or other entity will act as agent of the patron in making payment directly to the third party must, as a condition to engaging in such a business, post a bond as security in the amount of \$50,000.00 with the clerk of the superior court in the county in which its principal place of business is located; provided, however, that no such bonding requirement need be met by any person, corporation, partnership, association, or other entity who or which handles or administers fewer than 20 payments per month; provided, further, that no such bonding requirement need be met by any person, corporation, partnership, association, or other entity who or which has received written authorization from a third party to act as agent for the third party. Written authorization to the agent from one or more third parties does not relieve the agent from posting the security bond as required by this Code section if the agent is receiving 20 or more cash payments owed to one or more other third parties from whom no written authorization has been received. (Code 1933, § 84-6901, enacted by Ga. L. 1976, p. 558, § 1.)

## RESEARCH REFERENCES

**ALR.** — Check on bank as payment of debts held by bank for collection, 18 ALR 537; 65 ALR 1151.

Liability of principal for amount of fraudulent excess collection by agent, 46 ALR 1212.



**10-6-101. Right to restitution from bond; agent’s civil or criminal liability to patron not affected.**

Failure of any such agent to pay over moneys in accordance with lawful instructions or agreement shall entitle the third party to whom payment should have been made to restitution of moneys entrusted and not so paid over from such posted bond to the extent of the amount thereof; provided, however, that no payment on bond made in accordance with this article shall relieve any agent of any civil liability to the patron for sums misappropriated or not properly paid over or of any criminal liability for fraud, theft, conversion, breach of fiduciary duty, or other offense. (Code 1933, § 84-6902, enacted by Ga. L. 1976, p. 558, § 2.)

**RESEARCH REFERENCES**

- C.J.S.** — 2A C.J.S., Agency, § 347 et seq.
- ALR.** — Check on bank as payment of debts held by bank for collection, 18 ALR 537; 65 ALR 1151.
- Liability of principal for amount of fraudulent excess collection by agent, 46 ALR 1212.
- Embezzlement by independent collector or collection agency working on commission or percentage, 56 ALR2d 1156.
- Liability of collection agency for failure to pursue claim, 76 ALR2d 1155.
- Method employed in collecting debt due client as ground for disciplinary action against attorney, 93 ALR3d 880.

**10-6-102. Penalties for failure to post bond.**

Any person who fails to post a bond as required under this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not less than \$300.00 nor more than \$3,000.00, or by imprisonment for not more than six months, or both. (Code 1933, § 84-9994, enacted by Ga. L. 1976, p. 558, § 3.)

**ARTICLE 6**

**OVERSEERS**

**10-6-120. Overseer’s duties and powers.**

In the absence of the employer, the overseer stands in his place. It shall be his duty to see to the sustenance and protection of his employer’s property; and to discharge the duty, he shall be justified in repelling aggressors and trespassers to the same extent as the employer. (Orig. Code 1863, § 2193; Code 1868, § 2189; Code 1873, § 2215; Code 1882, § 2215; Civil Code 1895, § 3043; Civil Code 1910, § 3615; Code 1933, § 4-501.)

**JUDICIAL DECISIONS**

**Section does not make overseer purchasing agent.** — This section is not to be construed as conferring upon an overseer implied legal authority to act as a purchasing

agent, so as to bind the overseer's employer. *Render v. Hill Bros.*, 30 Ga. App. 239, 117 S.E. 258 (1923).

**Overseer's statement as to fence admissible to prove adverse possession.** — By virtue of former Code 1868, §§ 2189 and 3721, the statement of the overseer of defendant, who

was in possession on the land and managing the defendant's property for the defendant as the defendant's agent, as to the reason why a fence was located in a peculiar manner, was admissible to prove the adverse possession of the defendant. *Doe v. Roe*, 46 Ga. 593 (1872).

#### RESEARCH REFERENCES

**ALR.** — Right to eject customer from store, 33 ALR 421.

Implied or apparent authority of agent to

purchase or order goods or merchandise, 55 ALR2d 6.

#### 10-6-121. Parol contract between employer and overseer.

Contracts between employers and overseers may be by parol, though they may extend beyond a year from the time of the contract. (Orig. Code 1863, § 2195; Code 1868, § 2190; Code 1873, § 2216; Code 1882, § 2216; Civil Code 1895, § 3044; Civil Code 1910, § 3616; Code 1933, § 4-502.)

**Cross references.** — Statute of frauds, § 13-5-30 et seq.

#### JUDICIAL DECISIONS

**Cited in** *Baxley Veneer & Clete Co. v. Maddox*, 198 Ga. App. 235, 401 S.E.2d 282 (1990).

#### RESEARCH REFERENCES

**ALR.** — Enforceability, under statute of frauds provision as to contracts not to be performed within a year, or oral employ-

ment contract for more than one year but specifically made terminable upon death of either party, 88 ALR2d 701.

### ARTICLE 7

#### FINANCIAL POWER OF ATTORNEY

**Law reviews.** — For note on the 1995 enactment of this article, see 12 Ga. St. U.L. Rev. 216 (1995).

#### 10-6-140. Statutory form not exclusive method of creating financial power of attorney.

The Georgia Statutory Form for Financial Power of Attorney set out in Code Section 10-6-142 may be used to create a financial power of attorney, but is not the exclusive method for creating such an agency. (Code 1981, § 10-6-140, enacted by Ga. L. 1995, p. 1171, § 1.)

**10-6-141. Explanation for principals.**

The following explanation for principals may be used with the Georgia Statutory Form for Financial Power of Attorney:

**EXPLANATION FOR PRINCIPALS****WHAT IS A FINANCIAL POWER OF ATTORNEY?**

This document is called a "Financial Power of Attorney." It allows you to name one or more persons to help you handle your financial affairs. Depending on your individual circumstances, you can give this person or persons complete or limited power to act on your behalf. This document does not give someone the power to make medical decisions or personal decisions for you.

**WHAT CAN MY AGENT DO?**

The "Agent" is the person you give power to handle your financial affairs.

The "Principal" is you.

Your decision to use this document is a very important one and you should think carefully about what financial decisions you want your Agent to make for you. With this document, you can give your Agent the right to make all financial decisions or only certain, limited decisions.

For example, you can allow your Agent to handle all your financial affairs, including the power to sell, rent, or mortgage your home, pay your bills, cash or deposit checks, buy and sell your stock, investments, or personal items, or you can allow your Agent to handle only certain or specific financial affairs such as to pay your monthly bills.

**DO I GIVE ALL MY POWERS AWAY?**

No. Even with this document, you can still handle your own financial affairs as long as you choose to or are able to.

You need to talk to your Agent often about what you want and what he or she is doing for you using the document. If your Agent is not following your instructions or doing what you want, you may cancel or revoke the document and end your Agent's power to act for you.

**HOW DO I REVOKE MY FINANCIAL POWER OF ATTORNEY?**

You may revoke your financial power of attorney by writing a signed and dated revocation of power of attorney and giving it to your Agent. You should also give it to anyone who has been relying upon the financial power of attorney and dealing with your Agent, such as your bank and investment institutions.

Unless you notify all parties dealing with your Agent of your revocation,



they may continue to deal with your Agent. You should contact a lawyer if your Agent continues to act after you have revoked the power of attorney.

#### WHEN DOES MY AGENT'S AUTHORITY END?

As long as you are living, the financial power of attorney will remain in effect even if you become incapacitated or unable to communicate your wishes unless:

- (1) A guardian is appointed for your property; or
- (2) You include a date or specific occurrence when you want your document to be canceled.

However, upon your death or the death of your Agent or successor Agents, the document will be canceled and the Agent's power to act for you will end.

You can also include a date or a specific occurrence like your incapacity or illness as the time when you want your document to be canceled and your Agent's power to act for you to end.

#### WHEN DO THE POWERS TAKE EFFECT?

Depending on your circumstances, you may wish to specify an occurrence or a future date for the document to become effective. Unless you do so, it becomes effective immediately.

#### MUST MY AGENT DO THOSE THINGS I AUTHORIZE?

No. But if your Agent accepts this responsibility and agrees to act for you, he or she is required to sign and date the "Acceptance of Appointment" contained in the financial power of attorney form.

#### HOW DO I COMPLETE THIS DOCUMENT?

Both the Principal and the Agent should read the full document carefully before initialing or signing. The Principal and the Agent should fully understand what powers are being granted to the Agent and what restrictions, if any, exist.

Read each paragraph carefully. If you decide to give your Agent the power described in the paragraph, initial your name at the end of the paragraph.

If you do not wish to give your Agent the power described in a paragraph, strike through and initial the paragraph or any line within a paragraph.

#### HOW DO I EXECUTE THE DOCUMENT?

Two adult witnesses must watch you sign your name on the document. At least one witness cannot be the Principal's spouse or blood relative. After

they witness you signing your name, the witnesses must sign their names. This document does not need to be notarized unless real property transactions such as leasing, selling, or mortgaging of property are authorized.

THIS DOCUMENT REFLECTS THE WISHES OF THE PRINCIPAL.

Do not let anyone pressure you into making a financial power of attorney, naming an Agent, or granting a power unless it is your choice.

If you do not understand any portion of this document, you should ask a lawyer to explain it to you. (Code 1981, § 10-6-141, enacted by Ga. L. 1995, p. 1171, § 1; Ga. L. 1999, p. 485, § 3.)

**Code Commission notes.** — Pursuant to graph for “When Does My Agent’s Authority Code Section 28-9-5, in 1995, “canceled” End?”. was substituted for “cancelled” in the para-

10-6-142. Statutory form for financial power of attorney.

The Georgia Statutory Form for Financial Power of Attorney shall be substantially as follows:

FINANCIAL POWER OF ATTORNEY

County of \_\_\_\_\_  
State of Georgia  
I, \_\_\_\_\_, (hereinafter “Principal”), a resident of \_\_\_\_\_ County, Georgia, do hereby constitute and appoint \_\_\_\_\_ my true and lawful attorney-in-fact (hereinafter “Agent”) for me and give such person the power(s) specified below to act in my name, place, and stead in any way which I, myself, could do if I were personally present with respect to the following matters:

(Directions: To give the Agent the powers described in paragraphs 1 through 13, place your initials on the blank line at the end of each paragraph. If you DO NOT want to give a power to the Agent, strike through the paragraph or a line within the paragraph and place your initials beside the stricken paragraph or stricken line. The powers described in any paragraph not initialed or which has been struck through will not be conveyed to the Agent. Both the Principal and the Agent must sign their full names at the end of the last paragraph.)

- 1. Bank and Credit Union Transactions: To make, receive, sign, endorse, execute, acknowledge, deliver, and possess checks, drafts, bills of exchange, letters of credit, notes, stock certificates, withdrawal receipts and

deposit instruments relating to accounts or deposits in, or certificates of deposit of banks, savings and loans, credit unions, or other institutions or associations. \_\_\_\_\_

2. Payment Transactions: To pay all sums of money, at any time or times, that may hereafter be owing by me upon any account, bill or exchange, check, draft, purchase, contract, note, or trade acceptance made, executed, endorsed, accepted, and delivered by me or for me in my name, by my Agent. \_\_\_\_\_

Note: If you initial paragraph 3 or paragraph 4 which follow, a notarized signature will be required on behalf of the Principal.

3. Real Property Transactions: To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any interest in real property whatsoever, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, tear down, alter, rebuild, improve, manage, insure, move, rent, lease, sell, convey, subject to liens, mortgages, and security deeds, and in any way or manner deal with all or any part of any interest in real property whatsoever, including specifically, but without limitation, real property lying and being situate in the State of Georgia, under such terms and conditions, and under such covenants, as my Agent shall deem proper and may for all deferred payments accept purchase money notes payable to me and secured by mortgages or deeds to secure debt, and may from time to time collect and cancel any of said notes, mortgages, security interests, or deeds to secure debt. \_\_\_\_\_

4. Personal Property Transactions: To lease, sell, mortgage, purchase, exchange, and acquire, and to agree, bargain, and contract for the lease, sale, purchase, exchange, and acquisition of, and to accept, take, receive, and possess any personal property whatsoever, tangible or intangible, or interest thereto, on such terms and conditions, and under such covenants, as my Agent shall deem proper; and to maintain, repair, improve, manage, insure, rent, lease, sell, convey, subject to liens or mortgages, or to take any other security interests in said property which are recognized under the Uniform Commercial Code as adopted at that time under the laws of Georgia or any applicable state, or otherwise hypothecate, and in any way or manner deal with all or any part of any real or personal property whatsoever, tangible or intangible, or any interest therein, that I own at the time of execution or may thereafter acquire, under such terms and conditions, and under such covenants, as my Agent shall deem proper. \_\_\_\_\_

5. Stock and Bond Transactions: To purchase, sell, exchange, surrender, assign, redeem, vote at any meeting, or otherwise transfer any and all shares of stock, bonds, or other securities in any business, association,



corporation, partnership, or other legal entity, whether private or public, now or hereafter belonging to me. \_\_\_\_\_

6. Safe Deposits: To have free access at any time or times to any safe-deposit box or vault to which I might have access. \_\_\_\_\_

7. Borrowing: To borrow from time to time such sums of money as my Agent may deem proper and execute promissory notes, security deeds or agreements, financing statements, or other security instruments in such form as the lender may request and renew said notes and security instruments from time to time in whole or in part. \_\_\_\_\_

8. Business Operating Transactions: To conduct, engage in, and otherwise transact the affairs of any and all lawful business ventures of whatever nature or kind that I may now or hereafter be involved in. \_\_\_\_\_

9. Insurance Transactions: To exercise or perform any act, power, duty, right, or obligation, in regard to any contract of life, accident, health, disability, liability, or other type of insurance or any combination of insurance; and to procure new or additional contracts of insurance for me and to designate the beneficiary of same; provided, however, that my Agent cannot designate himself or herself as beneficiary of any such insurance contracts. \_\_\_\_\_

10. Disputes and Proceedings: To commence, prosecute, discontinue, or defend all actions or other legal proceedings touching my property, real or personal, or any part thereof, or touching any matter in which I or my property, real or personal, may be in any way concerned. To defend, settle, adjust, make allowances, compound, submit to arbitration, and compromise all accounts, reckonings, claims, and demands whatsoever that now are, or hereafter shall be, pending between me and any person, firm, corporation, or other legal entity, in such manner and in all respects as my Agent shall deem proper. \_\_\_\_\_

11. Hiring Representatives: To hire accountants, attorneys at law, consultants, clerks, physicians, nurses, agents, servants, workmen, and others and to remove them, and to appoint others in their place, and to pay and allow the persons so employed such salaries, wages, or other remunerations, as my Agent shall deem proper. \_\_\_\_\_

12. Tax, Social Security, and Unemployment: To prepare, to make elections, to execute and to file all tax, social security, unemployment insurance, and informational returns required by the laws of the United States, or of any state or subdivision thereof, or of any foreign government; to prepare, to execute, and to file all other papers and instruments which the Agent shall think to be desirable or necessary for safeguarding of me against excess or illegal taxation or against penalties imposed for claimed violation of any law or other governmental regulation; and to pay, to compromise, or to contest or to apply for refunds in connection

with any taxes or assessments for which I am or may be liable.

13. Broad Powers: Without, in any way, limiting the foregoing, generally to do, execute, and perform any other act, deed, matter, or thing whatsoever, that should be done, executed, or performed, including, but not limited to, powers conferred by Code Section 53-12-232 of the Official Code of Georgia Annotated, or that in the opinion of my Agent, should be done, executed, or performed, for my benefit or the benefit of my property, real or personal, and in my name of every nature and kind whatsoever, as fully and effectually as I could do if personally present.

14. Effective Date: This document will become effective upon the date of the Principal's signature unless the Principal indicates that it should become effective at a later date by completing the following, which is optional.

The powers conveyed in this document shall not become effective until the following time or upon the occurrence of the following event or contingency:

Note: The Principal may choose to designate one or more persons to determine conclusively that the above-specified event or contingency has occurred. Such person or persons must make a written declaration under penalty of false swearing that such event or contingency has occurred in order to make this document effective. Completion of this provision is optional.

The following person or persons are designated to determine conclusively that the above-specified event or contingency has occurred:

Signed: \_\_\_\_\_

Principal

Agent

It is my desire and intention that this power of attorney shall not be affected by my subsequent disability, incapacity, or mental incompetence. However, I understand that it shall be revoked and the Agent's power canceled in the event a guardian is appointed for my property. As long as no such guardian is appointed, any and all acts done by the Agent pursuant to the powers conveyed herein during any period of my disability, incapacity, or mental

incompetence shall have the same force and effect as if I were not disabled, incapacitated, or mentally incompetent.

I may, at any time, revoke this power of attorney, and it shall be canceled by my death. Otherwise, unless a guardian is appointed for my property, this power of attorney shall be deemed to be in full force and effect as to all persons, institutions, and organizations which shall act in reliance thereon prior to the receipt of written revocation thereof signed by me and prior to my death.

I do hereby ratify and confirm all acts whatsoever which my Agent shall do, or cause to be done, in or about the premises, by virtue of this power of attorney.

All parties dealing in good faith with my Agent may fully rely upon the power of and authority of my Agent to act for me on my behalf and in my name, and may accept and rely on agreements and other instruments entered into or executed by the agent pursuant to this power of attorney.

This instrument shall not be effective as a grant of powers to my Agent until my Agent has executed the Acceptance of Appointment appearing at the end of this instrument. This instrument shall remain effective until revocation by me or my death, whichever occurs first.

Compensation of Agent. (Directions: Initial the line following your choice.)

- 1. My Agent shall receive no compensation for services rendered. \_\_\_\_\_
- 2. My Agent shall receive reasonable compensation for services rendered. \_\_\_\_\_
- 3. My Agent shall receive \$\_\_\_\_\_ for services rendered. \_\_\_\_\_

IN WITNESS WHEREOF, I have hereunto set my hand and seal on this \_\_\_\_\_ day of \_\_\_\_\_, \_\_\_\_\_.

\_\_\_\_\_  
Principal  
WITNESSES

\_\_\_\_\_  
\_\_\_\_\_  
Signature and Address

\_\_\_\_\_  
\_\_\_\_\_  
Signature and Address



Note: A notarized signature is not required unless you have initialed paragraph 3 or 4 regarding property transactions.

I, \_\_\_\_\_, a Notary Public, do hereby certify that \_\_\_\_\_ personally appeared before me this date and acknowledged the due execution of the foregoing Power of Attorney.

\_\_\_\_\_  
Notary Public

State of Georgia

County of \_\_\_\_\_

ACCEPTANCE OF APPOINTMENT

I, \_\_\_\_\_ (print name), have read the foregoing Power of Attorney and am the person identified therein as Agent for \_\_\_\_\_ (name of grantor of power of attorney), the Principal named therein. I hereby acknowledge the following:

I owe a duty of loyalty and good faith to the Principal, and must use the powers granted to me only for the benefit of the Principal.

I must keep the Principal's funds and other assets separate and apart from my funds and other assets and titled in the name of the Principal. I must not transfer title to any of the Principal's funds or other assets into my name alone. My name must not be added to the title of any funds or other assets of the Principal, unless I am specifically designated as Agent for the Principal in the title.

I must protect, conserve, and exercise prudence and caution in my dealings with the Principal's funds and other assets.

I must keep a full and accurate record of my acts, receipts, and disbursements on behalf of the Principal, and be ready to account to the Principal for such acts, receipts, and disbursements at all times. I must provide an annual accounting to the Principal of my acts, receipts, and disbursements, and must furnish an accounting of such acts, receipts, and disbursements to the personal representative of the Principal's estate within 90 days after the date of death of the Principal.

I have read the Compensation of Agent paragraph in the Power of Attorney and agree to abide by it.

I acknowledge my authority to act on behalf of the Principal ceases at the death of the Principal.

I hereby accept the foregoing appointment as Agent for the Principal

with full knowledge of the responsibilities imposed on me, and I will faithfully carry out my duties to the best of my ability.

Dated: \_\_\_\_\_, \_\_\_\_\_.

(Signature) \_\_\_\_\_

(Address) \_\_\_\_\_

Note: A notarized signature is not required unless the Principal initialed paragraph 3 or paragraph 4 regarding property transactions.

I, \_\_\_\_\_, a Notary Public, do hereby certify that \_\_\_\_\_ personally appeared before me this date and acknowledge the due execution of the foregoing Acceptance of Appointment.

\_\_\_\_\_  
Notary Public

(Code 1981, § 10-6-142, enacted by Ga. L. 1995, p. 1171, § 1; Ga. L. 1997, p. 143, § 10; Ga. L. 1999, p. 81, § 10; Ga. L. 1999, p. 485, § 4; Ga. L. 2000, p. 136, § 10.)

## CHAPTER 6A

### BROKERAGE RELATIONSHIPS IN REAL ESTATE TRANSACTIONS

Sec.		Sec.	
10-6A-1.	Short title.	10-6A-10.	Duties of brokers prior to entering into brokerage engagement relationships.
10-6A-2.	Legislative findings, determinations, and declarations; chapter as basis for private rights of actions and defenses.	10-6A-11.	Creation of relationship not determined by payment or promise of compensation.
10-6A-3.	Definitions.	10-6A-12.	Broker acting as dual agent.
10-6A-4.	Broker's legal relationship to customers or clients.	10-6A-13.	Exclusive representation; company policies; actual knowledge; confidentiality.
10-6A-5.	Duties and responsibilities of broker engaged by seller.	10-6A-14.	Ministerial acts explained; required actions of transaction brokers; false information.
10-6A-6.	Duties of broker engaged by landlord.	10-6A-15.	Affiliation with common source information company.
10-6A-7.	Duties of broker engaged by buyer.	10-6A-16.	Regulation.
10-6A-8.	Duties of broker engaged by tenant.		
10-6A-9.	Duration of relationships between brokers and clients.		

**Cross references.** — Real Estate Brokers and Salespersons, § 43-40-1 et seq.

**Administrative rules and regulations.** — Substantive regulations, Official Compilation of the Rules and Regulations of the

State of Georgia, Georgia Real Estate Commission, Chapter 520-1.

**Law reviews.** — For note on 1993 enactment of this chapter, see 10 Ga. St. U.L. Rev. 23 (1993).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 12 Am. Jur. 2d, Brokers, §§ 88, 103, 110, 117.

**Am. Jur. Proof of Facts.** — Diminished Property Value Due to Environmental Contamination, 33 POF3d 163.

**C.J.S.** — 12 C.J.S., Brokers, §§ 1 et seq., 103 et seq.

#### 10-6A-1. Short title.

This chapter shall be known as and may be cited as the “Brokerage Relationships in Real Estate Transactions Act.” (Code 1981, § 10-6A-1, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

**Law reviews.** — For annual survey of real property law, see 57 Mercer L. Rev. 331

(2005). For annual survey of real property law, see 58 Mercer L. Rev. 367 (2006).



## JUDICIAL DECISIONS

**Propriety of summary judgment.** — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. *Ikola v. Schoene*, 264 Ga. App. 338, 590 S.E.2d 750 (2003).

Client's summary judgment motion was properly denied; the absence of a written agreement between a real estate broker and a client did not preclude the broker from seeking to recover compensation under the remedies found outside the scope of the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., including those at common law. *Killearn Partners, Inc. v. Southeast Props.*, 279 Ga. 144, 611 S.E.2d 26 (2005).

Trial court erred in granting summary judgment to a home seller and against a realtor in construing the unambiguous language in the brokerage agreement at issue, which was for a definite term and was not terminable at will; moreover, although a sale was not consummated, the realtor remained entitled to the realtor's six percent commission, and the seller remained obligated to pay that amount, which was the proper measure of damages. *Ben Farmer Realty, Inc. v. Owens*, 286 Ga. App. 678, 649 S.E.2d 771 (2007), cert. denied, 2008 Ga. LEXIS 81 (Ga. 2008).

In a purchaser's suit asserting fraud, rescission, breach of contract, and negligence with regard to the purchase of a townhome, the trial court properly granted summary judgment to the listing real estate agent, a listing broker, a listing brokerage, and a seller on all claims as the evidence established conclusively that a mold report that identified the water issues was disclosed to the purchaser's real estate agent (who the purchaser did not sue). However, the court found an exception to the general rule of caveat emptor with regard to the purchaser's

claim asserting negligent repair against the seller and found the grant of summary judgment on that claim only was in error since the seller had superior knowledge of the water issues, failed to repair the water issues as advised by an engineer, and covered up the defects with sheetrock. *Asuamah v. Haley*, 293 Ga. App. 112, 666 S.E.2d 426 (2008).

**Scope.** — Silence in the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., as to when or under what circumstances a real estate agent may assert a claim for payment owed in exchange for services rendered or whether a written agreement must exist before an agent may claim such payment demonstrates that the Georgia legislature did not intend for the Act to regulate real estate commissions or remuneration payments; rather the Act is concerned primarily with the question of whether and under what circumstances a client or a customer relationship arises, and what duties are owed within the context of each. *Killearn Partners, Inc. v. Southeast Props.*, 279 Ga. 144, 611 S.E.2d 26 (2005).

**Act is not exclusive remedy, common law claims remain.** — Nothing in the text of the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., provides for the act to be the exclusive remedy; therefore, even in the absence of a written brokerage engagement as defined under the act, a broker may nevertheless recover for the value of the broker's services under common law theories of quantum meruit or as the procuring cause. *Killearn Partners, Inc. v. Southeast Props., Inc.*, 266 Ga. App. 508, 597 S.E.2d 578 (2004).

**Remedies outside of act's scope not foreclosed.** — Nothing in the Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., indicates that the Georgia General Assembly intended to foreclose the availability of remedies outside the Act's scope, including those available under statute and at common law. *Killearn Partners, Inc. v. Southeast Props.*, 279 Ga. 144, 611 S.E.2d 26 (2005).

**Cited in** *Bircoll v. Rosenthal*, 267 Ga. App. 431, 600 S.E.2d 388 (2004).

**10-6A-2. Legislative findings, determinations, and declarations; chapter as basis for private rights of actions and defenses.**

(a) The General Assembly finds, determines, and declares that application of the common law of agency to the relationships between real estate brokers and persons who are sellers, buyers, landlords and tenants of rights and interests in real property has resulted in misunderstandings and consequences that have been contrary to the best interests of the public; the General Assembly further finds, determines, and declares that the real estate brokerage industry has a significant impact upon the economy of the State of Georgia and that it is in the best interests of the public to provide codification of the relationships between real estate brokers and consumers of brokerage services in order to prevent detrimental misunderstandings and misinterpretations of such relationships by both consumers and real estate brokers and thus promote and provide stability in the real estate market. The provisions of this chapter are enacted to govern the relationships between sellers, landlords, buyers, tenants, and real estate brokers and their affiliated licensees to the extent not governed by specific written agreements between and among the parties.

(b) The General Assembly further finds, determines, and declares that the provisions of this chapter are not intended to prescribe or affect the contractual relationships as between real estate brokers and the broker's affiliated licensees.

(c) The provisions of this chapter may serve as a basis for private rights of action and defenses by sellers, buyers, landlords, tenants, and real estate brokers. (Code 1981, § 10-6A-2, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, "General Assembly" was substituted for "general assembly" at the first instance of the term in subsection (a).

### JUDICIAL DECISIONS

**Cited in** Harrouk v. Fierman, 291 Ga. App. 818, 662 S.E.2d 892 (2008); Asuamah v. Haley, 293 Ga. App. 112, 666 S.E.2d 426 (2008).

**10-6A-3. Definitions.**

As used in this chapter, the term:

(1) "Agency" means every relationship in which a real estate broker acts for or represents another as a client by the latter's written authority in a real property transaction.

(2) "Broker" means any individual or entity issued a broker's real estate license by the Georgia Real Estate Commission pursuant to

Chapter 40 of Title 43. The term “broker” includes the broker’s affiliated licensees except where the context would otherwise indicate.

(3) “Brokerage” means the business or occupation of a real estate broker.

(4) “Brokerage engagement” means a written contract wherein the seller, buyer, landlord, or tenant becomes the client of the broker and promises to pay the broker a valuable consideration or agrees that the broker may receive a valuable consideration from another in consideration of the broker producing a seller, buyer, tenant, or landlord ready, able, and willing to sell, buy, or rent the property or performing other brokerage services.

(5) “Brokerage relationship” means the agency and nonagency relationships which may be formed between the broker and the broker’s clients and customers, as described in this chapter.

(6) “Client” means a person who is being represented by a real estate broker in an agency capacity pursuant to a brokerage engagement.

(7) “Common source information companies” means any person, firm, or corporation that is a source, compiler, or supplier of information regarding real estate for sale or lease and other data and includes but is not limited to multiple listing services.

(8) “Customer” means a person who is not being represented by a real estate broker in an agency capacity pursuant to a brokerage engagement but for whom a broker may perform ministerial acts in a real estate transaction pursuant to either a verbal or written agreement.

(9) “Designated agent” means one or more licensees affiliated with a broker who are assigned by the broker to represent solely one client to the exclusion of all other clients in the same transaction and to the exclusion of all other licensees affiliated with the broker.

(10) “Dual agent” means a broker who simultaneously has a client relationship with both seller and buyer or both landlord and tenant in the same real estate transaction.

(11) “Material facts” means those facts that a party does not know, could not reasonably discover, and would reasonably want to know.

(12) “Ministerial acts” means those acts described in Code Section 10-6A-14 and such other acts which do not require the exercise of the broker’s or the broker’s affiliated licensee’s professional judgment or skill.

(13) “Timely” means a reasonable time under the particular circumstances.

(14) “Transaction broker” means a broker who has not entered into a client relationship with any of the parties to a particular real estate



transaction and who performs only ministerial acts on behalf of one or more of the parties, but who is paid valuable consideration by one or more parties to the transaction pursuant to a verbal or written agreement for performing brokerage services. (Code 1981, § 10-6A-3, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1; Ga. L. 2002, p. 415, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, the subsection

(a) designation was deleted from the beginning, as there is no subsection (b).

### JUDICIAL DECISIONS

**Business brokers.** — O.C.G.A. § 10-6A-4(a), regarding a broker's legal relationship to customers or clients, which is in derogation of common law and must therefore be limited in strict accordance with its language, applies only to real estate brokers, not to business brokers, under O.C.G.A. § 10-6A-3. *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

**Reasonable care exercised by real estate broker.** — Trial court erred in denying motions for directed verdict and judgment notwithstanding the verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property where the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in

locating a property owner and checking on the status of desired property pursuant to § 10-6A-3. *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

**Brokerage agreement.** — Real estate broker was not entitled to recover a commission from buyers who elected not to close because the required brokerage agreement under O.C.G.A. § 10-6A-3(4) had the pertinent commission paragraph stricken and, thus, did not advise the buyers that any commission had to be paid under O.C.G.A. § 10-6A-10(3); although the broker sought to rely on, inter alia, an FMLS listing indicating the commission, that particular document was unsigned and indicated no assent to any contractual terms. *Pargar, LLC v. Jackson*, 294 Ga. App. 882, 670 S.E.2d 547 (2008).

**Cited in** *Campbell v. State*, 286 Ga. App. 72, 648 S.E.2d 684 (2007); *Asuamah v. Haley*, 293 Ga. App. 112, 666 S.E.2d 426 (2008).

### 10-6A-4. Broker's legal relationship to customers or clients.

(a) A broker who performs brokerage services for a client or customer shall owe the client or customer only the duties and obligations set forth in this chapter, unless the parties expressly agree otherwise in a writing signed by the parties. A broker shall not be deemed to have a fiduciary relationship with any party or fiduciary obligations to any party but shall only be responsible for exercising reasonable care in the discharge of its specified duties as provided in this chapter and, in the case of a client, as specified in the brokerage engagement.

(b) Whenever a broker with an existing brokerage relationship with either a customer or a client enters into a new brokerage relationship with the customer or client, the broker shall timely disclose that fact and the new brokerage relationship to all brokers, customers, or clients involved in the contemplated real estate transaction. (Code 1981, § 10-6A-4, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

## JUDICIAL DECISIONS

**Summary judgment.** — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor, as material fact issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. *Ikola v. Schoene*, 264 Ga. App. 338, 590 S.E.2d 750 (2003).

**Real estate broker owes no fiduciary duty to a client.** Instead, the broker is only responsible for exercising reasonable care in the discharge of the broker's specified duties. *Resnick v. Meybohm Realty, Inc.*, 269 Ga. App. 486, 604 S.E.2d 536 (2004).

Potential buyer did not have a viable common law cause of action for fraud and deceit against a real estate broker and a real estate agent because, as set forth in O.C.G.A. § 10-6A-4(a), no confidential or fiduciary relationship was created between the buyer and the broker and the agent as a matter of law. *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

Trial court erred in denying motions for directed verdict and judgment notwithstanding

the verdict, O.C.G.A. § 9-11-50, because a real estate broker and a real estate agent owed no duty to a potential buyer of property since the buyer did not engage the broker as defined in the Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq.; the buyer was, at most, a "customer" of the broker pursuant to O.C.G.A. § 10-6A-3(8), and the broker exercised reasonable care in locating a property owner and checking on the status of desired property pursuant to § 10-6A-3. *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

**Business brokers.** — O.C.G.A. § 10-6A-4(a), regarding a broker's legal relationship to the customers or the clients, which is in derogation of common law and must therefore be limited in strict accordance with its language, applies only to real estate brokers, not to business brokers, under O.C.G.A. § 10-6A-3. *Bienert v. Dickerson*, 276 Ga. App. 621, 624 S.E.2d 245 (2005).

**Cited in** *Wall v. Century 21 Winnerville Realty, Inc.*, 244 Ga. App. 762, 536 S.E.2d 798 (2000); *Centre Pointe Invs., Inc. v. Frank M. Darby Co.*, 249 Ga. App. 782, 549 S.E.2d 435 (2001).

## RESEARCH REFERENCES

C.J.S. — 12 C.J.S., Brokers, § 83.

## 10-6A-5. Duties and responsibilities of broker engaged by seller.

(a) A broker engaged by a seller shall:

(1) Perform the terms of the brokerage engagement made with the seller;

(2) Promote the interests of the seller by:

(A) Seeking a sale at the price and terms stated in the brokerage engagement or at a price and terms acceptable to the seller; provided, however, the broker shall not be obligated to seek additional offers to purchase the property while the property is subject to a contract of sale, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the seller, even when the property is subject to a contract of sale;

(C) Disclosing to the seller material facts which the broker has actual knowledge concerning the transaction;

(D) Advising the seller to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the seller has or may have an interest;

(3) Exercise reasonable skill and care in performing the duties set forth in this subsection and such other duties, if any, as may be agreed to by the parties in the brokerage engagement;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the seller unless the seller permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a seller shall timely disclose the following to all parties with whom the broker is working:

(1) All adverse material facts pertaining to the physical condition of the property and improvements located on such property including but not limited to material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer; and

(2) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions. Nothing in this subsection shall be deemed to create any duty on the part of a broker to discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate



neighborhood. Brokers shall not knowingly give prospective buyers false information; provided, however, that a broker shall not be liable to a buyer for providing false information to the buyer if the broker did not have actual knowledge that the information was false and discloses to the buyer the source of the information. Nothing in this subsection shall limit any obligation of a seller under any applicable law to disclose to prospective buyers all adverse material facts actually known by the seller pertaining to the physical condition of the property nor shall it limit the obligation of prospective buyers to inspect and to familiarize themselves with potentially adverse conditions related to the physical condition of the property, any improvements located on the property, and the neighborhood in which the property is located. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a seller in a real estate transaction may provide assistance to the buyer by performing ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the seller nor shall performing such ministerial acts for the buyer be construed to form a brokerage engagement with the buyer.

(d) A broker engaged by a seller does not breach any duty or obligation by showing alternative properties to prospective buyers. (Code 1981, § 10-6A-5, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

### JUDICIAL DECISIONS

#### **Seller disclosure form provided by agent.**

— A form disclosure statement provided by a real estate agent to the buyer plainly stating that the representations the statement contained were solely those of the seller was insufficient to form the basis for a claim of fraud because the statement was simply relaying information to the buyer without actual knowledge of the alleged falsity. *ReMax N. Atl. v. Clark*, 244 Ga. App. 890, 537 S.E.2d 138 (2000).

**Buyer's claim against seller's agents barred because buyer did not exercise diligence.** — Buyer's claim under Georgia Brokerage Relationships in Real Estate Transactions Act, O.C.G.A. § 10-6A-1 et seq., against the sellers' real estate agent and the employer failed because the buyer did not exercise diligence in determining the boundaries of the property; the buyer could

have easily ascertained the actual property lines, and buyer was unable to recover from the agents based upon any alleged failure to disclose information. *Peacock v. Kiser*, 272 Ga. App. 83, 611 S.E.2d 747 (2005).

**No fraud shown by agent.** — Trial court erred in denying a real estate agent's motion for summary judgment in an action against the agent by the homepurchasers, alleging that the agent committed fraud by failing to disclose the defective nature of the home's septic system, as there was no evidence that the broker had actual knowledge of any defect in the septic system, nor that the agent had breached the obligations under O.C.G.A. § 10-6A-5(b)(1); even if the septic system was defective, the agent could not be held liable. *Dasher v. Davis*, 274 Ga. App. 788, 618 S.E.2d 728 (2005).

**Section imposes no special duties regard-**

**ing pets.** — O.C.G.A. §§ 10-6A-5, 10-6A-14 43-40-15(a), and 43-40-25(b)(25) and related Code sections fail to impose any duties regarding pets other than the general duty to exercise reasonable skill and care in performing all duties; thus, a trial court's summary judgment dismissing claims against real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed. *Gibson v. Rezvanpour*, 268 Ga. App. 377, 601 S.E.2d 848 (2004).

**Independent contractor.** — Because the home buyers failed to show that a realty company knew of the drainage and flooding issues associated with their property, but instead claimed that the company was liable for negligence or negligent misrepresentation for failure to oversee the sales transaction and failure to oversee the listing agent because the company did not comply with the requirements of O.C.G.A. § 43-40-18 and Ga. Comp. R. & Regs. 520-1-10(4), the realty company was not liable for the acts of

the listing agent, as the listing agent was an independent contractor, and the homebuyers failed to present any evidence that the realty company assumed the right to control the time, manner, or method of the work. *Walker v. Johnson*, 278 Ga. App. 806, 630 S.E.2d 70 (2006), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

**Disclosure of material information.** — In an action involving a defect in a home's septic system, the home buyers' agent was not entitled to summary judgment on a Brokerage Relationship in Real Estate Transactions Act (BRETA), O.C.G.A. § 10-6A-1 et seq., claim because while notice to the buyers' agent was notice to the buyers under O.C.G.A. § 10-6-58, a disputed issue existed as to whether the buyers' agent actually disclosed the information as required by O.C.G.A. § 10-6A-5(b)(1) regarding the second pumping of the septic tank to the buyers. *Davis v. Silvers*, 295 Ga. App. 103, 670 S.E.2d 805 (2008).

### 10-6A-6. Duties of broker engaged by landlord.

(a) A broker engaged by a landlord shall:

(1) Perform the terms of the brokerage engagement made with the landlord;

(2) Promote the interests of the landlord by:

(A) Seeking a tenant at the price and terms stated in the brokerage engagement or at a price and terms acceptable to the landlord; provided, however, the broker shall not be obligated to seek additional offers to lease the property while the property is subject to a lease, or letter of intent to lease, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the landlord, even when the property is subject to a lease or a letter of intent to lease;

(C) Disclosing to the landlord adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the landlord to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the landlord has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties in the brokerage agreement;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the landlord unless the landlord permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a landlord shall timely disclose to prospective tenants with whom the broker is working:

(1) All adverse material facts pertaining to the physical condition of the property and improvements located on the property including, but not limited to, material defects in the property, environmental contamination, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the tenant; and

(2) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the tenant upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions. Nothing in this subsection shall be deemed to create any duty on the part of a broker to discover or seek to discover either adverse material facts pertaining to the physical condition of the property or existing adverse conditions in the immediate neighborhood. Brokers shall not knowingly give prospective tenants false information; provided, however, that a broker shall not be liable to a tenant for providing false information to the tenant if the broker did not have actual knowledge that the information was false and discloses to the tenant the source of the information. Nothing in this subsection shall limit any obligation of the landlord under any applicable law to disclose to prospective tenants all adverse material facts actually known by the landlord pertaining to the physical condition of the property nor shall it limit the obligation of prospective tenants to inspect and to familiarize themselves with potentially adverse conditions in the physical condition of the property, any improvements located on the property, and the



surrounding neighborhood. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a landlord in a real estate transaction may provide assistance to the tenant by performing such ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the landlord nor shall performing such ministerial acts for the tenant be construed to form a brokerage engagement with the tenant.

(d) A broker engaged by a landlord does not breach any duty or obligation by showing alternative properties to prospective tenants. (Code 1981, § 10-6A-6, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

#### **10-6A-7. Duties of broker engaged by buyer.**

(a) A broker engaged by a buyer shall:

(1) Perform the terms of the brokerage engagement made with the buyer;

(2) Promote the interests of the buyer by:

(A) Seeking a property at a price and terms acceptable to the buyer; provided, however, the broker shall not be obligated to seek other properties for the buyer while the buyer is a party to a contract to purchase property, unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the buyer, even when the buyer is a party to a contract to purchase property;

(C) Disclosing to the buyer adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the buyer to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the buyer has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the buyer unless the buyer permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of the broker's affiliated licensees assisting the broker in representing the buyer shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a buyer shall timely disclose to a prospective seller with whom the broker is working as a customer and who is selling property which will be financed either by a loan assumption or by the seller's providing a part or all of the financing all material adverse facts actually known by the broker concerning the buyer's financial ability to perform the terms of the sale and, in the case of a residential transaction, the buyer's intent to occupy the property as a principal residence. Brokers shall not knowingly give prospective sellers false information; provided, however, that a broker shall not be liable to a seller for providing false information to the seller if the broker did not have actual knowledge that the information was false and discloses to the seller the source of the information. Nothing in this subsection shall limit the obligation of the prospective buyer under any applicable law to disclose to the prospective seller all adverse material facts actually known by the buyer concerning the buyer's financial ability to perform the terms of the sale and, in the case of a residential transaction, the buyer's intent to occupy the property as a principal residence. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a buyer in a real estate transaction may provide assistance to the seller by performing ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the buyer nor shall performing such ministerial acts for the seller be construed to form a brokerage engagement with the seller.

(d) A broker engaged by a buyer does not breach any duty or obligation by showing properties in which the buyer is interested to other prospective buyers. (Code 1981, § 10-6A-7, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1993, "sale and, in" was substituted for "sale, and in" in the second and fourth sentences in subsection (b).

JUDICIAL DECISIONS

**Propriety of summary judgment.** — Trial court erred in granting summary judgment on a homebuyer's breach of contract claim against the buyer's realtor as material fact

issues remained as to whether the realtor violated the realtor's duties under the Brokerage Relationships in Real Estate Transaction Act, O.C.G.A. § 10-6A-1 et seq.; however, summary judgment was proper, based on the testimony presented on the motion, as to the homebuyer's fraudulent concealment claim. *Ikola v. Schoene*, 264 Ga. App. 338, 590 S.E.2d 750 (2003).

**Breach of duty not shown.** — Trial court properly dismissed a homebuyer's claim that the buyer's real estate agent breached the agent's duties under a brokerage agreement by suppressing an inspection report which

showed problems with a house the buyer purchased, and by falsely stating that other offers had been made on the house. Even though there was a gas leak in the house that ignited, there was no evidence that the agent knew about the leak or that the agent lied to the buyer about other offers the seller received. *Resnick v. Meybohm Realty, Inc.*, 269 Ga. App. 486, 604 S.E.2d 536 (2004).

**Cited in** *Wall v. Century 21 Winnerville Realty, Inc.*, 244 Ga. App. 762, 536 S.E.2d 798 (2000); *Harrouk v. Fierman*, 291 Ga. App. 818, 662 S.E.2d 892 (2008).

### 10-6A-8. Duties of broker engaged by tenant.

(a) A broker engaged by a tenant shall:

(1) Perform the terms of the brokerage engagement made with the tenant;

(2) Promote the interests of the tenant by:

(A) Seeking a property to lease at a price and terms acceptable to the tenant; provided, however, the broker shall not be obligated to seek other properties for the tenant while the tenant is a party to a lease or a letter of intent to lease unless the brokerage engagement so provides;

(B) Timely presenting all offers to and from the tenant, even when the tenant is a party to a lease or a letter of intent to lease;

(C) Disclosing to the tenant adverse material facts of which the broker has actual knowledge concerning the transaction;

(D) Advising the tenant to obtain expert advice as to material matters which are beyond the expertise of the broker; and

(E) Timely accounting for all money and property received in which the tenant has or may have an interest;

(3) Exercise ordinary skill and care in performing the duties set forth in this subsection and such other duties as may be agreed to by the parties;

(4) Comply with all requirements of this chapter and all applicable statutes and regulations, including but not limited to fair housing and civil rights statutes; and

(5) Keep confidential all information received by the broker during the course of the engagement which is made confidential by an express request or instruction from the tenant unless the tenant permits such disclosure by subsequent word or conduct, or such disclosure is required by law; provided, however, that disclosures between a broker and any of



the broker's affiliated licensees assisting the broker in representing the seller shall not be deemed to breach the duty of confidentiality described above.

(b) A broker engaged by a tenant shall timely disclose to a prospective landlord with whom the broker is working all adverse material facts actually known by the broker concerning the tenant's financial ability to perform the terms of the lease or letter of intent to lease or intent to occupy the property. Brokers shall not knowingly give prospective landlords false information; provided, however, that a broker shall not be liable to a landlord for providing false information to the landlord if the broker did not have actual knowledge that the information was false and the broker discloses to the landlord the source of the information. Nothing in this subsection shall limit any obligation of the prospective tenant under any applicable law to disclose to a prospective landlord all adverse material facts actually known by the tenant concerning the tenant's financial ability to perform the terms of the lease or letter of intent to lease or intent to occupy the property. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker.

(c) A broker engaged by a tenant in a real estate transaction may provide assistance to the landlord by performing such ministerial acts of the type described in Code Section 10-6A-14; and performing such ministerial acts shall not be construed to violate the broker's brokerage engagement with the tenant nor shall performing such ministerial acts for the landlord be construed to form a brokerage engagement with the landlord.

(d) A broker engaged by a tenant does not breach any duty or obligation by showing properties in which the tenant is interested to other prospective tenants. (Code 1981, § 10-6A-8, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

#### **10-6A-9. Duration of relationships between brokers and clients.**

(a) The relationships set forth in Code Sections 10-6A-4 through 10-6A-8 and Code Sections 10-6A-12 and 10-6A-13 shall commence at the time that the client engages the broker, and shall continue until:

(1) Completion of performance of the engagement; or

(2) If paragraph (1) of this subsection is not applicable, then the earlier of:

(A) Any date of expiration agreed upon by the parties in the brokerage engagement or in any amendments thereto;

(B) Any authorized termination of the relationship; or

(C) If no expiration is provided and no termination has occurred, then one year after initiation of the engagement.

(b) Except as otherwise agreed in writing and as provided in subsection (a) of this Code section, a broker owes no further duties to the client after termination, withdrawal, expiration, or completion of performance of the engagement, except:

(1) To account for all moneys and property relating to the engagement; and

(2) To keep confidential all information received during the course of the engagement which was made confidential by request or instructions from the client, unless:

(A) The client permits the disclosure by subsequent word or conduct;

(B) Such disclosure is required by law; or

(C) The information becomes public from a source other than the broker.

(c) Notwithstanding any other provision to the contrary contained in this chapter, in the event a conflict arises between a broker's duty to keep the confidence of a client and the duty not to give customers false information, the broker's duty not to give false information to customers shall prevail and shall govern the broker's actions. No cause of action shall arise on behalf of any person against a broker or the broker's affiliated licensees for revealing information in compliance with this subsection. (Code 1981, § 10-6A-9, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

#### RESEARCH REFERENCES

C.J.S. — 12 C.J.S., Brokers, § 92.

#### **10-6A-10. Duties of brokers prior to entering into brokerage engagement relationships.**

All brokerage engagements must:

(1) Advise the prospective client of the types of agency relationships available through the broker;

(2) Advise such prospective client of any brokerage relationships held by such broker with other parties which would conflict with any interests of the prospective client actually known to the broker but excluding the fact that the broker may be representing other sellers and landlords in

selling or leasing property or that the broker may be representing other buyers and tenants in buying or leasing other property;

(3) Advise such prospective client as to the broker's compensation and whether the broker will share such compensation with other brokers who may represent other parties to the transaction in an agency capacity; and

(4) Advise the prospective client of the broker's obligations to keep information confidential under this chapter. (Code 1981, § 10-6A-10, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

### JUDICIAL DECISIONS

**Brokerage agreement failed to advise of commission.** — Real estate broker was not entitled to recover a commission from buyers who elected not to close because the required brokerage agreement under O.C.G.A. § 10-6A-3(4) had the pertinent commission paragraph stricken and, thus, did not advise the buyers that any commis-

sion had to be paid under O.C.G.A. § 10-6A-10(3); although the broker sought to rely on, inter alia, an FMLS listing indicating the commission, that particular document was unsigned and indicated no assent to any contractual terms. *Pargar, LLC v. Jackson*, 294 Ga. App. 882, 670 S.E.2d 547 (2008).

### 10-6A-11. Creation of relationship not determined by payment or promise of compensation.

The payment or promise of payment of compensation to a broker by a seller, landlord, buyer, or tenant shall not determine whether a brokerage relationship has been created between any broker and a seller, landlord, buyer, or tenant. (Code 1981, § 10-6A-11, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

### 10-6A-12. Broker acting as dual agent.

(a) A broker may act as a dual agent only with the written consent of all clients. Such written consent shall contain the following:

(1) A description of the transactions or types of transactions in which the broker will serve as a dual agent;

(2) A statement that, in serving as a dual agent, the broker represents two clients whose interests are or at times could be different or even adverse;

(3) A statement that a dual agent will disclose all adverse material facts relevant to the transaction and actually known to the dual agent to all parties in the transaction except for information made confidential by request or instructions from another client which is not allowed to be disclosed by this Code section or required to be disclosed by this Code section;

(4) A statement that the broker or the broker's affiliated licensees will timely disclose to each client in a real estate transaction the nature of any



material relationship the broker and the broker's affiliated licensees have with the other clients in the transaction other than that incidental to the transaction. For the purposes of this Code section, a material relationship shall mean any actually known personal, familial, or business relationship between the broker or the broker's affiliated licensees and a client which would impair the ability of the broker or affiliated licensees to exercise fair and independent judgment relative to another client;

(5) A statement that the client does not have to consent to the dual agency; and

(6) A statement that the consent of the client has been given voluntarily and that the engagement has been read and understood.

(b) Upon the client signing a written consent meeting the requirements of this Code section, the consent of the client to dual agency shall conclusively be deemed to have been given and informed.

(c) No cause of action shall arise on behalf of any person against a dual agent for making disclosures allowed or required by this chapter and the dual agent does not terminate any agency by making such allowed or required disclosures.

(d) In the case of dual agency, each client and broker and their respective licensees possess only actual knowledge and information. There shall be no imputation of knowledge or information among or between the clients, brokers, or their affiliated licensees.

(e) In any transaction, a broker may without liability withdraw from representing a client who has not consented to a disclosed dual agency at any time prior to the existence of the dual agency. Such withdrawal shall not prejudice the ability of the broker to continue to represent the other client in the transaction, nor limit the broker from representing the client in other transactions not involving a dual agency. When such withdrawal as contemplated in this subsection occurs, the broker may receive a referral fee for referring a client to a broker employed by a different real estate brokerage firm.

(f) Every broker shall develop and enforce an office brokerage relationship policy among affiliated licensees which either specifically permits or rejects the practice of disclosed dual agency, which office brokerage relationship policy shall be disclosed pursuant to Code Section 10-6A-10 and paragraph (1) of subsection (a) of this Code section. (Code 1981, § 10-6A-12, enacted by Ga. L. 1993, p. 376, § 1; Ga. L. 2000, p. 929, § 1.)

#### JUDICIAL DECISIONS

Cited in *Wall v. Century 21 Winnerville Realty, Inc.*, 244 Ga. App. 762, 536 S.E.2d 798 (2000).

## RESEARCH REFERENCES

C.J.S. — 12 C.J.S., Brokers, § 124.

**10-6A-13. Exclusive representation; company policies; actual knowledge; confidentiality.**

(a) A broker may assign directly or through the adoption of a company policy different licensees affiliated with the broker as designated agents to exclusively represent different clients in the same transaction. In addition, the broker may delegate such assignment responsibility to other management level personnel acting under a company policy. Any company policy adopted to fulfill the requirements of this subsection shall contain provisions reasonably calculated to ensure each client is represented in accordance with the requirements of this chapter. A designated agent of a seller, landlord, buyer, or tenant shall owe his or her client the duties set forth in Code Section 10-6A-5, 10-6A-6, 10-6A-7, or 10-6A-8 of this chapter, respectively.

(b) If a broker appoints different designated agents in accordance with subsection (a) of this Code section, neither the broker, the broker's licensees, nor the real estate brokerage firm shall be deemed to be dual agents.

(c) When designated agents are appointed in accordance with subsection (a) of this Code section, the broker, the clients, and the designated agents shall be considered to possess only actual knowledge and information; there shall be no imputation of knowledge or information between and among the broker, the designated agents, and the clients. Designated agents shall not disclose, except to the designated agent's broker, information made confidential by request or instruction of the client whom the designated agent is representing, except information allowed to be disclosed by this Code section or required to be disclosed by this chapter. Unless required to be disclosed by law, the broker of a designated agent shall not reveal confidential information it receives from either the designated agent or the client with whom the designated agent is working. For the purposes of this Code section, confidential information shall be deemed to be any information the disclosure of which has not been consented to by the client that could harm the negotiating position of the client.

(d) The designation of one or more of a broker's affiliated licensees as designated agents shall not permit the disclosure by the broker or any of the broker's affiliated licensees of any information made confidential by an express request or instruction by a party prior to the creation of the designated agency. The broker and the broker's affiliated licensees shall continue to maintain such confidential information unless the party from whom the confidential information was obtained permits such disclosure by

subsequent word or conduct, or such disclosure is required by law. No liability shall be created as a result of a broker and the broker's affiliated licensee's compliance with this subsection. (Code 1981, § 10-6A-13, enacted by Ga. L. 2000, p. 929, § 1.)

**Editor's notes.** — Ga. L. 2000, p. 929, § 1, Code Section 10-6A-13 as present Code Section 10-6A-15, effective July 1, 2000, renumbered former

#### RESEARCH REFERENCES

C.J.S. — 12 C.J.S., Brokers, §§ 110,117.

#### **10-6A-14. Ministerial acts explained; required actions of transaction brokers; false information.**

(a) A broker acting as a transaction broker may provide assistance to buyers, sellers, tenants, and landlords by performing ministerial acts. Examples of ministerial acts which can be performed by the transaction broker on behalf of any of the parties in a real estate transaction include without limitation the following:

- (1) Identifying property for sale, lease, or exchange;
- (2) Providing real estate statistics and information on property;
- (3) Providing pre-printed real estate form contracts, leases, and related exhibits and addenda;
- (4) Acting as a scribe in the preparation of real estate form contracts, leases, and related exhibits and addenda;
- (5) Locating architects, engineers, surveyors, inspectors, lenders, insurance agents, attorneys, and other professionals; and
- (6) Identifying schools, shopping facilities, places of worship, and other similar facilities on behalf of any of the parties in a real estate transaction.

(b) A broker acting as a transaction broker shall do the following:

- (1) Timely present all offers to and from the parties involving the sale, lease, and exchange of property;
- (2) Timely account for all money and property received by the broker on behalf of a party in a real estate transaction;
- (3) Timely disclose the following to all buyers and tenants with whom the broker is working:
  - (A) All adverse material facts pertaining to the physical condition of the property and improvements located thereon including but not limited to material defects in the property, environmental contamina-



tion, and facts required by statute or regulation to be disclosed which are actually known by the broker which could not be discovered by a reasonably diligent inspection of the property by the buyer; and

(B) All material facts pertaining to existing adverse physical conditions in the immediate neighborhood within one mile of the property which are actually known to the broker and which could not be discovered by the buyer upon a diligent inspection of the neighborhood or through the review of reasonably available governmental regulations, documents, records, maps, and statistics. Examples of reasonably available governmental regulations, documents, records, maps, and statistics shall include without limitation: land use maps and plans; zoning ordinances; recorded plats and surveys; transportation maps and plans; maps of flood plains; crime statistics; tax maps; school district boundary maps; and maps showing the boundary lines of governmental jurisdictions.

(c) Transaction brokers shall not knowingly give any party in a real estate transaction false information; provided, however, that a broker shall not be liable to a party for providing false information to the party if broker did not have actual knowledge that the information was false and discloses to the party the source of the information. Nothing in this subsection shall limit any obligation of a seller under any applicable law to disclose to prospective buyers all adverse material facts actually known by the seller pertaining to the physical condition of the property nor shall it limit the obligation of prospective buyers to inspect and to familiarize themselves with potentially adverse conditions related to the physical condition of the property, any improvements located thereon, and the neighborhood in which the property is located. No cause of action shall arise on behalf of any person against a broker for revealing information in compliance with this subsection. No broker shall be liable for failure to disclose any matter other than those matters enumerated in this subsection. Violations of this subsection shall not create liability on the part of the broker absent a finding of fraud on the part of the broker. (Code 1981, § 10-6A-14, enacted by Ga. L. 2000, p. 929, § 1.)

**Editor's notes.** — Ga. L. 2000, p. 929, § 1, Code Section 10-6A-14 as present Code Section 10-6A-16, effective July 1, 2000, renumbered former

### JUDICIAL DECISIONS

**Section imposes no special duties regarding pets.** — O.C.G.A. §§ 10-6A-5, 10-6A-14, 43-40-15(a), and 43-40-25(b)(25), and related Code sections fail to impose any duties regarding pets other than the general duty to exercise reasonable skill and care in performing all duties thus, a trial court's summary judgment dismissing claims against

real estate agents and brokers for injuries arising from a dog bite while the injured person was viewing listed property for sale was affirmed. *Gibson v. Rezvanpour*, 268 Ga. App. 377, 601 S.E.2d 848 (2004).

**Disclosure of water and mold damage.** — In a purchaser's suit asserting fraud, rescission, breach of contract, and negligence

with regard to the purchase of a townhome, the trial court properly granted summary judgment to the listing real estate agent, a listing broker, a listing brokerage, and a seller on all claims as the evidence established conclusively that a mold report that identified the water issues was disclosed to the purchaser's real estate agent (who the purchaser did not sue). However, the court found an exception to the general rule of

caveat emptor with regard to the purchaser's claim asserting negligent repair against the seller and found the grant of summary judgment on that claim only was in error since the seller had superior knowledge of the water issues, failed to repair the water issues as advised by an engineer, and covered up the defects with sheetrock. *Asuamah v. Haley*, 293 Ga. App. 112, 666 S.E.2d 426 (2008).

#### **10-6A-15. Affiliation with common source information company.**

Except as may be provided in a written agreement between the parties, a broker shall not be deemed to have an agency relationship with a common source information company. No broker shall be deemed to be a subagent of any client of another broker solely by reason of membership or other affiliation by such brokers in a common source information company, including but not limited to multiple listing services. (Code 1981, § 10-6A-13, enacted by Ga. L. 1993, p. 376, § 1; Code 1981, § 10-6A-15, as redesignated by Ga. L. 2000, p. 929, § 1.)

#### **10-6A-16. Regulation.**

Nothing contained in this chapter shall limit the Georgia Real Estate Commission in its regulation of brokers and the broker's affiliated licensees pursuant to Chapter 40 of Title 43 and the substantive rules and regulations adopted by the commission pursuant thereto. (Code 1981, § 10-6A-14, enacted by Ga. L. 1993, p. 376, § 1; Code 1981, § 10-6A-16, as redesignated by Ga. L. 2000, p. 929, § 1.)

## CHAPTER 7

## SURETYSHIP

## Article 1

## Contract of Suretyship

Sec.	
10-7-1.	Contract of suretyship or guaranty defined; liability of surety generally.
10-7-2.	Nature of obligation of surety.
10-7-3.	Suretyship not extended by implication.
10-7-4.	Form of contract immaterial.

## Article 2

## Relative Rights of Creditor and Surety

10-7-20.	Effect of release of or compounding with surety.
10-7-21.	"Novation" defined; effect on surety's liability.
10-7-22.	Discharge of surety by increase of risk.
10-7-23.	Refusal to deliver evidence of debt and securities on tender of amount of debt as discharging surety.
10-7-24.	Refusal to sue principal after notice by surety as discharge.
10-7-25.	Extending liability.
10-7-26.	Promise to pay in ignorance of discharge.
10-7-27.	Provisions of Uniform Commercial Code to control.
10-7-28.	Process sued out and judgment entered against surety as such.
10-7-29.	Judgment against principal and surety at same time.
10-7-30.	Bad faith refusal of corporate surety to perform suretyship contract.
10-7-31.	Rights of certain parties claiming protection under a payment bond or security deposit; notice of commencement of work.

## Article 3

## Rights of Surety Against Principal, Cosureties, and Third Persons

10-7-40.	Attachment against principal.
10-7-41.	Action for money paid, interest,

## Sec.

	and costs — Right of surety or endorser.
10-7-42.	Action for money paid, interest, and costs — Effect of judgment against surety.
10-7-43.	Action for money paid, interest, and costs — Recovery of usury paid by surety.
10-7-44.	Foreclosure of mortgage or enforcement of security given by principal.
10-7-45.	Proof of suretyship — By parol.
10-7-46.	Proof of suretyship — After judgment.
10-7-47.	Control of execution and judgment by surety — Subrogation to plaintiff's rights.
10-7-48.	Control of execution and judgment by surety — When sued separately.
10-7-49.	Payment pending action; judgment for plaintiff for use of surety.
10-7-50.	Compelling contribution — After paying more than equal share; effect of surety's insolvency.
10-7-51.	Compelling contribution — Interest on sum recovered as contribution.
10-7-52.	Compelling contribution — Duty to account for indemnification from principal; compelling transfer of security from principal.
10-7-53.	Compelling contribution — Controlling action on debt and judgments therein.
10-7-54.	Endorser's right to control judgment on debt and execution thereon.
10-7-55.	Protection of bona fide purchasers when surety controls judgment.
10-7-56.	Subrogation to rights of creditor — Priority of claim.
10-7-57.	Subrogation to rights of creditor — As to securities held by creditor.



**Cross references.** — Powers of banks to act as sureties and guarantors, § 7-1-290. Sureties on bonds, § 17-6-30 et seq.

**Law reviews.** — For article analyzing problems and obligations of parties in personal

suretyship, see 5 Mercer L. Rev. 289 (1954). For article discussing Georgia commercial law in 1976 to 1977, see 29 Mercer L. Rev. 41 (1977).

## JUDICIAL DECISIONS

**Compensated sureties.** — Prior to 1981, this chapter was not intended to govern compensated sureties, which meant that the surety law for compensated sureties had to be found in the common law of this state. *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978) (excluding § 10-7-30, enacted in 1973, from holding and holding § 10-7-22 states common law applicable to compensated sureties).

**Corporations writing surety bonds for profit.** — Compensated corporate sureties engaged in writing surety bonds for a profit were, prior to 1981, not such sureties within the meaning of this chapter as to generally enjoy the protection afforded by all of its sections. *Brock Constr. Co. v. Houston Gen.*

*Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978).

**Uncompensated sureties.** — Persons who guaranteed payment of a note solely as an accommodation to another and not for any profit flowing to themselves were uncompensated sureties entitled as members of a favored class to the protections of this chapter. *Upshaw v. First State Bank*, 244 Ga. 433, 260 S.E.2d 483 (1979).

**In 1981, distinction between sureties and guarantors was abolished.** — Georgia L. 1981, p. 870, amends O.C.G.A. § 10-7-1 so as to abolish the distinction between sureties and guarantors. *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981).

## RESEARCH REFERENCES

**Am. Jur. Trials.** — Handling Fidelity Bond Claims, 47 Am. Jur. Trials 411.

## ARTICLE 1

### CONTRACT OF SURETYSHIP

## RESEARCH REFERENCES

**ALR.** — Right of surety to avoid contract for fraud on principal, 3 ALR 868.

Failure to pay premium on indemnity bond as terminating same, 45 ALR 617.

Misrepresentations by principal obligor to surety or guarantor as affecting obligee, 71 ALR 1278.

Right of sureties on bond to take advantage of noncompliance with statutory requirement as to approval of bond, 77 ALR 1479.

Liability of surety company as distinguished from that of gratuitous surety, 94 ALR 876.

Liability of surety on appeal or supersedeas bond as affected by death of

principal before decision on appeal, 94 ALR 971.

Liability of sureties on official bonds for profits realized by principal from use or investment of public funds, 104 ALR 1402.

Liability of sureties as affected by actual, constructive, or asserted transfer of property or funds by fiduciary acting in one capacity to himself acting in another capacity, 111 ALR 267.

Rights and liabilities of parties to bond given as condition of issuance of new corporation stock certificate, investment trust certificate, or other security in place of one lost or stolen, 112 ALR 900.

Equality among claimants under indem-

nity or surety bond which is insufficient to pay all claimants in full, 128 ALR 1096.

### 10-7-1. Contract of suretyship or guaranty defined; liability of surety generally.

The contract of suretyship or guaranty is one whereby a person obligates himself to pay the debt of another in consideration of a benefit flowing to the surety or in consideration of credit or indulgence or other benefit given to his principal, the principal in either instance remaining bound therefor. Sureties, including those formerly called guarantors, are jointly and severally liable with their principal unless the contract provides otherwise. There shall be no distinction between contracts of suretyship and guaranty. (Orig. Code 1863, § 2125; Code 1868, § 2120; Code 1873, § 2148; Code 1882, § 2148; Civil Code 1895, § 2966; Civil Code 1910, § 3538; Code 1933, § 103-101; Ga. L. 1981, p. 870, § 1.)

**Cross references.** — Contract of guarantor on negotiable instrument, § 11-3-416. Loan guaranties not state debt, § 20-3-269.

**Law reviews.** — For article contrasting guaranty with suretyship in Georgia, see 2 Ga. B.J. 25 (1939). For article, "The Distinction Between Guaranty and Suretyship in Georgia," see 9 Ga. B.J. 273 (1947). For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

For survey article citing developments in Georgia contracts law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 67 (1981). For annual survey of law of business associations, see 38 Mercer L. Rev. 57 (1986). For annual survey of construction law, see 43 Mercer L. Rev. 141 (1991).

For comment discussing distinction between guaranty and suretyship, in light of *McCallum v. Griffin*, 289 F.2d 135 (5th Cir. 1961), see 24 Ga. B.J. 273 (1961).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION CONSIDERATION FOR OBLIGATION PROCEDURE

#### General Consideration

**Editor's notes.** — Prior to 1981, this section was but a codification of the common law. *McIntyre v. Moore*, 105 Ga. 112, 31 S.E. 144 (1898); *Musgrove v. Luther Publishing Co.*, 5 Ga. App. 279, 63 S.E. 52 (1908). The language used in it in defining the obligation of a surety was almost exactly the language of the English textbooks. *Phillips v. Solomon*, 42 Ga. 192, 519 (1871). However, Ga. L. 1981, p. 870, § 1, amends this section to abolish the distinction between contracts of suretyship and guaranty. *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981). The distinction formerly expressly made by this section was that a

contract of suretyship "differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor." Many cases applied this distinction. See, for example, *Wright v. Shorter*, 56 Ga. 72 (1876); *Manry v. Wixelbaum Co.*, 108 Ga. 14, 33 S.E. 701 (1899); *Fields v. Willis*, 123 Ga. 272, 51 S.E. 280 (1905), later appeal, 132 Ga. 242, 63 S.E. 828 (1909); *Maril v. Boswell*, 12 Ga. App. 41, 76 S.E. 773 (1912); *Tennille Banking Co. v. Ward*, 29 Ga. App. 660, 116 S.E. 347 (1923); *Etheridge v. Rawleigh Co.*, 29 Ga. App. 698, 116 S.E. 903 (1923); *Brock Candy Co. v. Craton*, 33 Ga. App. 690, 127 S.E. 619 (1925), later appeal, 37 Ga. App. 728, 141 S.E. 916 (1928); *Wilson Bros. v.*

**General Consideration** (Cont'd)

Heard, 46 Ga. App. 497, 167 S.E. 913 (1933); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); Singleton v. Farmers & Merchants Bank, 55 Ga. App. 776, 191 S.E. 478 (1937); Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585 (1939); W.T. Rawleigh Co. v. Burkhalter, 59 Ga. App. 514, 1 S.E.2d 609 (1939); Cartwright v. Farmers Bank, 74 Ga. App. 847, 41 S.E.2d 818 (1947); National Bank v. Wright, 77 Ga. App. 272, 48 S.E.2d 306 (1948); Bearden v. Ebcap Supply Co., 108 Ga. App. 375, 133 S.E.2d 62 (1963); Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Decatur Coca-Cola Bottling Co. v. Variety Vending Corp., 277 F. Supp. 393 (N.D. Ga. 1967); Travelers Indem. Co. v. Sasser & Co., 138 Ga. App. 361, 226 S.E.2d 121 (1976); Brock Constr. Co. v. Houston Gen. Ins. Co., 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978); Jackson v. First Bank, 150 Ga. App. 182, 256 S.E.2d 923 (1979); Griswold v. Wells Aluminum, Moultrie, Inc., 156 Ga. App. 19, 274 S.E.2d 7 (1980); Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981). However, this was only one of the tests to distinguish a contract of suretyship from a contract of guaranty. Schlittler & Johnson v. Deering Harvester Co., 3 Ga. App. 86, 59 S.E. 342 (1907); McKibben v. Luther Williams Banking Co., 32 Ga. App. 419, 123 S.E. 726 (1924); Guaranty Mtg. Co. v. National Life Ins. Co., 55 Ga. App. 104, 189 S.E. 603 (1936), aff'd, 184 Ga. 644, 192 S.E. 298 (1937).

The test formerly laid down in this section was not decisive. As with other contracts, the whole matter was governed by the intention of the parties. For instance, in the usual indemnity contracts, the parties generally intended that the indemnitor should be surety, although the indemnitor received an independent consideration. And again, sometimes a contract would be construed to be one of guaranty although the guarantor received no consideration other than the benefit flowing to the guarantor's principal.

Baggs v. Funderburke, 11 Ga. App. 173, 74 S.E. 937 (1912); Rawleigh Co. v. Salter, 31 Ga. App. 329, 120 S.E. 679 (1923); McKibben v. Luther Williams Banking Co., 32 Ga. App. 419, 123 S.E. 726 (1924); Whitley v. Powell, 47 Ga. App. 105, 169 S.E. 766 (1933); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); General Finance Corp. v. Welborn, 98 Ga. App. 280, 105 S.E.2d 386 (1958); McCallum v. Griffin, 289 F.2d 135 (5th Cir. 1961), commented on in 24 Ga. B.J. 273 (1961); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Scarboro v. Universal C.I.T. Credit Corp., 364 F.2d 10 (5th Cir. 1961); Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975). The fundamental distinction between a contract of guaranty and one of suretyship was said to be that in a contract of suretyship the person obligating himself to pay the debt of another was primarily, and not merely secondarily, liable for its payment. Watkins Medical Co. v. Marbach, 20 Ga. App. 691, 93 S.E. 270 (1917); Hartsfield Co. v. Robertson, 48 Ga. App. 735, 173 S.E. 201 (1934); Hartsfield Co. v. Hamil, 180 Ga. 615, 180 S.E. 128 (1935); Brilliant Coal Co. v. Gandy, 51 Ga. App. 264, 180 S.E. 379 (1935); Arkansas Fuel Oil Co. v. Young, 66 Ga. App. 25, 16 S.E.2d 909 (1941); Erbelding v. Noland Co., 83 Ga. App. 464, 64 S.E.2d 218 (1951); Nichols v. Miller, 91 Ga. App. 99, 84 S.E.2d 841 (1954); Ferguson v. Atlanta Newspapers, Inc., 91 Ga. App. 115, 85 S.E.2d 72 (1954); Continental Cas. Co. v. White, 160 F. Supp. 611 (M.D. Ga. 1957); General Fin. Corp. v. Welborn, 98 Ga. App. 280, 105 S.E.2d 386 (1958); McCallum v. Griffin, 289 F.2d 135 (5th Cir. 1961), commented on in 24 Ga. B.J. 273 (1961); Fagelson v. Pfister Aluminum Corp., 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); Rankin v. Smith, 113 Ga. App. 204, 147 S.E.2d 649 (1966); National Acceptance Co. v. Fulton Nat'l Bank, 113 Ga. App. 517, 148 S.E.2d 907, rev'd on other grounds sub nom. Wolkin v. National Acceptance Co., 222 Ga. 487, 150 S.E.2d 831 (1966); Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492 (1975); Oliver v. Citizens DeKalb Bank, 150 Ga. App. 437, 258 S.E.2d



204 (1979). While a surety rendered himself primarily responsible with the principal debtor and on the same undertaking, a guarantor became collaterally responsible by virtue of the guarantor's own separate and independent obligation, whereby, without joining in the principal's undertaking, the guarantor yet vouched for the principal's solvency by guaranteeing that the principal would be able to perform as the principal had agreed. *Rawleigh Co. v. Salter*, 31 Ga. App. 329, 120 S.E. 679 (1923); *Hartsfield Co. v. Robertson*, 48 Ga. App. 735, 173 S.E. 201 (1934); *Hartsfield Co. v. Hamil*, 180 Ga. 615, 180 S.E. 128 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937); *Arkansas Fuel Oil Co. v. Young*, 66 Ga. App. 25, 16 S.E.2d 909 (1941); *W.T. Rawleigh Co. v. Overstreet*, 71 Ga. App. 873, 32 S.E.2d 574 (1944); *Fagelson v. Pfister Aluminum Corp.*, 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965); *Wolkin v. National Acceptance Co.*, 222 Ga. 487, 150 S.E.2d 831 (1966); *Griswold v. Wells Aluminum, Moultrie, Inc.*, 156 Ga. App. 19, 274 S.E.2d 7 (1980). Hence, it was held that waiver of presentment, protest, and notice of nonpayment of any note or other evidence of indebtedness accepted by a promisee from the principal was evidence of suretyship, as it indicated assumption of a primary, rather than secondary, obligation to pay the debt. The 1981 amendment also inserted the provision that "sureties, including those formerly called guarantors, are jointly and severally liable with their principals unless the contract provides otherwise."

Many of the cases cited below construed or applied this section as it existed prior to the 1981 amendment.

**Section reasonably construed.** — This section must be given a reasonable and not an unreasonable construction. *Tennille Banking Co. v. Ward*, 29 Ga. App. 660, 116 S.E. 347 (1923).

**Distinction between suretyship and guaranty has been eliminated.** *Johns v. Leaseway of Ga., Inc.*, 166 Ga. App. 472, 304 S.E.2d 555 (1983); *Daprano v. Sherwin-Williams Co.*, 166 Ga. App. 811, 305 S.E.2d 655 (1983).

An "indemnity contract" is defined as an agreement between two parties, whereby the

one party, the indemnitor, either agrees to indemnify and save harmless the other party, the indemnitee, from loss or damage, or binds the indemnitor to do some particular act or thing, or to protect the indemnitee against liability to, or the claim of, a third party. "Indemnity" means reimbursement, restitution, or compensation. *National Bank v. Wright*, 77 Ga. App. 272, 48 S.E.2d 306 (1948).

In a contract of indemnity the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person, or against loss resulting from such liability. The contract of the indemnitor is an original undertaking. *National Bank v. Wright*, 77 Ga. App. 272, 48 S.E.2d 306 (1948).

**Contracts of surety and indemnity compared.** — The difference between a contract of surety and a contract of indemnity lies in the character of the promisee. In suretyship, the promise runs to an obligee or creditor, present or prospective. In indemnity, the promise runs to an obligor or debtor, present or prospective. In suretyship, the promisee has or is about to extend credit to a third person, the principal, and the promise is made to protect the promisee creditor in case the principal fails to perform. In indemnity, the promisee owes or is about to assume an obligation to a third person, the creditor, and the promisor agrees to save the promisee harmless from a loss as a result of assuming that obligation. *Rankin v. Smith*, 113 Ga. App. 204, 147 S.E.2d 649 (1966).

**Suretyship and fidelity insurance distinguished.** — There is a well-recognized difference between a contract of suretyship under this section and one of fidelity insurance. *John Church Co. v. Aetna Indem. Co.*, 13 Ga. App. 826, 80 S.E. 1093 (1913). See § 33-7-7.

**Insurance law not applicable to suretyship contract.** — Insurance law was not applicable in a case involving liability under a suretyship contract; thus, O.C.G.A. § 33-24-7 did not apply to excuse a surety from liability based on fraud of the principal. *American Mfg. Mut. Ins. Co. v. Tison Hog Mkt., Inc.*, 182 F.3d 1284 (11th Cir. 1999), cert. denied, 531 U.S. 819, 121 S. Ct. 59, 148 L. Ed. 2d 26 (2000).

**Difference between guarantee of loan and guarantee of negotiable instrument.** — There is a difference between an undertak-

### General Consideration (Cont'd)

ing which guarantees a loan and one which guarantees the payment of a negotiable instrument; the former covers the debt; the latter the evidence thereof. *Sulter v. Citizens Bank & Trust Co.*, 51 Ga. App. 798, 181 S.E. 694 (1935).

**Principal and surety are joint and several obligors.** — If an obligation, joint in form, is executed by one party as principal and another as surety, they were to be deemed joint and several obligors, since by former Code 1933, § 107-102 the obligation of the surety was an accessory to that of the principal. *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932).

**Liability of principal is essence of suretyship.** — The very essence of a contract of suretyship is that there should be someone liable as principal. This necessarily contemplates that where a note is given to purchase a store and goods there must be at least two parties who signed the note and are liable for the payment thereof, the principal and the surety. Where only one person signed the note sued on, that person must necessarily be the principal. *Jordan v. Douglas Grocery Co.*, 27 Ga. App. 296, 108 S.E. 139 (1921); *Saxon v. National City Bank*, 169 Ga. 784, 151 S.E. 501 (1930); *Boles v. Hartsfield Co.*, 50 Ga. App. 442, 178 S.E. 416 (1935); *Meeks v. Withers*, 181 Ga. 787, 184 S.E. 604 (1937); *Magid v. Beaver*, 56 Ga. App. 286, 192 S.E. 532 (1937), rev'd on other grounds, 185 Ga. 669, 196 S.E. 422 (1938).

**Nature of liability established by guaranty terms.** — Generally, a guarantor or surety is primarily liable along with the guarantor's principal to pay the debt; however, the true nature of the guarantor's liability is established by the terms of the guaranty, which may render the guarantor only secondarily liable on the principal's inability to pay, or otherwise condition or limit liability in any number of ways. *Holland v. Holland Heating & Air Conditioning*, 208 Ga. App. 794, 432 S.E.2d 238 (1993).

**Verdict for principal extinguishes surety's liability.** — Verdict in favor of the principal, on the principal's defense of failure of consideration, extinguishes ipso facto the obligation of the sureties. *Schlittler & Johnson v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S.E. 342 (1907). See § 10-7-2.

**Illegality of consideration to principal is defense to surety.** — If a note was executed by one as principal and by another as surety and the consideration therefor was illegal and immoral, but this fact was unknown to the surety at the time of the execution and delivery of the note, the surety may nevertheless defend a suit thereon by showing that the note was in fact executed by the principal for such a consideration. *William-Hester Marble Co. v. Walton*, 22 Ga. App. 433, 96 S.E. 269 (1918). See § 11-3-305.

**Duress of principal.** — If the principal signed the obligation sought to be enforced under such duress as would release the principal from liability thereon, the duress of the principal is an available defense for the surety, if the principal signed without knowledge of the defense. *Patterson v. Gibson*, 81 Ga. 802, 10 S.E. 9, 12 Am. St. R. 356 (1888).

**If purported principal not bound, promissor is principal and not surety.** — It is essential that there be a principal, and if a person undertakes that another will pay or perform, there not being any legal liability on the part of such person to pay or perform, the promissor is the principal and not a surety. *Saxon v. National City Bank*, 169 Ga. 784, 151 S.E. 501 (1930).

**Contract of suretyship does not depend on form.** — Under this section, a contract, whatever the contract's form, by which one obligates oneself to pay the debt of another in consideration of credit or indulgence or other benefit given to one's principal, the principal remaining bound for the debt, is a contract of suretyship. *Buck v. Bank of Ga.*, 104 Ga. 660, 30 S.E. 872 (1898). See § 10-7-4.

The form of the contract is immaterial, provided the fact of suretyship exists, and one may assume that relation even by an instrument separate and distinct from that of one's principal and also subsequent in time. *Kennedy v. Thruway Serv. City, Inc.*, 133 Ga. App. 858, 212 S.E.2d 492 (1975).

**No written instrument between creditor and surety required.** — Fact that written instrument may not have been executed between creditor and alleged surety does not preclude existence of a suretyship. *Griswold v. Wells Aluminum, Moultrie, Inc.*, 156 Ga. App. 19, 274 S.E.2d 7 (1980).

**Whether one is principal or surety determined by facts.** — Whether one signs a note



with another as joint principal maker or as surety merely is a question to be determined by the facts and not by the opinion that either party to the contract may entertain. *Williams v. Peoples Bank*, 9 Ga. App. 714, 72 S.E. 177 (1911).

**Facts, not statements, control.** — The real character of the instrument must be determined by the facts, not by the statement of the payee that the defendant did sign as principal and not as surety nor by the defendant's statement that the defendant understood the plaintiff signed as principal and not as surety. *McDaniel v. Akridge*, 5 Ga. App. 208, 62 S.E. 1010 (1908), later appeal, 12 Ga. App. 79, 76 S.E. 755 (1912).

**Purchase subject to lien does not create suretyship.** — An implied promise of suretyship with the incident rights of a surety to discharge does not arise where a purchase is made merely subject to the outstanding lien of a mortgage. *Nelson v. National Life & Accident Ins. Co.*, 51 Ga. App. 684, 181 S.E. 202 (1935).

**Retiring partner as surety.** — Where a partnership is dissolved by the retirement of one of the partners and the continuing partner agrees to assume the debts of the firm, the retiring partner becomes a surety for the copartner. *Stapler v. Anderson*, 177 Ga. 434, 170 S.E. 498, answer conformed to, 47 Ga. App. 379, 170 S.E. 501 (1933).

**Drawer of bill of exchange as surety.** — The contract of one who draws a domestic bill of exchange is that if the drawee does not accept, the drawer will pay, and if the drawee does not pay after acceptance, the drawer will. After acceptance, the contract of the drawer is one of suretyship. *Tennille Banking Co. v. Ward*, 29 Ga. App. 660, 116 S.E. 347 (1923). See O.C.G.A. § 11-3-413.

**Endorser held principal, not surety.** — Where four persons owning equal undivided interests in property situated in Alabama executed in that state an instrument in writing purporting to convey such property, in trust for themselves, to a named corporation of that state as trustee, and providing for the appointment of a board of advisors to govern the estate, consisting of one representative for each of the four undivided shares and one representative of the trustee, each such member of the board to have one vote accordingly, but under the terms of the agreement the grantors reserved unto them-

selves or their assigns as beneficiaries the power to remove their representatives and fill vacancies, and the further power to remove the trustee through such representatives, and where the designated trustee was a bank, and before the execution of such instrument had loaned money to the grantors as individuals, and after its execution advanced additional money to itself as trustee for the benefit of the estate, and finally as trustee signed a note payable to itself for the entire indebtedness, in view of the control reserved to the beneficiaries by the trust agreement, the entity created, if any, was in the nature of a partnership, with the trustee as its agent, and endorsement by the beneficiaries of the note amounted to a ratification of the trustee's action, rendering the endorser liable as principals, so that endorsement by one of the beneficiaries did not create the relation of surety within the meaning of the law of this state. *National City Bank v. First Nat'l Bank*, 193 Ga. 477, 19 S.E.2d 19 (1942).

**Set-off not guaranty.** — The setoff provision was not a guaranty nor created an obligation for appellant to answer for appellant's son's debt. *Yates v. Trust Co. Bank*, 212 Ga. App. 438, 443 S.E.2d 293 (1994).

**Persons who sign on the back of a note made by one party to another, or order, are liable as sureties or joint promisors, and the mere limitation in the term "endorser" written after the name of such a signer would not change the real status, if as a matter of fact the endorsement was to add strength to the paper and not to negotiate title.** *Burkhalter v. Conley*, 24 Ga. App. 256, 100 S.E. 725 (1919) (judgment of superior court judge). See O.C.G.A. §§ 11-3-402 and 11-3-414.

**Where two persons sign a note apparently as joint principals** and there is nothing in the face of the note to indicate that one is principal and the other is surety, the law presumes that both are principals. This presumption is rebuttable, of course, but the burden is on those asserting suretyship to establish suretyship. *United States v. Frost*, 149 F. Supp. 386 (M.D. Ga. 1957).

**Cosurety may become such without knowledge of other sureties.** — Under this section, if an apparent accommodation endorser knew other apparent makers were sureties and intended to become surety for principal



**General Consideration (Cont'd)**

maker, the endorser and the other sureties were cosureties, though they signed at different times and the others had no knowledge or expectation that the endorser would become surety. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923). See § 11-3-415.

**Cosureties who had set forth in different instruments their separate promises** to pay the debt of their principal were not joint contractors or obligors, and one cosurety was not a necessary party in a creditor's action against the other cosurety to recover a debt. *Floyd Davis Sales, Inc. v. Central Mtg. Corp.*, 197 Ga. App. 532, 398 S.E.2d 820 (1990).

**Suretyship is not valid as to creditor until creditor assents.** — Where the grantee of property under a mortgage assumes and agrees with the mortgagor to pay the mortgage, the grantee becomes, as to the mortgagor with whom the grantee thus contracts, the principal debtor; with the result that the mortgagor thereafter occupies the position of surety; but the mortgagee is not bound by such an agreement unless one personally assents to such express assumption. *Nelson v. National Life & Accident Ins. Co.*, 51 Ga. App. 684, 181 S.E. 202 (1935).

Where B conveys lands to C in consideration of the assumption by C of the obligation due to A, the relationship between B and C is that of principal and surety, but so far as A is concerned, such relationship between B and C is not effective as to A unless A assents to and accepts the relationship. *Federal Land Bank v. Conger*, 55 Ga. App. 11, 189 S.E. 567 (1936).

**Effect of death of guarantor.** — The death of a guarantor and knowledge or notice of such death to the guarantee revokes the guaranty as to future transactions, where the guaranty is a continuing one based on a divisible consideration, if the contract of guaranty itself does not express a contrary intention. *Sulter v. Citizens Bank & Trust Co.*, 51 Ga. App. 798, 181 S.E. 694 (1935).

**Surety is liable for judgment against principal without being party.** — Where a surety is bound under a materialman's bond to pay a claim against the principal, the surety is liable for a judgment rendered against the defendant principal even though the surety was not a party in the prior case. *Travelers*

*Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976).

**Surety is not obligated to furnish additional collateral.** — A contract being one of suretyship only, accessory to that of the principal and limited to the principal's obligation to pay the principal's debt, a bank had no legal right to demand of the surety additional collateral provided for in the instrument, and it was therefore unnecessary for it to do so as a condition precedent to declaring the note due. *Chandler v. Bank of Waynesboro*, 29 Ga. App. 5, 113 S.E. 25 (1922).

**Surety or guarantor may consent in advance to conduct which would otherwise result in surety's discharge.** *Bobbitt v. Firestone Tire & Rubber Co.*, 158 Ga. App. 580, 281 S.E.2d 324 (1981).

**Agent guarantying payment jointly and severally liable on account.** — An authorized agent is generally not personally liable on contracts which the agent enters into on behalf of the disclosed principal, but an agent may become a party to a contract either by the term of the agreement or by implication based on the surrounding facts and circumstances. One guarantying payment is jointly and severally liable on an account, notwithstanding the fact that one is acting as an agent for a disclosed principal. *TBS, Inc. v. Sanyo Elec., Inc.*, 33 Bankr. 996 (N.D. Ga. 1983), *aff'd sub nom. TBS v. Rubin*, 742 F.2d 1465 (11th Cir. 1984).

**Corporation was not a surety** on a note, where the corporation's name did not appear on the face of the note and the debt was paid by the corporation to protect a co-maker's credit and not to protect any interest or right of the corporation. *Levinson v. American Thermex, Inc.*, 196 Ga. App. 291, 396 S.E.2d 252 (1990).

**Co-debtor was not a surety** of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties

that one was signing as the principal debtor and the other was signing as a surety. *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

**Knowledge of endorser's signing as accommodation party.** — Even assuming that a creditor was aware that the president of a corporation co-signed a note as a guarantor to accommodate the corporation, knowledge that the president signed as an accommodation party to guarantee the note would not relieve the president of the joint and several liability the president assumed under the terms of the note. *Hassell v. First Nat'l Bank*, 218 Ga. App. 231, 461 S.E.2d 245 (1995).

When a tenant which terminated the tenant's lease early and agreed to pay the landlord the difference between the tenant's rental obligation and rent the landlord was able to obtain from a third party the tenant said this agreement was a guaranty from which the tenant had been discharged, the landlord was entitled to partial summary judgment on the landlord's breach of contract claim in the landlord's suit to enforce the agreement, because the agreement was not a guaranty subject to the discharge provisions of O.C.G.A. § 10-7-20 et seq., as the tenant did not agree to be answerable for the debt of another but, instead, agreed to continue the tenant's rental obligation to the landlord, subject to any credit the tenant might be entitled to for rent the landlord received from a third party. *Equifax, Inc. v. 1600 Peachtree, L.L.C.*, 268 Ga. App. 186, 601 S.E.2d 519 (2004).

**Cited in** *Phillips v. Solomon*, 42 Ga. 192 (1871); *Wright v. Shorter*, 56 Ga. 72 (1876); *Allen v. Richardson*, 74 Ga. 719 (1885); *McIntyre v. Moore*, 105 Ga. 112, 31 S.E. 144 (1898); *Manry v. Waxelbaum Co.*, 108 Ga. 14, 33 S.E. 701 (1899); *Fields v. Willis*, 123 Ga. 272, 51 S.E. 280 (1905); *Maril v. Boswell*, 12 Ga. App. 41, 76 S.E. 773 (1912); *Burkhalter v. Conley*, 24 Ga. App. 256, 100 S.E. 725 (1919); *W.T. Rawleigh Co. v. Salter*, 31 Ga. App. 329, 120 S.E. 679 (1923); *McKibben v. Luther Williams Banking Co.*, 32 Ga. App. 419, 123 S.E. 726 (1924); *Erwin v. Brooke*, 159 Ga. 683, 126 S.E. 777 (1925); *Brock Candy Co. v. Craton*, 33 Ga. App. 690, 127 S.E. 619 (1925); *Electric City Brick Co. v. Hagler*, 168 Ga. 836, 149 S.E. 126 (1929); *Wilson Bros. v. Heard*, 46 Ga. App. 497, 167

S.E. 913 (1933); *Whitley v. Powell*, 47 Ga. App. 105, 169 S.E. 766 (1933); *Dickerson v. Universal Credit Co.*, 47 Ga. App. 512, 170 S.E. 822 (1933); *Hartsfield Co. v. Robertson*, 48 Ga. App. 735, 173 S.E. 201 (1934); *Hartsfield Co. v. Hamil*, 180 Ga. 615, 180 S.E. 128 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936); *Singleton v. F & M Bank*, 55 Ga. App. 776, 191 S.E. 478 (1937); *Borders v. Gladney*, 60 Ga. App. 692, 4 S.E.2d 736 (1939); *Greenwold Grift Co. v. Durham*, 191 Ga. 586, 13 S.E.2d 346 (1941); *Cartwright v. Farmers Bank*, 74 Ga. App. 847, 41 S.E.2d 818 (1947); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955); *Continental Cas. Co. v. White*, 160 F. Supp. 611 (M.D. Ga. 1957); *General Fin. Corp. v. Welborn*, 98 Ga. App. 280, 105 S.E.2d 386 (1958); *Hammond v. Southern Cotton Oil Co.*, 101 Ga. App. 368, 114 S.E.2d 54 (1960); *Goodyear Tire & Rubber Co. v. New Amsterdam Cas. Co.*, 101 Ga. App. 577, 114 S.E.2d 546 (1960); *McCallum v. Griffin*, 289 F.2d 135 (5th Cir. 1961); *National Acceptance Co. v. Fulton Nat'l Bank*, 113 Ga. App. 517, 148 S.E.2d 907 (1966); *Scarboro v. Universal C.I.T. Credit Corp.*, 364 F.2d 10 (5th Cir. 1966); *Fruehauf Corp. v. McIntire*, 408 F.2d 910 (5th Cir. 1969); *Parker v. Puckett*, 129 Ga. App. 265, 199 S.E.2d 343 (1973); *Farmer v. Peoples Am. Bank*, 132 Ga. App. 751, 209 S.E.2d 80 (1974); *Hurst v. Stith Equip. Co.*, 133 Ga. App. 374, 210 S.E.2d 851 (1974); *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975); *Yancey Bros. Co. v. Sure Quality Framing Contractors*, 135 Ga. App. 465, 218 S.E.2d 142 (1975); *Friedland v. Citizens & S. S. DeKalb Bank*, 135 Ga. App. 591, 218 S.E.2d 302 (1975); *Graves Refrigeration, Inc. v. Haswell*, 137 Ga. App. 515, 224 S.E.2d 494 (1976); *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976); *American Druggist Ins. Co. v. Georgia Power Co.*, 145 Ga. App. 104, 243 S.E.2d 319 (1978); *McGraw Edison Credit Corp. v. Motorola Communications & Elecs., Inc.*, 579 F.2d 885 (5th Cir. 1978); *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981); *Cosby v. A.M. Smyre Mfg. Co.*, 158 Ga. App. 587, 281 S.E.2d 332 (1981); *Scales v. Alterman Foods, Inc.*, 159 Ga. App. 700, 285 S.E.2d 39 (1981);



**General Consideration (Cont'd)**

White v. Phillips, 679 F.2d 373 (5th Cir. 1982); Growth Properties of Fla., Ltd. v. Wallace, 168 Ga. App. 893, 310 S.E.2d 715 (1983); Ford Motor Credit Co. v. Sullivan, 170 Ga. App. 718, 318 S.E.2d 188 (1984); Seay's Home Furnishings, Inc. v. Dozier Home Bldrs., Inc., 176 Ga. App. 660, 337 S.E.2d 440 (1985); Fidelity & Deposit Co. v. West Point Constr. Co., 178 Ga. App. 578, 344 S.E.2d 268 (1986); Virgil v. Kapplin, 187 Ga. App. 206, 369 S.E.2d 808 (1988); Charania v. Ramada Inns, Inc., 192 Ga. App. 1, 383 S.E.2d 603 (1989); Davis v. Concord Com. Corp., 209 Ga. App. 595, 434 S.E.2d 571 (1993); Rohm & Haas Co. v. Gainesville Paint & Supply Co., 225 Ga. App. 441, 483 S.E.2d 888 (1997); Steiner v. Handler, 229 Ga. App. 833, 495 S.E.2d 132 (1998); Shah v. Taco Del Sur, Inc., 257 Ga. App. 224, 570 S.E.2d 654 (2002); Beasley v. Wachovia Bank, 277 Ga. App. 698, 627 S.E.2d 417 (2006); Thomas-Sears v. Morris, 278 Ga. App. 152, 628 S.E.2d 241 (2006); General Steel, Inc. v. Delta Bldg. Sys., Ga. App. , S.E.2d , 2009 Ga. App. LEXIS 392 (Mar. 27, 2009).

**Consideration for Obligation**

**Consideration for a guarantor's signature is the extension of credit to guarantor's principal.** Griswold v. Whetsell, 157 Ga. App. 800, 278 S.E.2d 753 (1981); Beard v. McDowell, 174 Ga. App. 793, 331 S.E.2d 104 (1985).

**"Benefit" means more than nominal benefit.** — The word "benefit," as used in this section, means some real and substantial, and not a mere nominal, benefit. Tennille Banking Co. v. Ward, 29 Ga. App. 660, 116 S.E. 347 (1923).

**Benefit to guarantor need not be direct.** — If there is a consideration for the promise of the guarantor, it is immaterial whether or not the guarantor personally gets any immediate and direct benefit therefrom. Musgrove v. Luther Publishing Co., 5 Ga. App. 279, 63 S.E. 52 (1908).

**Generally, consideration to guarantor is new or independent.** — As a general proposition, a contract of guaranty must be expected to be founded on some new or independent consideration flowing directly

to the guarantor. Etheridge v. Rawleigh Co., 29 Ga. App. 698, 116 S.E. 903 (1923).

A contract of guaranty exists if one lends one's credit for the benefit of another, but under an obligation which is separate and distinct from that of the principal debtor, by which one renders oneself secondarily or collaterally liable on account of any inability of the principal to perform one's own contract, and is supported either as an original undertaking to guarantee satisfaction for benefits to be subsequently extended to the principal or is based upon an independent consideration flowing directly to the guarantor. Except as indicated, a contract of guaranty must be expected to be founded on some new or independent consideration flowing directly to the guarantor. Durham v. Greenwold, 188 Ga. 165, 3 S.E.2d 585 (1939).

A contract of guaranty, whether entered into on the same or another instrument as that of the original obligation, whether executed at the same or a different time, and whether or not purporting to be the separate obligation of the signer, must, to be enforceable, show a consideration flowing directly to the guarantor. This is because it is a separate contract, and any contract, to be enforceable, must have a consideration. Bearden v. Ebcap Supply Co., 108 Ga. App. 375, 133 S.E.2d 62 (1963).

**Obligation of a surety may be for a previously existing obligation if there is a consideration for the execution of the instrument.** Nichols v. Miller, 91 Ga. App. 99, 84 S.E.2d 841 (1954).

**Consideration for preexisting debt is insufficient.** — Whether the obligation of a person in executing a note in payment of a preexisting indebtedness of another, where the latter is not released, constitutes a contract of suretyship, the consideration for the latter's obligation will not suffice as a consideration for the contract of suretyship, but the contract must be supported by a new and distinct consideration. McCrary v. Berry, 51 Ga. App. 947, 181 S.E. 814 (1935).

**Promise without detriment to creditor or benefit to debtor is nudum pactum.** — A promise to pay the preexisting debt of another, without any detriment or inconvenience to the creditor or any benefit secured to the debtor in consequence of the undertaking, is a mere nudum pactum. Jackson v.



First Bank, 150 Ga. App. 182, 256 S.E.2d 923 (1979).

**Benefit to principal binds surety.** — Under this section, the benefit given to or obtained by the maker or principal on the maker's transfer of the note with a surety's endorsement supplies a consideration sufficient to bind the surety. *Jordan v. First Nat'l Bank*, 19 Ga. App. 118, 91 S.E. 287 (1917). See §§ 11-3-415 and 11-3-416.

**Proof of want of consideration.** — A surety cannot defeat liability by proving merely that the surety received no monetary consideration, but in order to sustain a defense of want of consideration, the surety would have to show that the principal did not receive any consideration or benefit from the paper sued on. *Tennille Banking Co. v. Ward*, 29 Ga. App. 660, 116 S.E. 347 (1923); *Jackson v. First Bank*, 150 Ga. App. 182, 256 S.E.2d 923 (1979).

**Consideration to surety individually not needed.** — It is not necessary that there should be a consideration to the surety individually for the suretyship in order to bind the surety; it is sufficient if there is a valid consideration out of which the suretyship grew. *Walls v. Muscogee Bank & Trust Co.*, 44 Ga. App. 361, 161 S.E. 663 (1931).

**Only consideration flowing to principal is required.** — A contract of suretyship is where, in consideration of the benefit extended to the principal debtor, one lends one's credit by joining in the principal debtor's obligation, so as to render oneself directly and primarily responsible with the principal on the same contract, and without any reference to the solvency of the principal; in such a case, the promise of each being one and the same, one consideration, the one flowing to the principal debtor, is all that is required, although there may be additional consideration flowing to the surety. *Durham v. Greenwold*, 188 Ga. 165, 3 S.E.2d 585 (1939).

**Confidentiality provision void and consideration adequate.** — The trial court properly granted summary judgment to a payee under the terms of a settlement agreement to recover funds owed for a preexisting debt, despite the fact that a confidentiality provision contained therein was void for public policy reasons, as the consideration supporting the payment provision was separate and apart from the confidentiality provision.

Thus, the obligation to pay the payee remained enforceable, and the guarantor under the settlement agreement remained obligated to pay the payee the debt owed. *Unami v. Roshan*, 290 Ga. App. 317, 659 S.E.2d 724 (2008).

**Indulgence to principal, such as extension of time, suffices.** — An extension of time by a creditor to a principal debtor is a sufficient consideration to support the accommodation endorsement of a note renewing the original note. *Hollinshead v. Virginia Nat'l Bank*, 104 Ga. 250, 30 S.E. 728 (1898).

Where the appellant obligates oneself as a surety, it is not necessary that the appellant receive a separate consideration from the transaction in order for the appellant's promise to be binding on the appellant. It is enough that the maker received a consideration, even though that consideration may have amounted to nothing more than an extension of time resulting from the refinancing of preexisting indebtedness. *Oliver v. Citizens DeKalb Bank*, 150 Ga. App. 437, 258 S.E.2d 204 (1979).

**Words "value received"** are always subject to explanation. *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S.E. 937 (1912).

The words "value received" have been held not to show conclusively that there was consideration. *Wolkin v. National Acceptance Co.*, 222 Ga. 487, 150 S.E.2d 831 (1966).

The mere recitation "for value received" in the instrument is not controlling. *Southern Land & Dev. Co. v. Silvers*, 499 F.2d 967 (6th Cir. 1974).

**Implied promise may be a sufficient consideration** for an express promise whereby one party obligates oneself to pay the debt of another in consideration of indulgence to one's principal, the latter remaining bound therefor. *Loewenherz v. Weil*, 33 Ga. App. 760, 127 S.E. 883 (1925).

**Past consideration is insufficient for guaranty or suretyship.** — Past consideration, one which has already served its purpose in a former transaction, will support neither a contract of guaranty nor a contract of suretyship. *Jackson v. First Bank*, 150 Ga. App. 182, 256 S.E.2d 923 (1979).

The guarantor's promise cannot be founded on a past consideration or one flowing to the debtor only, such as previous extension of credit to the principal debtor

**Consideration for Obligation (Cont'd)**

plus an agreement to postpone the time of collection of the principal's debt, and the fact that the purported guarantor is a married woman who owns all of the stock of the corporate debtor does not allow the court to pierce the corporate veil and to consider the benefit as one flowing directly to the owner. *Bearden v. Ebcap Supply Co.*, 108 Ga. App. 375, 133 S.E.2d 62 (1963).

A contract of guaranty executed after the original obligation must be founded on some new type of consideration, independent of that flowing to the principal and flowing directly to the guarantor; past consideration which has already served its purpose in a former transaction will not support a contract of guaranty. *Gwinnett Com. Bank v. Flake*, 151 Ga. App. 578, 260 S.E.2d 523 (1979).

**Forbearance to sue would be insufficient unless requested for becoming surety.** — Mere forbearance by the plaintiff to prosecute a judgment, without even so much as a request therefor, would not have afforded a consideration for the promise of the defendants to be liable as sureties. But undoubtedly, if they sought and also obtained an agreement for the grant of it, the execution of the notes signed by them as sureties in consideration thereof would be binding upon them. *Broughton v. Joseph Lazarus Co.*, 13 Ga. App. 153, 78 S.E. 1024 (1913); *Watkins Medical Co. v. Marbach*, 20 Ga. App. 691, 93 S.E. 270 (1917); *Loewenherz v. Weil*, 33 Ga. App. 760, 127 S.E. 883 (1925).

**If the principal received the proceeds of the subject loans**, there was adequate consideration for the contracts of suretyship. *Delta Diversified, Inc. v. Citizens & S. Nat'l Bank*, 171 Ga. App. 625, 320 S.E.2d 767 (1984).

**Consideration found.** — In return for parties' personal and unconditional guaranty of a debt, the federal government guaranteed a loan of the principal, a corporation of which the guarantors were 10 percent stockholders. Because this in essence financed the guarantors' business, there was thereby conferred a direct benefit on the principal and an indirect benefit on the guarantors. *United States v. Blue Dolphin Assocs.*, 620 F. Supp. 463 (S.D. Ga. 1985).

**Procedure**

**When action against surety barred by statute of limitations.** — The right of action

upon an unsealed contract of surety is barred by the statute of limitations upon the expiration of six years after the date of the maturity of the obligation, not six years after the date of the execution of the agreement, since no right of action accrues until the maturity date of the obligation. *Fagelson v. Pfister Aluminum Corp.*, 109 Ga. App. 663, 137 S.E.2d 313 (1964), commented on in 1 Ga. St. B.J. 523 (1965).

**Action may be brought against surety by one beneficially interested in contract.** — A subcontractor's bond to a main contractor to build a hospital, conditioned in part to pay all persons having contracts directly with the subcontractor for labor and materials, gave a materialman who furnished marble directly to the subcontractor such a beneficial interest in the bond as to authorize an action against the surety thereon, for the use of the materialman, for the subcontractor's failure to pay the materialman for the marble. *Fidelity & Deposit Co. v. Pittman ex rel. Georgia Marble Co.*, 52 Ga. App. 394, 183 S.E. 572 (1936).

**Principal and surety may be joined in one action.** — The liability of the principal and surety being joint and several, they may be joined in same action. *Durham v. Greenwold*, 188 Ga. 165, 3 S.E.2d 585 (1939).

A surety binds oneself to perform if the principal does not, without regard to one's ability to do so. The surety's contract is equally absolute with that of the principal. They may be sued in the same action, and judgment may be entered up against both. *Hartsfield Co. v. Robertson*, 48 Ga. App. 735, 173 S.E. 201 (1934); *Hartsfield Co. v. Hamil*, 180 Ga. 615, 180 S.E. 128 (1935); *Brilliant Coal Co. v. Gandy*, 51 Ga. App. 264, 180 S.E. 379 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937); *Arkansas Fuel Oil Co. v. Young*, 66 Ga. App. 25, 16 S.E.2d 909 (1941); *W.T. Rawleigh Co. v. Overstreet*, 71 Ga. App. 873, 32 S.E.2d 574 (1944); *Kennedy v. Thruway Serv. City, Inc.*, 133 Ga. App. 858, 212 S.E.2d 492 (1975).

A "contract of suretyship" is where one lends one's credit by joining in the principal debtor's obligation, so as to render oneself directly and primarily responsible with the debtor, and on the same contract, and with-



out reference to the solvency of the principal. In such a case, the promise of each being one and the same, and their liability being joint and several, they may be joined in the same action. *Erbelding v. Noland Co.*, 83 Ga. App. 464, 64 S.E.2d 218 (1951).

**Surety may be sued alone.** — If note was a joint and severable obligation, suit was properly brought against the surety alone who resided in the county in which the suit was instituted. *Griffin v. Blackshear Bank*, 66 Ga. App. 821, 19 S.E.2d 325 (1942).

**Surety may be sued first.** — A surety is an original debtor, and a surety's contract is equally absolute with that of a surety's principal; they may be sued in the same action, or the surety may even be sued first. *Woodward v. La Porte*, 181 Ga. 731, 184 S.E. 280 (1936).

**Guarantor and principal may not be sued jointly.** — The contract of the guarantor is separate and distinct from the contract of the debtor, and they cannot be sued jointly; the two contracts are several, not joint, and the liability on each is several and those who contracted the account are not liable at all on the guaranty, and one who made the guaranty is not liable at all on the account. *Shepard v. Moultrie Banking Co.*, 48 Ga. App. 194, 172 S.E. 587 (1934).

**Improper joinder does not bar subsequent action against guarantor.** — The fact that a joint action was brought against the principal and the other named parties as sureties or guarantors and a judgment by default obtained against all of them except the defendant, who successfully contended that the defendant was a guarantor and could not be sued in such action, will not estop the plaintiff from bringing an action against the defendant as such guarantor. *W.T. Rawleigh Co. v. Burkhalter*, 59 Ga. App. 514, 1 S.E.2d 609 (1939).

**To recover against guarantor, inability of principal to perform must be shown.** — Before an action can be maintained against a guarantor, it must be shown that the principal is unable to perform. The surety says to the creditor: "If your debtor will not pay, I will pay." The guarantor says to the creditor: "Proceed first against the principal, and, if he should not be able to pay, then you may proceed against me." It has been said that there is no instance in the books of a guarantor contracting jointly with a principal.

*Hartsfield Co. v. Hamil*, 180 Ga. 615, 180 S.E. 128 (1935).

A guarantor does not contract that the principal will pay, but simply that the principal is able to do so, warranting nothing but the solvency of the principal, and before an action can be maintained against a guarantor, it must be shown that the principal is unable to perform. *Brilliant Coal Co. v. Gandy*, 51 Ga. App. 264, 180 S.E. 379 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937).

Ordinarily, a guarantor cannot be sued to judgment on a contract of guaranty in the absence of a prior judgment against the principal and a nulla bona return, unless it is alleged and proved that the principal debtor is insolvent or that the debtor cannot be made to respond to a judgment that may be obtained against the debtor by the plaintiff. *Arkansas Fuel Oil Co. v. Young*, 66 Ga. App. 25, 16 S.E.2d 909 (1941).

Where the contract, properly construed, is one of guaranty, before an action may be maintained on such contract, it must appear that the principal debtor is insolvent or is unable to respond to any judgment which the creditor may obtain against it. *Erbelding v. Noland Co.*, 83 Ga. App. 464, 64 S.E.2d 218 (1951).

A guarantor is only secondarily liable on the principal's obligation, and in order to recover against a guarantor without first suing and seeking to enforce a judgment against the principal, the obligee must first show that the principal is insolvent or cannot be made to respond to a judgment against him. *Ferguson v. Atlanta Newspapers, Inc.*, 91 Ga. App. 115, 85 S.E.2d 72 (1954).

A guarantor, unlike a surety, is not liable until it appears that the debt is uncollectible from the primary debtor. *Decatur Coca-Cola Bottling Co. v. Variety Vending Corp.*, 277 F. Supp. 393 (N.D. Ga. 1967).

**Where guarantor's liability under contract is direct and primary.** — Where under an agreement the defendant is primarily liable to the plaintiff, not secondarily so due to the defendant's having agreed to pay a certain amount for the principal debtor promptly on demand at maturity. The defendant's liability under the contract is direct and primary and, upon the defendant's failure to pay as provided therein, the defendant is



**Procedure (Cont'd)**

subject to suit thereon, without it being shown that the principal debtor was insolvent, or unable to respond to any judgment that the plaintiff may obtain against the principal debtor. Under these circumstances, it is immaterial whether the instrument in question be denominated a contract of suretyship or one of guaranty. *Arkansas Fuel Oil Co. v. Young*, 66 Ga. App. 25, 16 S.E.2d 909 (1941).

**Amount admitted by guarantor's principal not conclusive.** — Guarantor is not conclusively bound by a judgment or the amount admitted due by the guarantor's principal, and such amount is only prima facie evidence of liability to the creditor; while a default judgment against a guarantor as to liability based on the guarantor's failure to answer the complaint was proper, the trial

court erred in granting judgment against the guarantor without proof of damages, and the case was remanded for further proceedings regarding the damages owed by the guarantor. *McCorvey Grading & Pipeline, Inc. v. Blalock Oil Co.*, 268 Ga. App. 795, 602 S.E.2d 842 (2004).

**Case remanded where findings so deficient as to preclude review.** — Where there may have been forbearance sufficient to constitute consideration for the guaranty as a material issue, but the findings of the trial court are so deficient as to preclude review, the appeal will be remanded with direction that the judgment be vacated and a new one entered with appropriate findings of fact and conclusions of law, after which the losing party shall be free to enter another appeal. *Hickok v. Starka Indus., Inc.*, 151 Ga. App. 668, 261 S.E.2d 418 (1979).

**OPINIONS OF THE ATTORNEY GENERAL**

**Contract of guaranty is a collateral "obligation"** which is just as enforceable as any other contract. 1971 Op. Att'y Gen. No. 71-69.

Notes guaranteed by the Georgia Higher

Education Assistance Corporation and the United States government were "obligations" within the meaning of Ga. L. 1965, p. 217, § 5(2). 1971 Op. Att'y Gen. No. 71-69.

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 1 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 12.

**ALR.** — Liability of surety or guarantor for partnership in respect of transactions or defaults subsequent to change in personnel of the partnership, 45 ALR 1426.

Liability of grantee assuming mortgage debt, to grantor, 76 ALR 1191; 97 ALR 1076.

Duration of continuing guaranty, 81 ALR 790.

Liabilities of sureties on bond of guardian, executor, administrator, or trustee for defalcation or deficit occurring before bond was given, 82 ALR 585.

Guaranty of "collection and payment" as independent guaranty of payment or only of payment through collection, 84 ALR 289.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 ALR 651.

Penalty as limit of liability on bond which protects several persons, and their relative rights as affected thereby, 89 ALR 1071.

Lessee as surety for rent after assignment, and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 ALR 1238.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 ALR 1236; 58 ALR5th 325.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 107 ALR 1171.

Consideration for assumption of obligation as guarantor, surety, endorser, or indemnitor, after execution and delivery of principal contract, as predicable upon an antecedent promise to assume or furnish such obligation, 167 ALR 1174.

Parol evidence rule as applied to written guaranty, 33 ALR2d 960.

Who may enforce guaranty, 41 ALR2d 1213.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Necessity of creditor giving guarantor notice of acceptance of guaranty, 6 ALR3d 355.

Conflict of laws: what law governs validity and construction of written guaranty, 72 ALR3d 1180.

## 10-7-2. Nature of obligation of surety.

The obligation of the surety is accessory to that of his principal; and, if the latter from any cause becomes extinct, the former shall cease of course, even though it is in judgment. If, however, the original contract of the principal was invalid from a disability to contract and this disability was known to the surety, he shall still be bound. (Orig. Code 1863, § 2126; Code 1868, § 2121; Code 1873, § 2149; Code 1882, § 2149; Civil Code 1895, § 2967; Civil Code 1910, § 3539; Code 1933, § 103-102.)

## JUDICIAL DECISIONS

### ANALYSIS

GENERAL CONSIDERATION

SURETY'S OBLIGATION

DISCHARGE OF SURETY

DISABILITY OF PRINCIPAL

### General Consideration

**This section is but an affirmation of the common law** upon this subject. *Phillips v. Solomon*, 42 Ga. 192 (1871); *Schwitzerlet-Seigler Co. v. Citizens & S. Bank*, 155 Ga. 740, 118 S.E. 365 (1923).

**Judgment against surety does not preclude setting up defense.** — If, for any cause, the surety failed to set up a defense and judgment went against the surety, the surety would not be precluded by that judgment, under this section, from showing this fact and protecting the surety, at least to this extent. *Norris v. Pollard*, 75 Ga. 358 (1885).

**Cited in** *Roberts v. Crosby*, 43 Ga. App. 267, 158 S.E. 444 (1931); *Hartsfield Co. v. Kitchens*, 51 Ga. App. 154, 179 S.E. 920 (1935); *Browne v. Institute of Bus. & Accounting*, 63 Ga. App. 871, 12 S.E.2d 455 (1940); *Peerless Cas. Co. v. Housing Auth.*, 228 F.2d 376 (5th Cir. 1955); *Parker v. Puckett*, 129 Ga. App. 265, 199 S.E.2d 343 (1973); *Gilbert v. Arneson*, 142 Ga. App. 205, 235 S.E.2d 647 (1977); *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 624 F.2d 722 (5th Cir. 1980); *Fidelity & Deposit Co. v. West Point Constr. Co.*, 178

Ga. App. 578, 344 S.E.2d 268 (1986); *Hardaway Co. v. Amwest Sur. Ins. Co.*, 986 F.2d 1395 (11th Cir. 1993).

### Surety's Obligation

**Surety's liability governed by intent of parties as expressed in instrument.** — Ordinarily, as a matter of construction, liability of surety on bond which is plain and unambiguous is governed, like any other contract, by intention of parties as expressed in the instrument. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), *aff'd*, 667 F.2d 30 (11th Cir. 1982).

**Surety's obligation is predicated on bond.** — While the obligation of a surety is accessory to that of the surety's principal, still regardless of the underlying cause, the liability of the surety is predicated on the bond and not on a tort. *Fidelity-Phenix Ins. Co. v. Mauldin*, 123 Ga. App. 108, 179 S.E.2d 525 (1970).

**Principal and surety are joint and several obligors.** — Where an obligation, joint in form, is executed by one party as principal and another as surety, they are to be deemed joint and several obligors, since by this sec-

**Surety's Obligation (Cont'd)**

tion the obligation of the surety is accessory to that of the principal. *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932). See O.C.G.A. § 10-7-1 and notes thereto.

**Accommodation endorser.** — An obligation in the form "we promise to pay," but signed by one party as maker and endorsed by another as an accommodation endorser, is a joint and several obligation, since the endorser is a mere surety. *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932).

**Balance owed by principal determines amount owed by surety.** — By virtue of this section, the balance due by a principal on a contract of suretyship must determine the amount due by the surety thereon. *Gartrell v. Johns*, 15 Ga. App. 671, 84 S.E. 175 (1915).

The surety is liable for no greater amount than is found to be due from the principal; the surety's liability cannot be extended beyond that of the principal. This follows from the very nature of the contract. *Norris v. Pollard*, 75 Ga. 358 (1886).

**Surety's promise is presumed to continue to amount agreed until revocation.** — Where an absolute promise is made to become responsible for a certain amount with no limitation as to time and there is nothing in the circumstances surrounding the execution of the contract to evince a contrary intention, it will be presumed that the promise was to continue until revoked, and the promisor will be held liable to the extent of one's guaranty, notwithstanding the principal may have, during the existence of the contract, contracted debts to an amount equal to or greater than the sum named in the guaranty. *Manry v. Waxelbaum Co.*, 108 Ga. 14, 33 S.E. 701 (1899); *Brock Candy Co. v. Craton*, 33 Ga. App. 690, 127 S.E. 619 (1925), later appeal, 37 Ga. App. 728, 141 S.E. 916 (1928).

**Extension of credit beyond limit does not release surety.** — The extension of credit to the principal in excess of the sum named in the contract of suretyship will not release the surety, the limit thus named being merely as to the surety's liability and not as to the credit to be extended. *Brock Candy Co. v. Craton*, 33 Ga. App. 690, 127 S.E. 619 (1925), later appeal, 37 Ga. App. 728, 141 S.E. 916 (1928).

**Obligations may be determined in light of surrounding circumstances.** — Although,

standing alone, a letter signed by defendants is ambiguous, the intention of the parties may be ascertained by viewing the circumstances under which the letter was written, and under such circumstances it constituted a continuing guaranty of loans as they were made after the receipt of the letter. *Roberson v. Liberty Nat'l Bank & Trust Co.*, 88 Ga. App. 271, 76 S.E.2d 522 (1953).

**Want of due care by a payee bank is no defense to the willful misconduct of the principal** for the faithful performance of whose duties the surety obligated itself. *American Sur. Co. v. Citizens' Bank*, 48 Ga. App. 448, 172 S.E. 801 (1934), aff'd, 180 Ga. 827, 180 S.E. 635 (1935).

**Accommodation party held liable without endorsement.** — If one signs as maker a note payable to oneself and another signs the note as surety only, the maker's endorsement converts the note into a negotiable instrument, and the transfer of the note binds the surety, notwithstanding the absence of an endorsement by the surety. *Jordan v. First Nat'l Bank*, 19 Ga. App. 118, 91 S.E. 287 (1917). See §§ 11-3-413, 11-3-415.

**Surety on fiduciary's bond only liable as to official acts.** — A surety on the bond of an administrator or executor is liable only for acts of nonfeasance or misfeasance on the part of such representative in respect to one's official acts. *Watson v. Watson*, 61 Ga. App. 825, 7 S.E.2d 614 (1940).

**Alleging executor's fraud in employing puffer does not state cause of action.** — Petition against executor and executor's bond to recover an amount in excess of actual value plaintiff was required to pay for lands sold by executor at public outcry by reason of fraudulent conduct of executor in securing a puffer to bid with the understanding that such person would not have to comply with one's bid did not set out a cause of action against the defendants. *Watson v. Watson*, 61 Ga. App. 825, 7 S.E.2d 614 (1940).

**Guarantor is not conclusively bound by judgment or amount admitted due by one's principal**, as such amount is only prima-facie evidence of liability to the creditor. But, where such evidence has been introduced, it does establish prima facie the liability of the guarantor then the burden shifts to the guarantor to rebut the correctness of the amount. *Peterson v. Midas Realty Corp.*, 160 Ga. App. 333, 287 S.E.2d 61 (1981).



**Surety or guarantor may assert all but personal defenses principal would have to contract.** *Peterson v. Midas Realty Corp.*, 160 Ga. App. 333, 287 S.E.2d 61 (1981).

### Discharge of Surety

**Generally, discharge of the principal debtor also discharges the surety.** *Hendricks v. Davis*, 196 Ga. App. 286, 395 S.E.2d 632, cert. denied, 196 Ga. App. 908, 395 S.E.2d 632 (1990), overruled on other grounds, *Hardaway Co. v. Amwest Sur. Ins. Co.*, 263 Ga. 697, 436 S.E.2d 642 (1993).

**Section does not include discharge of principal by operation of law.** — This section does nothing more than to announce the general law applicable to principal and surety and does not include that class of cases where the principal debtor is discharged by operation of law; the more especially when that law which discharges the principal debtor expressly declares that it shall not operate to discharge the surety. *Phillips v. Solomon*, 42 Ga. 192 (1871) (Warner, J., concurring).

**Discharge under bankruptcy law.** — By the words "from any cause" as used in this section is meant any cause dependent on the act or negligence of the creditor and not such a cause as the discharge of the principal under the bankruptcy law, Title 11, U.S.C., which is beyond the control of the creditor, and by force of the laws of the land. *Phillips v. Solomon*, 42 Ga. 192 (1871).

**Discharge of principal by party's act discharges surety.** — If the principal is discharged from liability by the act of the party procuring the contract, or by the party seeking to enforce the contract, and this was done without the knowledge of the surety, the surety will also be discharged, under this section. *Langston v. Aderhold*, 60 Ga. 376 (1878); *Richardson v. Allen*, 74 Ga. 719 (1885); *Patterson v. Gibson*, 81 Ga. 802, 10 S.E. 9, 12 Am. St. R. 356 (1889).

Under this section, if the maker of notes with sureties thereon executes a deed of assignment for the benefit of one's creditors, with a provision therein that the acceptance of any benefits thereunder by one's creditors will be a full satisfaction of the claims of the creditors against such maker, the acceptance, by the payee of such notes, of benefits under the assignment terminates the liability of the maker of such notes and would like-

wise discharge the sureties thereon, if done without their knowledge and consent. *Schwitzerlet-Seigler Co. v. Citizens & S. Bank*, 155 Ga. 740, 118 S.E. 365 (1923).

**Sureties not discharged where creditor reserves rights.** — Where the creditor reserves all rights against the sureties, or it appears from the whole transaction that the sureties should remain bound, the sureties would not be discharged. *Schwitzerlet-Seigler Co. v. Citizens & S. Bank*, 155 Ga. 740, 118 S.E. 365 (1923).

**Knowledge of continued liability on assigned notes.** — When the holder of the notes accepted benefits under the assignment with the knowledge of the sureties and under an express understanding with the sureties that their liability on the notes was to continue, the sureties were not discharged from liability on the notes, although the acceptance of such benefits was a full satisfaction of the notes so far as the maker was concerned. *Schwitzerlet-Seigler Co. v. Citizens & S. Bank*, 155 Ga. 740, 118 S.E. 365 (1923).

**Debt does not become extinct merely because the debt has become barred by limitation.** *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

**Verdict for principal discharges surety.** — The verdict of the jury in favor of the principal, discharging the principal from liability, extinguished ipso facto the obligation of the sureties. *Schlittler & Johnson v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S.E. 342 (1907); *Marietta Fertilizer Co. v. Gary*, 22 Ga. App. 604, 96 S.E. 711 (1918).

**Verdict against surety only in joint action discharges surety and principal.** — If the principal and the principal's surety on a promissory note, which is joint and several on its face, are sued in the same action and verdict and judgment are taken against the surety only, both the principal and the surety are discharged. *Fricks v. Rome Mercantile Co.*, 49 Ga. App. 431, 175 S.E. 807 (1934).

**Effect of dismissal without prejudice from case.** — The dismissal without prejudice of a principal from a case sub judice is not equivalent to the extinction of the principal's obligation so as to render relevant the provisions of O.C.G.A. § 10-7-2. *Gowdey v. Rem Assocs.*, 176 Ga. App. 83, 335 S.E.2d 309 (1985).

### Disability of Principal

**Duress** is, or, rather, it imposes, a disability. *Patterson v. Gibson*, 81 Ga. 802, 10 S.E. 9, 12 Am. St. R. 356 (1889).

**Duress of principal unknown to surety is good defense.** — A bond executed under the duress of the principal is void as to the surety also if the surety acted without knowledge of the duress; and knowledge of the fact of imprisonment does not necessarily involve knowledge of its want of legality. *Patterson v. Gibson*, 81 Ga. 802, 10 S.E. 9, 12 Am. St. R. 356 (1889).

**Disability known to surety is no defense to surety.** — Any disability of the principal in a bond or recognizance which is known to the bail will not prevent the bail from being bound by their undertaking, they being instrumental in causing the principal to be

discharged from arrest, and delivered into their friendly custody. *Weldon v. Colquitt*, 62 Ga. 449, 35 Am. R. 128 (1879).

**General rule is inapplicable if surety knew surety had no remedy against principal.** — Whatever discharges the principal also discharges the surety; but this rule does not apply where the principal binds oneself knowing the principal has no remedy over against the principal. *Patterson v. Gibson*, 81 Ga. 802, 10 S.E. 9, 12 Am. St. R. 356 (1889).

**Supreme Court has jurisdiction of claim Constitution prevents enforcement against principal.** — The Supreme Court and not the Court of Appeals has jurisdiction where surety seeks to be held free of liability on grounds of constitutional provisions which made obligation unenforceable against school system as principal. *Franklin v. Mobley*, 202 Ga. 212, 42 S.E.2d 755 (1947).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 1, 93.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 18, 19.

**ALR.** — Agreement by principal to pay compound or additional interest, as releasing surety, 2 ALR 1569.

Right of surety to avoid contract for fraud on principal, 3 ALR 868.

Right to judgment against surety where action fails against principal, 5 ALR 594.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Right of obligee in surety bond to fill blank as to amount, 37 ALR 1395; 48 ALR 741.

Taking of demand note in renewal as releasing surety or endorser, 48 ALR 1222.

Ignorance or mistake as to character of instrument signed as affecting liability of surety or guarantor, 66 ALR 312.

Right to contribution or indemnity of executor, administrator, guardian, testamentary trustee, or sureties against a cofiduciary or sureties, in respect of losses or defaults for which the fiduciaries are answerable, 66 ALR 1147.

Liability of grantee assuming mortgage debt, to grantor, 76 ALR 1191; 97 ALR 1076.

Liability of guarantor of obligations to

bank as affected by limitation of amount which bank may legally loan, 92 ALR 341.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 ALR 1236; 58 ALR5th 325.

Acceptance of construction work as releasing contractors or sureties on bond conditioned for performance of construction contract or guaranteeing completed work, 109 ALR 625.

Liability of sureties on bond of tax collector for illegal or unauthorized acts of latter toward individual taxpayer, 127 ALR 857.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Duty of construction contractor to indemnity contractee held liable for injury to third person, in absence of express contract for indemnity, 97 ALR2d 616.

Liability of surety on infant's contract or obligation, where contract is disaffirmed by infant, 44 ALR3d 1417.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

### 10-7-3. Suretyship not extended by implication.

The contract of suretyship is one of strict law; and the surety's liability will not be extended by implication or interpretation. (Orig. Code 1863, § 2127; Code 1868, § 2122; Code 1873, § 2150; Code 1882, § 2150; Civil Code 1895, § 2968; Civil Code 1910, § 3540; Code 1933, § 103-103.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

#### General Consideration

**Strict construction of contract of suretyship or guaranty.** — When a person promises to become a sponsor for the debt of another, the person's promise is to be strictly construed by virtue of this section. *Musgrove v. Luther Publishing Co.*, 5 Ga. App. 279, 63 S.E. 52 (1908).

This section calls for a strict construction of a contract of suretyship. *American Sur. Co. v. Small Quarries Co.*, 157 Ga. 33, 120 S.E. 617 (1923); *Hannah v. Lovelace-Young Lumber Co.*, 159 Ga. 856, 127 S.E. 225 (1925).

Under this section, the courts of this state have construed bonds given by contractors on public works strictly. *Durden v. American Sur. Co.*, 40 Ga. App. 705, 151 S.E. 408 (1930).

Whether the contract is one of guaranty or suretyship, the rule of stricti juris is applicable. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972) (decided prior to 1981 amendment to O.C.G.A. § 10-7-1, abolishing distinction between contracts of suretyship and guaranty).

**Construction same at law or in equity.** — Undertaking of a surety being one stricti juris, the surety cannot, either at law or in equity, be bound farther or otherwise than the surety is by the very terms of the contract. *Kenney v. Armour Fertilizer Works*, 33 Ga. App. 126, 126 S.E. 284 (1924), rev'd on other grounds, 161 Ga. 477, 131 S.E. 281, later appeal, 34 Ga. App. 820, 131 S.E. 915 (1926); *Mayor of Savannah v. Glens Falls Ins. Co.*, 104 Ga. App. 879, 123 S.E.2d 293 (1961), overruled on another point, *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460,

246 S.E.2d 316 (1978); *Johns v. Leaseway of Ga., Inc.*, 166 Ga. App. 472, 304 S.E.2d 555 (1983); *Stone v. Palm Pool Prods., Ltd.*, 198 Ga. App. 751, 403 S.E.2d 69 (1991).

**Section inapplicable where surety's obligation is manifest.** — This section is inapplicable to an action upon an injunction bond if the surety's obligation is made manifest and full by a reference in the bond to certain portions of the injunction proceedings. *Richardson v. Allen*, 74 Ga. 719 (1885).

**Liability cannot be extended by implication.** — If the contract is unambiguous and subject to only one construction, the liability of any surety (whether compensated or not) is not to be extended beyond the terms of the contract by implication or interpretation. *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978) (decided prior to 1981 amendment to O.C.G.A. § 10-7-1, abolishing distinction between contracts of suretyship and guaranty).

The surety's liability on a bond given to dissolve a garnishment is one of strict law and cannot be extended by implication. *Roney v. McCall*, 128 Ga. 249, 57 S.E. 503 (1907).

Guarantee agreement executed between lessor and lessee three days prior to a lease agreement could not apply to the lease agreement as it would have effectively extended the lessee's liability by implication. *Avec Corp. v. Schmidt*, 207 Ga. App. 374, 427 S.E.2d 850 (1993).

**Any unconsented to change discharges surety.** — The contract of suretyship is one of strict law by virtue of this section, and any change of the nature or terms of the contract without the consent of the surety discharges the surety. *Camp v. Howell*, 37 Ga.



**General Consideration (Cont'd)**

312 (1867). See O.C.G.A. §§ 10-7-21 and 10-7-22.

Liability of a surety cannot be extended beyond the actual terms of the surety's engagement and will be extinguished by any act or omission which alters the terms of the contract, unless it is done with the surety's consent. *Washington Loan & Banking Co. v. Holliday*, 26 Ga. App. 792, 107 S.E. 370, cert. denied, 26 Ga. App. 801 (1921).

The undertaking of a surety being stricti juris, one cannot, in law or equity, be bound further than the very terms of one's contract; and if the principal and obligee change the terms of the contract without consent, the surety is discharged. *LeCraw v. Atlanta Arts Alliance, Inc.*, 126 Ga. App. 656, 191 S.E.2d 572 (1972).

**Appearance at specified term of court complies with bond.** — Under this section, where the condition in a criminal recognizance was that a principal should appear at a particular term of court, but it contained no provision as to appearing from term to term, or other like provision, the appearance of the principal at the specified term was a compliance with the condition, and the principal's failure to appear at a subsequent term to which the case was continued, would not subject the sureties to a forfeiture. *Colquitt v. Smith*, 65 Ga. 341 (1880).

The undertaking of the sureties on a criminal bond is stricti juris by virtue of this section, and where the bond obligates the principal to be present at a specified term of court, but contains no provision for the surety's appearance from term to term, or other like provision, the appearance of the principal at the term specified in the bond would be a compliance with the condition thereof. *Roberts v. State*, 32 Ga. App. 339, 123 S.E. 151 (1924).

**Official bond does not apply to funds received after term of office.** — Under this section and § 45-4-24(a)(1), the official bond of the former treasurer of the county did not impose upon the treasurer's sureties any obligation with reference to the county funds received by the treasurer after the treasurer's term of office from the treasurer's successor. *Fannin County v. Daves*, 23 Ga. App. 220, 98 S.E. 104 (1919).

**Recovery is limited to penalty in bond.** — Where, pursuant to former Civil Code 1910,

§§ 5185, 5186, and 5187, a bond was executed with a penalty value of \$20.00, as far as the surety was concerned, the only recovery which could have been had on the bond was the named penalty of \$20.00. *Gullatt v. Blankenship*, 42 Ga. App. 139, 155 S.E. 353 (1930).

**Rule of strict construction in surety's favor applies only to gratuitous sureties.** — Rule of "strict law" embodied in this section which provides an absolute rule of strict construction of surety contract in favor of surety applies only to uncompensated sureties (sureties acting gratuitously), not to compensated sureties (sureties engaged in writing surety bonds for profit). *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982).

**Contracts of compensated sureties construed strongly against surety.** — Unlike gratuitous sureties, compensated sureties are not favorites of the law; on the contrary, the contract of a surety company, acting for compensation, and of any other surety for hire, is construed most strongly against the surety and in favor of an indemnity which the obligee has reasonable grounds to expect. *Sims' Crane Serv., Inc. v. Reliance Ins. Co.*, 514 F. Supp. 1033 (S.D. Ga. 1981), aff'd, 667 F.2d 30 (11th Cir. 1982).

**Cited in** *Tennille Banking Co. v. Ward*, 29 Ga. App. 660, 116 S.E. 347 (1923); *Southern Sur. Co. v. Williams*, 36 Ga. App. 692, 137 S.E. 861 (1927); *Roberts v. Crosby*, 43 Ga. App. 267, 158 S.E. 444 (1931); *Glens Falls Indem. Co. v. Southeastern Constr. Co.*, 207 Ga. 488, 62 S.E.2d 149 (1950); *H.W. Ivey Constr. Co. v. Southwest Steel Prods.*, 111 Ga. App. 527, 142 S.E.2d 394 (1965); *Conner v. Resolute Ins. Co.*, 112 Ga. App. 883, 146 S.E.2d 791 (1966); *Palmer v. Southern Mechanical Co.*, 117 Ga. App. 672, 161 S.E.2d 413 (1968); *Overcash v. First Nat'l Bank*, 117 Ga. App. 818, 162 S.E.2d 210 (1968); *Peara v. Atlanta Newspapers, Inc.*, 120 Ga. App. 163, 169 S.E.2d 670 (1969); *Travelers Indem. Co. v. West Ga. Nat'l Bank*, 387 F. Supp. 1090 (N.D. Ga. 1974); *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975); *Sentry Indem. Co. v. Central Elec. Co.*, 136 Ga. App. 557, 222 S.E.2d 40 (1975); *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83 (1978); *Busbee v. Reserve Ins. Co.*, 243 Ga.

371, 254 S.E.2d 324 (1979); *Cobb Bank & Trust Co. v. American Mfrs. Mut. Ins. Co.*, 624 F.2d 722 (5th Cir. 1980); *Fidelity & Deposit Co. v. West Point Constr. Co.*, 178 Ga. App. 578, 344 S.E.2d 268 (1986); *Arnold v. Indcon*, 219 Ga. App. 813, 466 S.E.2d 684 (1996); *Rohm & Haas Co. v. Gainesville Paint & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997); *Wickliffe v. Wickliffe Co.*, 227 Ga. App. 432, 489 S.E.2d 153 (1997); *Fontaine v. Gordon Contractors Bldg. Supply, Inc.*, 255 Ga. App. 839, 567 S.E.2d 324 (2002); *Shah v. Taco Del Sur, Inc.*, 257 Ga. App. 224, 570 S.E.2d 654 (2002); *Capital Color Printing, Inc. v. Ahern*, 291 Ga. App. 101, 661 S.E.2d 578 (2008).

### Application

**Sheriff's surety is not liable for injuries by fellow prisoners allowed by jailer.** — Action against surety on bond of a sheriff for injuries sustained by a prisoner confined, for violation of a municipal ordinance, in a county jail where the prisoner was "kangarooed" by other prisoners confined therein, the jailer knowingly allowing the injuries to be inflicted, was properly nonsuited. *Tate v. National Sur. Corp.*, 58 Ga. App. 874, 200 S.E. 314 (1938).

**Defendant was not a compensated surety** and thus was entitled to the application of the extremely protective rule of strictissimi juris set forth in the statute; while the defendant had ownership interests in the businesses who were the unnamed principal debtors and may have eventually derived some benefit from their success, the consideration for the defendant signing the guarantees did not flow to the defendant, but instead to the businesses. *Workman v. Sysco Food Servs.*, 236 Ga. App. 784, 513 S.E.2d 523 (1999).

**Contract held not to extend to all debts of principal.** — Where, other than the general statement that plaintiff would not lease trucks to a company without a guaranty or suretyship agreement, there was no evidence that would alter the clear and unambiguous language of the agreement that defendant would guarantee the obligation of the company arising from a weekly lease agreement of the same date as the suretyship agreement, nor was any evidence produced of the referenced lease agreement or that the company owed plaintiff anything under the

agreement, plaintiff failed to prove that defendant was obligated to pay any sums under the suretyship agreement; and the trial court's factual finding that the purpose of obtaining defendant's guarantee was to have defendant be responsible for all the debts of the company and its judgment for plaintiff were clearly erroneous. *Johns v. Leaseway of Ga., Inc.*, 166 Ga. App. 472, 304 S.E.2d 555 (1983).

**Addition of coguarantor held not to alter contract.** — Where the contract contemplates more than one guarantor to be jointly and severally liable and the addition of other guaranties, the terms of the contract as to the original guarantor, would not be altered by adding a coguarantor, as the guarantor remains jointly and severally liable, nor would there be any increase in the risk to the guarantor if a coguarantor were added. *Daprano v. Sherwin-Williams Co.*, 166 Ga. App. 811, 305 S.E.2d 655 (1983).

**Debt unenforceable.** — A writing which left blank both the name of the principal debtor and the name of the person individually guaranteeing the indebtedness was unenforceable. *Sysco Food Servs., Inc. v. Coleman*, 227 Ga. App. 460, 489 S.E.2d 568 (1997).

**Directed verdict error where fact of suretyship does not appear on face of contract.** — It was error to grant a motion for directed verdict when the fact of suretyship did not appear on the face of a contract, and since the question is an evidentiary one, the fact finder should hear all the facts in order to determine the parties' intention. *Growth Properties of Fla., Ltd. v. Wallace*, 168 Ga. App. 893, 310 S.E.2d 715 (1983).

**Explicit, limited contract terms governed.** — Trial court did not err in finding that the guaranties had expired where, under the explicit terms in each guaranty, the guarantors' obligations were to end on the 42nd month of the lease in the event that no default existed, which was indeed the case. *Roswell Festival, L.L.L.P. v. Athens Int'l, Inc.*, 259 Ga. App. 445, 576 S.E.2d 908 (2003).

**Insufficient identification of guarantor.** — Trial court erred in denying a guarantor's motion for summary judgment on grounds that the guaranty was unenforceable by the creditor under the statute of frauds because the guarantor was insufficiently identified in the guaranty; the trial court was not autho-

**Application** (Cont'd)

rized to determine the identity of the guarantor by inference as this entailed consideration of impermissible parol evidence. *Haralson v. John Deere Co.*, 262 Ga. App. 385, 585 S.E.2d 711 (2003).

**Lease holdover.** — Lease guarantor was liable for increased holdover rent since the lease specifically reserved the holdover rent and the guaranty obligated the guarantor; since there was no change in the terms of the lease, the landlord's act of allowing the tenant to remain as a holdover was not a novation of the lease, and the guarantor's reliance on O.C.G.A. § 10-7-3 to refute the

landlord's claim under the guaranty was misplaced because the guarantor's liability was established by the terms of the guaranty. *Hood v. Peck*, 269 Ga. App. 249, 603 S.E.2d 756 (2004).

**Expired performance bond.** — Because the performance bond, on which the plaintiff's sole claim against an insurer was based, expired before the plaintiff asserted the claims, the insurer's motion for summary judgment was granted; the surety's liability could not be extended by implication or interpretation. *Snapping Shoals Elec. Mbrshp. Corp. v. RLI Ins. Corp.*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 36776 (N.D. Ga. Dec. 14, 2005).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 21.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 32, 46 et seq.

**ALR.** — Agreement by principal to pay compound or additional interest as releasing surety, 2 ALR 1569.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 ALR 1262.

Right of obligee in guaranty or surety bond to fill blank as to amount, 48 ALR 741.

Liability of guarantor or of surety for bank deposit as affected by reorganization, merger, or consolidation of bank, 78 ALR 381.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency, 81 ALR 10.

Duration of continuing guaranty, 81 ALR 790.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 ALR 651.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Liability of sureties as affected by actual, constructive, or asserted transfer of property or funds by fiduciary acting in one capacity to himself acting in another capacity, 111 ALR 267.

Labor and materials furnished to subcontractor as within coverage of bond of principal contractor under nonpublic building or construction contract, 128 ALR 938.

Guaranty of payment at maturity as covering expense of collection, 4 ALR2d 138.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR2d 734.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 ALR3d 582.

**10-7-4. Form of contract immaterial.**

The form of the contract is immaterial, provided the fact of suretyship exists. (Orig. Code 1863, § 2128; Code 1868, § 2123; Code 1873, § 2151; Code 1882, § 2151; Civil Code 1895, § 2969; Civil Code 1910, § 3541; Code 1933, § 103-104.)

**Editor's notes.** — In *Massell v. Prudential Ins. Co. of America*, 57 Ga. App. 460, 196 S.E. 115 (1938), it was held that this section,

under which an accommodation endorser was considered merely a surety, must yield to the former Negotiable Instruments Law, Ga.



L. 1924, p. 126, which has in turn been superseded by the commercial paper provisions of the Uniform Commercial Code, O.C.G.A. §§ 11-3-101 through 11-3-805. The UCC provides that a signature in an ambiguous capacity is an endorsement (O.C.G.A. § 11-3-402); that an accommodation party is liable in the capacity in which he has signed, even though the taker knows of the accommodation, where the instrument has been taken for value before it is due (O.C.G.A. § 11-3-415(2)); that oral proof of the accommodation is not admissible against a holder in due course who has no notice of the accommodation to give the accommodation party the benefit of discharges dependent on his character as such, but in other cases is admissible (§ 11-3-415(3)); and that an accommodation party paying the instrument has a right of recourse against the accommodated party (§ 11-3-415(5)), and spells out the liability of makers, drawers, acceptors, endorsers, and guarantors (O.C.G.A. §§ 11-3-413, 11-3-414, and 11-3-416) and how the liability of parties to commercial

paper is discharged (§§ 11-3-601 through 11-3-606).

Many cases involving negotiable instruments were decided under this section before the UCC became effective. See, for example, *Freeman v. Cherry*, 46 Ga. 14 (1872); *Camp v. Simmons*, 62 Ga. 73 (1878), later appeals, 64 Ga. 726, 65 Ga. 674 (1880), 71 Ga. 54 (1883); *Patillo v. Mayer & Glauber*, 70 Ga. 715 (1883); *Hall v. Capital Bank*, 71 Ga. 715 (1883); *Parmelee v. Williams*, 72 Ga. 42 (1883); *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893); *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S.E. 937 (1912); *Bank of LaFayette v. Wardlaw*, 20 Ga. App. 741, 93 S.E. 236 (1917); *Washington Loan & Banking Co. v. Holliday*, 26 Ga. App. 792, 107 S.E. 370, cert. denied, 26 Ga. App. 801 (1921); *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923); *McKibben v. Fourth Nat'l Bank*, 32 Ga. App. 222, 122 S.E. 891 (1924); *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932); *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934).

## JUDICIAL DECISIONS

**Editor's notes.** — Some of the cases noted below were decided before the UCC became effective January 1, 1964, and must be considered in light of the UCC provisions referred to above.

**Form of contract makes no difference.** — Under this section, the form of the contract can make no difference, if the fact of suretyship is made to appear from the evidence and that fact was known to all the parties. *Norris v. Pollard*, 75 Ga. 358 (1885); *Buck v. Bank of Ga.*, 104 Ga. 660, 30 S.E. 872 (1898).

Under this section, the mere language of the contract does not determine the contract's legal character. Courts may disregard formal expressions to ascertain the real intent of the parties. *Schlittler & Johnson v. Deering Harvester Co.*, 3 Ga. App. 86, 59 S.E. 342 (1907).

The form is immaterial if the fact of suretyship exists. *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Formal expressions may be disregarded.** — No particular or formal phrase is required to create a contract of surety. Courts may disregard formal expressions to ascer-

tain the real intent of the parties, and the form of the contract is immaterial. *W.T. Raleigh Co. v. Overstreet*, 71 Ga. App. 873, 32 S.E.2d 574 (1944); *United States v. Ferguson*, 409 F. Supp. 393 (S.D. Ga. 1975), *aff'd*, 529 F.2d 999 (5th Cir. 1976).

**Suretyship may be created by separate instrument.** — While a surety is usually bound with the surety's principal by the same instrument, that is not always true, and one may assume that the relation of suretyship exists even by an instrument separate and distinct from that of the surety's principal and also subsequent in time. *McKibben v. Fourth Nat'l Bank*, 32 Ga. App. 222, 122 S.E. 891 (1924), overruled on other grounds, *Timberlake Grocery Co. v. Cartwright*, 146 Ga. App. 746, 247 S.E.2d 567 (1978); *Griswold v. Wells Aluminum, Moultrie, Inc.*, 156 Ga. App. 19, 274 S.E.2d 7 (1980).

**Written instrument is not required.** — Fact that written instrument may not have been executed between creditor and alleged surety does not preclude existence of a suretyship. *Griswold v. Wells Aluminum, Moultrie, Inc.*, 156 Ga. App. 19, 274 S.E.2d 7 (1980).

**Suretyship may be shown although not on face of instrument.** — Although the fact of suretyship does not appear on the face of a note, the defendants are clearly entitled to show that the defendant's were only sureties by virtue of this section. *Duggan v. Monk*, 5 Ga. App. 206, 62 S.E. 1017 (1908).

Where the evidence offered tended to show that B signed the note purely for the accommodation of S to enable the latter to borrow the money from the bank, that B did not receive a cent of the money, that B had no interest in the loan and that B therefore obligated B to pay S's debt in consideration of the credit extended to S by the bank while S remained bound for the debt, under the provision of this section, B was only a surety for S. *Buck v. Bank of Ga.*, 104 Ga. 660, 30 S.E. 872 (1898).

Under this section, if a negotiable promissory note purports to have been given "for value received," and suit is brought thereon by the payee, the maker may plead and prove by parol that the note was executed without consideration as between the parties, and for the sole purpose of enabling the payee to endorse the note to a third person as collateral security for a debt which the payee desired to contract and which the payee promised to pay without assistance from the maker of the note. Such a note is a mere accommodation paper and, while in the hands of the person to be accommodated, is without consideration and binds nobody, but it would be otherwise if the note were in the hands of an endorsee who received the note for value. *Rheney v. Anderson*, 22 Ga. App. 417, 96 S.E. 217, cert. denied, 22 Ga. App. 803 (1918), later appeal, 152 Ga. 418, 110 S.E. 164 (1921).

One who signs a note with another apparently as a joint principal may in an action by the payee plead and prove that one had no interest in the paper and was only surety for the accommodation of the other and principal signer, and that the plaintiff took the note with knowledge of such facts. *Cheshire v. Hightower*, 33 Ga. App. 793, 127 S.E. 891 (1925).

One who signs a note ostensibly as a coprincipal may in fact be a surety, and this may be established by parol. *Campbell v. Rybert*, 46 Ga. App. 461, 167 S.E. 924 (1933).

**Creditor's reliance on surety's credit does not alter rule.** — The fact that the payee of

the note might have been induced to make the loan on the faith of the surety's credit, rather than upon that of the principal debtor, would not alter the rule. *Cheshire v. Hightower*, 33 Ga. App. 793, 127 S.E. 891 (1925).

**Surety usually bound with principal by same instrument, executed at same time, and on same consideration;** the surety is an original promisor and debtor from the beginning. *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981).

**Surety or guarantor may consent in advance to conduct which would otherwise result in surety's discharge.** *Griswold v. Whetsell*, 157 Ga. App. 800, 278 S.E.2d 753 (1981).

**Cited in** *Freeman v. Cherry*, 46 Ga. 14 (1872); *Camp v. Simmons*, 62 Ga. 73 (1873); *Patillo v. Mayor & Glauber*, 70 Ga. 715 (1883); *Hall v. Capital Bank*, 71 Ga. 715 (1883); *Parmelee v. Williams*, 72 Ga. 42 (1883); *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893); *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S.E. 937 (1912); *Bank of Lafayette v. Wardlaw*, 20 Ga. App. 741, 93 S.E. 236 (1917); *Burkhalter v. Conley*, 24 Ga. App. 256, 100 S.E. 725 (1919); *Washington Loan & Banking Co. v. Holliday*, 26 Ga. App. 792, 107 S.E. 370 (1921); *Meldrim v. Peoples Bank*, 28 Ga. App. 294, 111 S.E. 76 (1922); *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923); *Federal Reserve Bank v. Lane*, 35 Ga. App. 177, 132 S.E. 247 (1926); *Mulling v. Bank of Cobbtown*, 36 Ga. App. 55, 135 S.E. 222 (1926); *Durden v. Youmans*, 37 Ga. App. 182, 139 S.E. 91 (1927); *Holton v. Smith*, 44 Ga. App. 832, 163 S.E. 516 (1932); *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932); *Stapler v. Anderson*, 177 Ga. 434, 170 S.E. 498 (1933); *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934); *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936); *Lamis v. Callianos*, 57 Ga. App. 238, 194 S.E. 923 (1938); *Parker v. Puckett*, 129 Ga. App. 265, 199 S.E.2d 343 (1973); *Yancey Bros. Co. v. Sure Quality Framing Contractors*, 135 Ga. App. 465, 218 S.E.2d 142 (1975); *Motz v. Landmark First Nat'l Bank*, 154 Ga. App. 858, 270 S.E.2d 81 (1980); *Seay's Home Furnishings, Inc. v. Dozier Home Bldrs., Inc.*, 176 Ga. App. 660, 337 S.E.2d 440 (1985); *Cohen v. Capco Sportswear, Inc.*, 225 Ga. App. 211, 483 S.E.2d 634 (1997); *Capital Color Printing, Inc. v. Ahern*, 291 Ga. App. 101, 661 S.E.2d 578 (2008).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 11 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 29, 30.

**ALR.** — Right of accommodation party to bill or note to revoke his signature, 22 ALR 1348.

Ignorance or mistake as to character of

instrument signed as affecting liability of surety or guarantor, 66 ALR 312.

Question, as one of law for court or of fact for jury, whether oral promise was an original one or was a collateral promise to answer for the debt, default, or miscarriage of another, 20 ALR2d 246.

## ARTICLE 2

## RELATIVE RIGHTS OF CREDITOR AND SURETY

**Cross references.** — Discharge of liability for fraud on principal, 3 ALR 868.

Discharge of party on negotiable instrument by act or agreement which would discharge simple contract to pay money, § 11-3-601.

## JUDICIAL DECISIONS

**Failure of a cosurety to disclose** the true nature and purport of the note at the time of endorsement is insufficient to release an accommodation endorser who did not read

the note but seeks to avoid liability on the ground that the endorsement was obtained by fraud and deceit. *Hollinshead v. Virginia Nat'l Bank*, 104 Ga. 250, 30 S.E. 728 (1898).

## RESEARCH REFERENCES

**ALR.** — Right of surety to avoid contract for fraud on principal, 3 ALR 868.

Failure to pay premium on indemnity bond as terminating same, 45 ALR 617.

Duty of employer to notify surety that employee was dilatory, slow, or negligent in settling account, 60 ALR 160.

Liability of sureties on bond of public officer for acts or defaults occurring after termination of office or principal's incumbency, 81 ALR 10.

Right of construction contractor who does not comply strictly with contract as against guarantor or surety for payment, 81 ALR 1211.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 ALR 1014.

Right of surety on fidelity bond to allowance or refund where obligee makes recov-

ery from principal or other sources, 126 ALR 946.

Joinder in one action of sureties on different bonds relating to same matter, 137 ALR 1044.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 ALR2d 1122.

Application of payments as between debts for which a surety or guaranty is bound and those for which he is not, 57 ALR2d 855.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 ALR2d 899.

Creditor's duty of disclosure to surety or guarantor after inception of suretyship or guaranty, 63 ALR4th 678.

Computation of net "loss" for which fidelity insurer is liable, 5 ALR5th 132.

## 10-7-20. Effect of release of or compounding with surety.

The creditor may release or compound with the surety without releasing the principal, but the release of or compounding with one surety shall discharge a cosurety. (Orig. Code 1863, § 2129; Code 1868, § 2124; Code



1873, § 2152; Code 1882, § 2152; Civil Code 1895, § 2970; Civil Code 1910, § 3542; Code 1933, § 103-201.)

**Cross references.** — Effect of commercial paper article of Uniform Commercial Code, § 10-7-27.

### JUDICIAL DECISIONS

**“Compound” defined.** — To “compound” is to compromise or make a composition whereby a creditor discharges the creditor’s debtor on payment of a smaller sum than that actually owing. *Williams-Thompson Co. v. Williams*, 10 Ga. App. 251, 73 S.E. 409 (1912) (no compounding shown).

**Foreign statute denying release conflicts with policy of this state.** — Tennessee statute providing that the release of a cosurety or coobligor does not release the other surety or obligor when the parties, other than those not released, stipulate that such other surety or obligor was not released, was contrary to the public policy of this state as expressed by former Code 1933, §§ 20-910 and 103-201 (see O.C.G.A. §§ 10-7-20 and 13-4-80), and will not be enforced. *Kent v. Hair*, 60 Ga. App. 652, 4 S.E.2d 703 (1939).

**Section only applies to release without consent of cosureties.** — Where the novation of a contract by the release of one surety and the substitution of another was done with the consent of the sureties, derived from the provisions of the contract of suretyship, the provision of this section for the discharge of cosureties by the release of a surety must be construed, in pari materia with former Code 1933, § 103-202, so as to apply only when such release is done without the consent of such cosurety or co-sureties. *Overcash v. First Nat’l Bank*, 115 Ga. App. 499, 155 S.E.2d 32 (1967).

**Unenforceable attempt to release surety does not release cosurety.** — The release of or compounding with one surety discharges

a cosurety under this section, but an attempt to release one of the sureties does not have this effect where the attempted release is unenforceable for lack of consideration. *Williams-Thompson Co. v. Williams*, 10 Ga. App. 251, 73 S.E. 409 (1912).

**Individually liable guarantors not cosureties.** — Nonsettling guarantors of promissory notes who were individually, not jointly, liable were not cosureties under O.C.G.A. § 10-7-20; thus, they were not discharged by plaintiff’s acceptance from other guarantors of less than the total sum owed under the notes. Any novation by virtue of the settlement agreement would not operate to release the nonsettling guarantors from their individual limited liabilities. *Marret v. Scott*, 212 Ga. App. 427, 441 S.E.2d 902 (1994).

**Waiver of defense by terms of guaranty documents.** — Even if a corporation president was released from the president’s personal guarantee of a corporate loan, O.C.G.A. § 10-7-20 did not apply to release co-guarantors from liability where, by virtue of the terms of their guarantee documents, the guarantors had expressly waived any defense the guarantors might have which was related to the guarantors’ claim under § 10-7-20. *Baby Days, Inc. v. Bank of Adairsville*, 218 Ga. App. 752, 463 S.E.2d 171 (1995).

**Cited in** *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935); *Hurt v. Hartford Fire Ins. Co.*, 122 Ga. App. 675, 178 S.E.2d 342 (1970); *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 69 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 149 et seq.

**ALR.** — Release of payee from warranty

constituting a part of the consideration for a note as releasing a surety, 7 ALR 1605.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838, 43 ALR 589.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 ALR 477.

Construction and effect of provision in bond purporting to protect contractee in building contract against release of surety, 77 ALR 229.

### 10-7-21. "Novation" defined; effect on surety's liability.

Any change in the nature or terms of a contract is called a "novation"; such novation, without the consent of the surety, discharges him. (Orig. Code 1863, § 2130; Code 1868, § 2125; Code 1873, § 2153; Code 1882, § 2153; Civil Code 1895, § 2971; Civil Code 1910, § 3543; Code 1933, § 103-202.)

**Editor's notes.** — It was held in some cases, prior to 1981, that this section did not apply to compensated sureties, as they were treated as guarantors under O.C.G.A. § 10-7-1 as it then read. See, for example, *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976); *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978), overruling *Little Rock Furn. Co. v. Jones & Co.*, 13 Ga. App. 502, 79 S.E. 375 (1913), and *Fairmont Creamery Co. v. Collier*, 21 Ga. App. 87, 94

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

S.E. 56 (1917). Other cases stated that this section did apply to contracts of guaranty. See, for example, *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975); *Gilbert v. Cobb Exch. Bank*, 140 Ga. App. 514, 231 S.E.2d 508 (1976); *Ricks v. United States*, 434 F. Supp. 1262 (S.D. Ga. 1976). Then in 1981, Ga. L. 1981, p. 870, § 1, amended O.C.G.A. § 10-7-1 to abolish the distinction between contracts of suretyship and guaranty. See the Editor's note to O.C.G.A. § 10-7-1.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### NOVATION

##### CONSENT

##### APPLICATION

##### EXTENSION

### General Consideration

**Section strictly construed.** — Georgia courts have given this section strict enforcement. *Oellerich v. First Fed. Sav. & Loan Ass'n*, 552 F.2d 1109 (5th Cir. 1977).

**Liability of a surety cannot be extended beyond the actual terms of surety's engagement** and will be extinguished by any act or omission which alters the terms of the contract, unless it is done with the surety's consent. *Washington Loan & Banking Co. v. Holliday*, 26 Ga. App. 792, 107 S.E. 370, cert. denied, 26 Ga. App. 801 (1921). See § 10-7-3.

**Cited in** *Richardson v. Allen*, 74 Ga. 719 (1885); *McMillan v. Benfield*, 159 Ga. 457, 126 S.E. 246 (1924); *Payne v. Fourth Nat'l Bank*, 38 Ga. App. 41, 142 S.E. 310 (1928); *Bank of Norman Park v. Colquitt County*, 172 Ga. 109, 157 S.E. 469 (1931); *Smith v. Georgia Battery Co.*, 46 Ga. App. 840, 169 S.E. 381 (1933); *Burgess v. Ohio Nat'l Life Ins. Co.*, 48 Ga. App. 260, 172 S.E. 676 (1934); *American Sur. Co. v. Garber*, 114 Ga. App. 532, 151 S.E.2d 887 (1966); *Overcash v. First Nat'l Bank*, 115 Ga. App. 499, 155 S.E.2d 32 (1967); *Palmer v. Southern Mechanical Co.*, 117 Ga. App. 672, 161 S.E.2d 413 (1968); *Overcash v. First Nat'l Bank*, 117

**General Consideration** (Cont'd)

Ga. App. 818, 162 S.E.2d 210 (1968); *Hurt v. Hartford Fire Ins. Co.*, 122 Ga. App. 675, 178 S.E.2d 342 (1970); *Farmer v. Peoples Am. Bank*, 132 Ga. App. 751, 209 S.E.2d 80 (1974); *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976); *Jackson v. College Park Supply Co.*, 140 Ga. App. 134, 230 S.E.2d 329 (1976); *Gilbert v. Cobb Exch. Bank*, 140 Ga. App. 514, 231 S.E.2d 508 (1976); *Ricks v. United States*, 434 F. Supp. 1262 (S.D. Ga. 1976); *Browning v. National Bank*, 143 Ga. App. 278, 238 S.E.2d 275 (1977); *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978); *Walter E. Heller & Co. v. Aetna Bus. Credit, Inc.*, 158 Ga. App. 249, 280 S.E.2d 144 (1981); *White v. Phillips*, 679 F.2d 373 (5th Cir. 1982); *Rice v. Georgia R.R. Bank & Trust Co.*, 183 Ga. App. 302, 358 S.E.2d 882 (1987); *Howell Mill/Collier Assocs. v. Gonzales*, 186 Ga. App. 909, 368 S.E.2d 831 (1988); *South Atlanta Assocs. v. Strelzik*, 192 Ga. App. 574, 385 S.E.2d 439 (1989); *Regan v. United States Small Bus. Admin.*, 729 F. Supp. 1339 (S.D. Ga. 1990); *First Union Nat'l Bank v. Boykin*, 216 Ga. App. 732, 455 S.E.2d 406 (1995).

**Novation**

**Novation discharges surety.** — Contract of suretyship was one of strict law under former Code 1863, § 2127, and any change of the nature or terms of the contract, without the consent of the surety, discharges the surety. *Camp v. Howell*, 37 Ga. 312 (1867).

A change in the nature or terms of the contract is a novation, and such a novation, without the consent of the surety discharges the surety from liability. *Smith v. Georgia Battery Co.*, 46 Ga. App. 840, 169 S.E. 381 (1933) (change in terms of bond after surety signed).

Any change in the terms of the contract is considered a novation and discharges the surety in the absence of the latter's consent. The surety is also discharged by any act of the creditor which injures the surety or increases the surety's risk. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

Any novation without the consent of the surety, or increase in risk, discharges the

surety. *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

Tenant and landlord changed the terms of lease without the consent of the guarantor on the lease, therefore the guarantor was discharged from its obligations; the amendments, which removed the landlord's obligation to provide additional access to the property and waived the landlord's liability for leasing portions of the property to competing businesses, were material changes to the lease. *SuperValu, Inc. v. KR Douglasville, LLC*, 272 Ga. App. 710, 613 S.E.2d 154 (2005).

In a suit to recover on a note, the trial court properly denied a creditor's motion for summary judgment, and granted summary judgment to the guarantor of the note, releasing the guarantor from the guaranty the guarantor entered into with the creditor's debtor, as the execution of an escrow agreement between the creditor and the debtor, which materially changed the debtor's obligations thereunder without the guarantor's consent, amounted to a novation, releasing the guarantor from any obligation under the note. *Thomas-Sears v. Morris*, 278 Ga. App. 152, 628 S.E.2d 241 (2006).

**Change must be material.** — Any material alteration in the original contract, without the knowledge or consent of the guarantor thereof, will relieve the guarantor from the guaranty. *H.C. Whitmer Co. v. Sheffield*, 51 Ga. App. 623, 181 S.E. 119 (1935).

A surety will not be discharged from the contract unless the change or alteration in the contract is material. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

**Changes in lease agreed on in advance by guarantor.** — Increased holdover rent was reserved in a commercial lease, and since there was no change in the terms of the lease, the landlord's act of allowing the corporation to remain as a tenant holding over was not a novation; in any event, the guaranty gave the landlord the authority to change the amount, time, or manner of payment of rent and to amend, modify, change or supplement the lease, and thus, the guarantor consented in advance to changes in the lease. *Hood v. Peck*, 269 Ga. App. 249, 603 S.E.2d 756 (2004).

**One who consents to a novation is not discharged** as a surety. If notes are accepted



by a creditor as security and are signed by the surety, the notes are not "without the consent of the surety" as contemplated by this section. *Mauldin v. Lowe's of Macon, Inc.*, 146 Ga. App. 539, 246 S.E.2d 726 (1978).

If a party makes a contract in such a manner as is authorized by law, the party has a right to object to being bound by any other, and this elementary general rule has particular application to material changes in contractual obligations of sureties when made without their consent, and their liability is thereby extinguished. *Hamby v. Crisp*, 48 Ga. App. 418, 172 S.E. 842 (1934).

**Individually liable guarantors not released by novation.** — Nonsettling guarantors of promissory notes who were individually, not jointly, liable were not cosureties under O.C.G.A. § 10-7-21; thus, they were not discharged by plaintiff's acceptance from other guarantors of less than the total sum owed under the notes. Any novation by virtue of the settlement agreement would not operate to release the nonsettling guarantors from their individual limited liabilities. *Marret v. Scott*, 212 Ga. App. 427, 441 S.E.2d 902 (1994).

**No evidence of novation to discharge surety.** — Given that the broad language of a guaranty obligated the guarantor to the bank, absolutely and unconditionally guaranteeing the payment and performance of each and every debt that the debtor would owe, and because no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation, the guarantor remained obligated under the guaranty to the bank. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

**Change which benefits surety.** — The rule enunciated in this section will not be altered by the fact that the change in the contract, which was made without the knowledge or consent of the surety, nevertheless inured to the benefit of the principal and the surety. If the change is made without the knowledge or consent of the surety, the surety's complete reply is non haec in foedera veni. *Little Rock Furn. Co. v. Jones & Co.*, 13 Ga. App. 502, 79 S.E. 375 (1913), overruled on another point, *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316

(1978); *Fairmont Creamery Co. v. Collier*, 21 Ga. App. 87, 94 S.E. 56 (1917), overruled on another point, *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, aff'd, 241 Ga. 460, 246 S.E.2d 316 (1978).

Any change in the terms of a contract by which a new and materially different contract is created constitutes a novation and, when made without the consent of the surety, operates to discharge the latter; this is true even though such newly created contract is more favorable to the surety than the contract as originally executed. *Paulk v. Williams*, 28 Ga. App. 183, 110 S.E. 632 (1922).

A surety who has not consented to a change in a bond is entitled to claim a discharge, regardless of how the change affected the surety, and even if the change inured to the surety's benefit. *Smith v. Georgia Battery Co.*, 46 Ga. App. 840, 169 S.E. 381 (1933).

**Change which does not injure surety.** — A surety is discharged from the terms of the contract, even though the surety is not injured by the contract change. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

If there is a change in the nature of the contract and it is made without the knowledge or consent of the surety, a release will result, regardless of injury. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

Any change, whether to the surety's benefit or detriment, is a novation which discharges the surety. *Upshaw v. First State Bank*, 244 Ga. 433, 260 S.E.2d 483 (1979).

**Release of parties to instrument secured discharges surety.** — By virtue of this section, when a surety or accommodation endorser signs a note, the consideration of which is that the note shall be held by the bank where it is negotiated as collateral security for another note or draft due the bank, and the bank, without the knowledge and consent of the surety, changes the contract by releasing the acceptor and endorser of that other note or draft, the security or accommodation endorser of the collateral note is discharged. *Stallings v. Bank of Americus*, 59 Ga. 701 (1877).

**Change in terms of payment to creditor discharges surety.** — A change by the obligee and principal in the terms of payments to

**Novation** (Cont'd)

the contractor from that provided in the building contract operates to discharge the surety. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

**Claim for interest not novation.** — Creditor's claim for interest in an action against the debtor and personal guarantor on an open account agreement did not result in a novation of the agreement. *Charles S. Martin Distrib. Co. v. Berhardt Furn. Co.*, 213 Ga. App. 481, 445 S.E.2d 297 (1994).

**Increase in rate of interest.** — The giving of a new note for a usurious increase in interest, and part payment thereof, in consideration of 12 months delay to sue, discharges the surety on the original note. *Camp v. Howell*, 37 Ga. 312 (1867).

Under former Civil Code 1885, §§ 2968 and 2971, if, after a promissory note payable to a named payee or bearer has been signed by one as surety, the principal, before it comes into the hands of one who thereafter receives it as bearer in the course of negotiation before due, so alters it as to increase the rate of interest agreed to be paid from 8 to 12 percent, such note is by such alteration rendered void as to such surety; and this is true even though, at the time it comes into the hands of such bearer, one has no notice of the alteration by the principal. *Hill v. O'Niell*, 101 Ga. 832, 28 S.E. 996 (1897).

Comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest since the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. *Bank of Terrell v. Webb*, 177 Ga. App. 715, 341 S.E.2d 258 (1986).

**Change in payment terms, costs and expenses resulted in novation.** — New agreement was a novation under O.C.G.A. § 10-7-21 as the agreement changed the payment terms of the original contract by adding the requirement of late charges on unpaid balances, and costs and expenses of collection, including attorney fees; therefore, the novation discharged the guarantor. *Bldr. Marts of Am., Inc. v. Gilbert*, 257 Ga. App. 763, 572 S.E.2d 88 (2002).

**There is no novation if there is no new consideration.** *Sens v. Decatur Fed. Sav. &*

*Loan Ass'n*, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

**Consent**

**Implied consent makes change immaterial.** — Any change or alteration made in an instrument after the instrument's execution which is impliedly authorized by the signers thereof, and which merely expresses what would otherwise be supplied by intentment, is immaterial, and will not discharge one signing as surety. *Watkins Medical Co. v. Harrison*, 33 Ga. App. 585, 126 S.E. 909 (1925).

**Surety may consent in advance** to a course of conduct which would otherwise result in the surety's discharge. *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

A surety is not discharged by any act of the creditor or obligee to which the surety consents. Consent may be given in advance, as at the time the contract of suretyship is entered into. *Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc.*, 155 Ga. App. 257, 270 S.E.2d 696 (1980).

A guarantor may consent in advance to conduct which would otherwise result in statutory discharge. *Regan v. United States Small Bus. Admin.*, 926 F.2d 1078 (11th Cir. 1991).

If the language of a guaranty specifically contemplated an increase in the obligor's debt and the creation of new obligations, and included waivers of any "legal or equitable discharge" and of any defense based upon an increase in risk, the protections O.C.G.A. §§ 10-7-21 and 10-7-22 were waived. *Underwood v. NationsBanc Real Estate Serv., Inc.*, 221 Ga. App. 351, 471 S.E.2d 291 (1996).

By assenting in advance to a waiver of all legal and equitable defenses, the guarantor was foreclosed from asserting that the guarantor was discharged under O.C.G.A. § 10-7-21 or O.C.G.A. § 10-7-22. *Ramirez v. Golden*, 223 Ga. App. 610, 478 S.E.2d 430 (1996).

Alleged guarantor was not discharged from the obligations of a personal guarantee under O.C.G.A. §§ 10-7-21 and 10-7-22 because, although a subsequent agreement changed the terms of the original guaranty by granting an extension of time regarding the terms of purchase from a company and



acted as a novation, the alleged guarantor consented to those changes. *Staten v. Beaulieu Group, LLC*, 278 Ga. App. 179, 628 S.E.2d 614 (2006).

**Disregard of condition of surety's consent makes section apply.** — If a surety authorizes the substitution of the new bill on a condition useless to himself and the condition is disregarded, the surety may claim the principle announced in this section. *Central Ga. Bank v. Cleveland Nat'l Bank*, 59 Ga. 667 (1877).

**Unconsented increase in risk is an independent ground for discharge** of a surety. *Upshaw v. First State Bank*, 244 Ga. 433, 260 S.E.2d 483 (1979).

### Application

**Rules apply to negotiable instruments.** — An agreement (novation) which would discharge the surety or guarantor of a simple contract for the payment of money will also discharge one who is a guarantor or surety on a negotiable instrument. *Sewell v. Akins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

**Official bonds.** — Where, after the execution of the public printer's performance bond, the legislature by resolution authorized the treasurer (now director of the Office of Treasury and Fiscal Services) to advance to the printer a sum in part payment for the public printing of the session then pending, this was such a novation of the contract as discharged the sureties under this section, if done without the surety's consent. *Walsh v. Colquitt*, 64 Ga. 740 (1880).

**Taking of a promissory note for an antecedent liability** does not constitute a payment of the debt in the absence of an agreement to that effect, or evidence that such was the intention of the parties. *Sulter v. Citizens Bank & Trust Co.*, 51 Ga. App. 798, 181 S.E. 694 (1935).

**Minimal intention to treat former contract as no longer binding must be shown.** — To do away with the stipulations in a contract, the circumstances must show a mutual intention of the parties to treat the stipulations as no longer binding and must be such as, in law, to make practically a new agreement. *Pittsburgh Plate Glass Co. v. Jarrett*, 42 F. Supp. 723 (M.D. Ga. 1942), modified, 131 F.2d 674 (5th Cir. 1942).

**Promissory note evidence of settlement of accounts.** — Generally, the execution of a promissory note is prima facie evidence of the full settlement of all accounts up to the date of the note. A compromise, or mutual accord and satisfaction, is binding on both parties. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

Under the facts, the taking of a demand promissory note for a preexisting liability which was covered by the guaranty did not constitute a payment of the debt and thereby release the guarantor. *Sulter v. Citizens Bank & Trust Co.*, 51 Ga. App. 798, 181 S.E. 694 (1935).

**Accord and satisfaction is effected by each party relinquishing claim.** — Where each of two persons relinquishes a claim against the other, or each discontinues an action against the other, a mutual accord and satisfaction is effected, regardless of the respective amounts involved; and this bars any further recourse on the part of either as to such claims. Any rights of the parties must now be based upon the new agreement. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

**New note for less than old is presumptive evidence of settlement.** — A new note for a less sum than the old note, given in renewal thereof, is presumptive evidence that all differences between the parties were adjusted and settled when such new note was given. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

**Other agreement must be clearly shown.** — It must be upon clear and satisfactory evidence that both parties agreed and intended that the settlement, made when the new note was given, was not final and that any defense which could have been made to the old note might still be made to the new one. *Collier v. Casey*, 59 Ga. App. 627, 1 S.E.2d 776 (1939).

**New note given for old with different terms is novation.** — When a note was given by principal and security during the Civil War which, at the close of the war, was scaled to a gold standard, a new note given by a principal alone for the amount thus scaled, and accepted by the payee in the discharge of the first note, was a novation of the original contract under former Code 1868, §§ 2125, 2828. *Hamilton v. Willingham*, 45 Ga. 500 (1872).

**Substituting absolute deed for mortgage.** — An absolute deed conveying land as secu-



**Application (Cont'd)**

rity for a debt is a security of a higher nature than a mortgage for the same debt on the same premises, and when the mortgage is entered satisfied and surrendered up because of the execution of such deed, the transaction operates as a novation and amounts to a merger. *Bostwick v. Felder*, 73 Ga. App. 118, 35 S.E.2d 783 (1945).

**Changing the date from which a promissory note draws interest** by erasing the words "from date" and substituting therefor the words "from maturity" is a material alteration creating a new contract and constitutes a novation. *Paulk v. Williams*, 28 Ga. App. 183, 110 S.E. 632 (1922).

**Renewing note at same rate.** — By virtue of this section, the mere renewal of a note at the same rate of interest is not a novation. *Partridge v. Williams' Sons*, 72 Ga. 807 (1884).

**New note to ward and security deed conveying same property conveyed to guardian.** — If a guardian holding a note secured by a deed received, for the benefit of two minor wards, payment from the debtor of a sum equal to the share of one of the wards, and settled with such ward at majority, and thereafter the debtor executed a new note and security deed to the other ward at majority, the new note representing the ward's share of the original indebtedness and the security deed conveying the same property as the original deed to the guardian, it was held that the new note and security deed did not amount to a novation. *Kelley v. Spivey*, 182 Ga. 507, 185 S.E. 783 (1936).

**Failure to enter into contract not relied upon by surety.** — The fact that no contract was ultimately entered into between the grantor and grantee in the security deed executed contemporaneously with notes endorsed by a surety does not constitute a fraud upon the surety so as to relieve the surety of liability on the notes; nor does such fact constitute a novation of the notes so as to relieve the surety of the surety's liability thereon, for if it does not appear that the surety relied upon the existence of such contract as an inducement to sign as surety, there can be no fraud, nor can the failure to enter into the contract, which was cancellable at any time solely by the grantee in the security deed (the payee in the notes), con-

stitute a novation of the notes. *Southern Cotton Oil Co. v. Hammond*, 92 Ga. App. 11, 87 S.E.2d 426 (1955).

**Surety will not be released by fraudulent renewal note disaffirmed by creditor.** — While under former Civil Code 1910, §§ 3543 and 3544 a surety will be discharged by a novation changing the nature or terms of the surety's contract without the surety's consent, and therefore the acceptance by a payee bank, without the agreement or consent of the surety, of a new note in renewal or payment of the original note signed by the surety will discharge the surety from liability, such an acceptance by the payee bank, when induced by the actual fraud of the maker in presenting the renewal instrument with the signature of the surety forged thereon, and without knowledge or reasonable ground to suspect, on the part of the bank, that the signature was in fact a forgery, will not release the surety, if it appeared that upon discovery of the fraud of the maker the bank promptly disaffirmed the bank's previous acceptance of the renewal note by regaining possession of the original note and suing thereon. *Biddy v. People's Bank*, 29 Ga. App. 580, 116 S.E. 222 (1923).

**Substituting note for account.** — By virtue of this section, a guarantor is not released by reason of the mere fact that an account which the guarantor guaranteed has been reduced to a note, when it appears the account was for goods furnished "in pursuance of the contract of guaranty" and it appears that the note represents the same amount and stands in lieu of the account. *Kalmon v. Scarboro*, 11 Ga. App. 547, 75 S.E. 846 (1912), later appeal, 13 Ga. App. 28, 78 S.E. 686 (1913) (see O.C.G.A. § 10-7-21).

The substitution of a promissory note for an original account indebtedness, with the inclusion in the note of an extended time for payment, a higher face amount reflecting accrued interest, and a provision authorizing the recovery of attorney fees in the event of collection by an attorney, did not result in either a novation of the contract nor an increased risk and did not discharge the guarantors of the prior guaranty agreement from liability. *Columbia Nitrogen Corp. v. Mason*, 171 Ga. App. 685, 320 S.E.2d 838 (1984).

**Contract simply giving creditor additional security.** — Where a second contract simply

gave the seller additional security for the payment of the debt, was not inconsistent with the first contract, and did not increase the risk of the surety, the second contract was not a novation of the first within the meaning of former Code 1933, § 103-202 and did not release the surety under the provisions of either § 103-202 or former Code 1933, § 103-203. *W.T. Raleigh Co. v. Overstreet*, 71 Ga. App. 873, 32 S.E.2d 574 (1944).

**Failure of creditor to record lien.** — Where the defendant had signed the note as surety, and this fact was known to the plaintiffs when they accepted the note, the failure of the plaintiffs to record the retention of title contract within the time required by law did not discharge the surety. *La Boon v. Wright & Locklin*, 42 Ga. App. 275, 155 S.E. 770 (1930).

**Grantor whose debt is assumed is surety if creditor assents to assumption.** — Where A, the mortgagor, was originally bound as principal to B, the mortgagee, and C, the grantee, assumed the debt to B, as between A and C, the latter assumed the position of principal debtor and the former was changed to a mere surety. The consideration for C's assumption of the debt was the property conveyed by A to C. This change of position would not affect B, the mortgagee, if B did not assent to the change. *Stapler v. Anderson*, 177 Ga. 434, 170 S.E. 498, answer conformed to, 47 Ga. App. 379, 170 S.E. 501 (1933).

**New obligation from grantee to creditor is recognition of suretyship.** — When a grantee in a sales agreement, as part of the consideration thereof, assumes and agrees to pay an outstanding indebtedness against the property conveyed, the grantee takes upon the grantee the burden of the debt secured by the deed, and, as between himself and the grantor, the grantee becomes the principal and the latter merely a surety for payment of the debt. While the holder of the security deed is not bound by such an agreement unless the holder consents to it, when, with knowledge of such an agreement, the holder enters into an independent stipulation on the holder's own account with the grantee whereby the holder obtains a new obligation running directly to the holder on the footing that the grantee becomes the principal, then, in the absence of special conditions,

the holder is held to have recognized and become bound by the relation of principal and surety existing between the maker of the surety deed and the grantee. *Zellner v. Hall*, 210 Ga. 504, 80 S.E.2d 787 (1954), later appeal, 211 Ga. 572, 87 S.E.2d 395 (1955).

**Extension of mortgage without consent of grantor discharges grantor.** — A purchased land subject to a mortgage which A assumed, and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A. It was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

**Grant must consent to extension where suretyship was not created by mutual agreement of all parties.** — In the absence of a mutual agreement of the grantor, the grantee, and the holder of the encumbrance to that effect, the relation of principal and surety did not exist between the grantee and grantor, and the latter was not discharged from liability by an agreement between the other parties to extend the time of payment. *Alsobrook v. Taylor*, 181 Ga. 10, 181 S.E. 182 (1935).

**Reduction in interest rate does not release grantor who remains principal.** — Change in the rate of interest called for by contract from eight to six percent at the time of the sale of the premises to grantees, when grantor remained bound to holder as principal debtor, would not operate to relieve the grantor from responsibility on the grantor's note and deed to secure debt. *Zellner v. Hall*, 211 Ga. 572, 87 S.E.2d 395 (1955).

**Creditor's agreement to allow delay in payment** is not an additional consideration, as debtor's promise to pay debt already due creates no additional obligation. *Sens v. Decatur Fed. Sav. & Loan Ass'n*, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

**Payment of late charges or reinstatement fees authorized by original contract** does not furnish new consideration. *Sens v. Decatur Fed. Sav. & Loan Ass'n*, 159 Ga. App. 767, 285 S.E.2d 226 (1981).

**Promise to pay usury does not discharge surety.** — A mere promise to pay usury is



**Application (Cont'd)**

void, and the surety is not thereby discharged. *Lewis, Leonard & Co. v. Brown*, 89 Ga. 115, 14 S.E. 881 (1892).

**Parol contract does not release surety where statute of frauds applies.** — Where a written contract which must, under the statute of frauds, be in writing has been signed by a surety for one of the contracting parties, the surety will not be released from liability by reason of the making of a subsequent parol contract between the principals which does not become binding by reason of complete performance or otherwise. *Willis v. Fields*, 132 Ga. 242, 63 S.E. 828 (1909).

**Parol evidence inadmissible to show novation under statute of frauds.** — A contract which by law is required to be in writing cannot be changed by parol evidence so as to substitute therefor, by novation, a contract which is also required by law to be in writing. Evidence of a parol agreement is inadmissible to establish the novation of a contract by law required to be in writing. *Ver Nooy v. Pitner*, 17 Ga. App. 229, 86 S.E. 456 (1915).

**When section should be charged.** — Where Civil Code 1895, §§ 2968, 2971, and 2972, defining a contract of suretyship and the rights of a surety, were pertinent to the issues involved, the statutes should have been given in a charge to the jury on timely written request, or even without request. *Haigler v. Adams*, 5 Ga. App. 637, 63 S.E. 715 (1909).

**If the arrangement for the use of a pledged savings account did not deviate from the terms of the subject note as agreed to by plaintiffs, no issue concerning the discharge defenses remained for jury determination, warranting summary judgment.** *Cohen v. Northside Bank & Trust Co.*, 207 Ga. App. 536, 428 S.E.2d 354 (1993).

**Extension**

**Extension of time for payment.** — If after the maturity of a note the debtor pays to the creditor a sum of money representing advance interest upon the principal at the rate of 8 percent per annum for a definite period of time, in consideration of a promise by the creditor to extend the time of payment of the principal, this agreement, although not in writing, constitutes a valid contract between the parties, and, when made without

the consent of the surety upon the note, operates to release and discharge the latter by virtue of this section. *Lewis v. Citizens' & S. Bank*, 31 Ga. App. 597, 121 S.E. 524 (1924), *aff'd*, 159 Ga. 551, 126 S.E. 392 (1925).

If a valid and binding extension is granted to the principal debtor without the consent of the surety, the latter is discharged. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

A creditor of a partnership who has notice of the dissolution and of the agreement by the continuing partner to assume the debts of the firm is bound to accord to the retiring partner all the rights of a surety. Hence, if, without the latter's knowledge or consent, the creditor, upon a sufficient consideration, extends the time of payment of the firm indebtedness, the retiring partner is released from the indebtedness, and the creditor must thereafter look only to the firm assets and to the individual assets of the continuing partner. *Grigg v. Empire State Chem. Co.*, 17 Ga. App. 385, 87 S.E. 149 (1915).

Where the creditor had, for a consideration, extended the time of payment of the note signed by the surety, and in addition thereto had calculated, and undertook to and did collect, usurious interest from the principal, and by reason of such payment did indulge the principal debtor and extend the payment of the note, all of which, according to the evidence, was without the knowledge or consent of the surety, the surety was discharged by virtue of this section. *Pickett v. Brooke*, 24 Ga. App. 651, 101 S.E. 814, *cert. denied*, 24 Ga. App. 817 (1920).

**Period of extension must be fixed by agreement.** — In order to discharge a surety by an extension of time to the principal, not only must there be an agreement for the extension, but the proof must show that the indulgence was extended for a definite period fixed by the agreement. *Bunn v. Commercial Bank*, 98 Ga. 647, 26 S.E. 63 (1896); *Ver Nooy v. Pitner*, 17 Ga. App. 229, 86 S.E. 456 (1915).

If a signer of a note was in fact a surety only and the payee, under a valid agreement with the principal and without the consent of the surety, extends the time of maturity as fixed by the obligation, a release of the



surety will result, but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. *Duckett v. Martin*, 23 Ga. App. 630, 99 S.E. 151 (1919); *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937).

**Taking demand note is not extension of time.** — Taking of a demand note was not such an extension of time as would release a guarantor because a demand note is instantly due and the moment delivered can

be sued upon. *Sulter v. Citizens Bank & Trust Co.*, 51 Ga. App. 798, 181 S.E. 694 (1935).

**Creditor may rescind extension obtained by fraud.** — Under former Code 1882, §§ 2153 and 2154, if the maker of a note induced the payee to extend the time of payment, by fraudulent representations, upon the discovery of such fraud, the creditor can rescind the agreement, but if the creditor failed so to do and retained the benefits of the transaction, this will operate to discharge a surety or accommodation endorser. *Burnlap v. Robertson*, 75 Ga. 689 (1885).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 35.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 95 et seq.

**ALR.** — Consenting to continuance or extension of time in action as releasing surety, 7 ALR 376.

Extension of time or other modification of original contract as releasing indemnitor of surety or guarantor, 43 ALR 1368.

Liability of surety or guarantor for partnership in respect of transactions or defaults subsequent to change in personnel of the partnership, 45 ALR 1426.

Discharge of accommodation maker or surety by extension of time or release of collateral, under Negotiable Instruments Law, 48 ALR 715; 65 ALR 1425; 108 ALR 1088; 2 ALR2d 260.

Taking of demand note in renewal as releasing surety or endorser, 48 ALR 1222.

Acceptance of interest in advance as consideration for, or evidence of, an extension of time which will release a guarantor, surety, or endorser, 59 ALR 988.

Liability of grantee assuming mortgage debt to grantor, 76 ALR 1191; 97 ALR 1076.

Liability of guarantor of or surety for bank deposit as affected by reorganization, merger, or consolidation of bank, 78 ALR 381.

Creditor's knowledge of, or consent to, assumption by third person of debtor's obligation as release of original debtor or extinguishment of original debt essential to novation, 87 ALR 281.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 ALR 651.

Lessee as surety for rent after assignment; and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 ALR 1238.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Rule as to discharge of surety by subsequent modification of obligation without his consent as applicable to surety on bond for discharge of lien, 102 ALR 764.

Failure of accommodation maker or endorser to disaffirm transaction, or his continued recognition of note after learning of its use for purpose other than intended, as ratification of, or estoppel to assert, the diversion, 105 ALR 437.

Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 ALR 964.

Remission or waiver of part of principal's obligation as releasing surety or guarantor, 121 ALR 1014.

Necessity of proof of original obligor's consent to, or ratification of, third person's assumption of obligation, in order to effect a novation, 124 ALR 1498.

Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 ALR 10.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Surety's liability as affected by the addition, without surety's knowledge or consent, of the personal obligation of a third person, 144 ALR 1266.

Creditor's acceptance of obligation of third person as constituting novation, 61 ALR2d 755.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's

note or other paper payable at an extended date, 74 ALR2d 734.

Liability of lessee's guarantor or surety beyond the original period fixed by lease, 10 ALR3d 582.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

## 10-7-22. Discharge of surety by increase of risk.

Any act of the creditor, either before or after judgment against the principal, which injures the surety or increases his risk or exposes him to greater liability shall discharge him; a mere failure by the creditor to sue as soon as the law allows or neglect to prosecute with vigor his legal remedies, unless for a consideration, shall not release the surety. (Orig. Code 1863, § 2131; Code 1868, § 2126; Code 1873, § 2154; Code 1882, § 2154; Civil Code 1895, § 2972; Civil Code 1910, § 3544; Code 1933, § 103-203.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### ACTS DISCHARGING SURETY

1. IN GENERAL
2. LOSS OF COLLATERAL
3. FORBEARANCE TO SUE AND DISMISSAL OF SUIT

#### General Consideration

**Editor's notes.** — In *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978), this section was held not to apply to compensated sureties. However, Ga. L. 1981, p. 870, § 1, amended § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981). See the editor's note under § 10-7-1.

**Section codifies general rule.** — This section is a codification of the general rule. *Timmons v. Butler, Stevens & Co.*, 138 Ga. 69, 74 S.E. 784 (1912); *Johnson v. Longley*, 142 Ga. 814, 83 S.E. 952 (1914), later appeal, 22 Ga. App. 96, 95 S.E. 315 (1918).

**Section is of judicial origin**, being merely the adoption and incorporation into the Code by legislative approval of the principles previously asserted in *Brown v. Executors of*

*Riggins*, 3 Ga. 405 (1847), and *Jones v. Whitehead*, 4 Ga. 397 (1848). *Cloud v. Scarborough*, 3 Ga. App. 7, 59 S.E. 202 (1907).

**Common law.** — The rule stated in this section is a correct statement of the common law applicable to compensated sureties. *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978); *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981).

While O.C.G.A. § 10-7-22 does not apply to compensated sureties, the rule stated therein is a correct statement of common law applicable to compensated sureties. *West Cash & Carry Bldg. Materials of Savannah, Inc. v. Liberty Mtg. Corp.*, 160 Ga. App. 323, 287 S.E.2d 320 (1981).

**Uniform Commercial Code provides for discharge of parties on instruments.** — Former Code 1933, § 103-203 was super-

seded by former Code 1933, § 14-902. Former § 14-902 was, in turn, repealed by Ga. L. 1962, p. 156. The law governing discharge of sureties and other parties on instruments is currently governed by the Uniform Commercial Code provisions. *Christian v. Atlanta Army Depot Fed. Credit Union*, 151 Ga. App. 403, 260 S.E.2d 533 (1979).

Law governing the discharge of parties from liability on instruments may be found in present O.C.G.A. § 11-3-601. *Westwood Place, Ltd. v. Green*, 153 Ga. App. 595, 266 S.E.2d 242, aff'd in part, rev'd in part on other grounds, 246 Ga. 287, 271 S.E.2d 194 (1980).

**Not applicable to liability of debtor to guarantor.** — O.C.G.A. §§ 10-7-22 and 11-3-606 address liability of a guarantor to a creditor, not the liability of a debtor to the debtor's guarantor, and did not apply to the release of a guarantor's principal from liability on a note. *Fabian v. Dykes*, 214 Ga. App. 792, 449 S.E.2d 305 (1994).

**Holder of collateral may not split debt.** — Where a debtor to secure a debt deposits more than one piece of property, whether personal or real, as security in gross for an entire debt, the amount of which is definitely fixed in the contract, it is not within the power of the holder of such collateral, whether the holder is the original creditor or a transferee, to split the debt so as to make it the liability of two persons instead of one, and to be paid in full as to a portion of the original amount with a provision that it shall still retain vigor as to the other debtor. *Loftis v. Clay*, 164 Ga. 845, 139 S.E. 668 (1927).

**Contract of guaranty not broken by shipments not confirmed by guarantor.** — A contract guaranteeing a trade account, which says that "this guarantee does not limit the amount of credit extended the said party, but my liability hereunder is not to exceed \$2000.00 at any one time," and "no shipments are to be made except on orders confirmed by me," means that the guarantor will not be liable for any shipment not confirmed by the guarantor, nor for more than \$2000.00 at any one time, but that the vendor may extend credit in addition to the amounts guaranteed, and consequently the contract was not broken by the vendor shipping some goods to the vendee without the

confirmation of the guarantor. *Brown Shoe Co. v. Moore*, 53 Ga. App. 159, 184 S.E. 923 (1936).

**Both principal and surety discharged by verdict against surety only.** — Where the principal and the principal's surety on a promissory note, which is joint and several on its face, are sued in the same action, and verdict and judgment are taken against the surety only, both the principal and the surety are discharged. *Fricks v. Rome Mercantile Co.*, 49 Ga. App. 431, 175 S.E. 807 (1934).

**Guarantor consented to the additional risk.** — The sole shareholder of the corporation consented to the additional risk created by the extension of credit beyond \$15,000, where the personal guaranty language provided that the guarantor's liability under the guaranty was to be "UNLIMITED", and that the guaranty remained in full force and effect until the guarantor gave written notice to the seller to make no further advances on the security of the guaranty. *Builders Dev. Corp. v. Hughes Supply*, 242 Ga. App. 244, 529 S.E.2d 388 (2000).

**Cited in** *Richardson v. Allen*, 74 Ga. 719 (1885); *Citizens' & S. Bank v. Lewis*, 159 Ga. 551, 126 S.E. 392 (1925); *Crandall v. Shepard*, 166 Ga. 889, 144 S.E. 772 (1928); *Short v. Jordan*, 39 Ga. App. 45, 146 S.E. 31 (1928); *Bulloch Mtg. Loan Co. v. Jones*, 63 Ga. App. 55, 10 S.E.2d 88 (1940); *Duggan v. Jelks*, 67 Ga. App. 571, 21 S.E.2d 282 (1942); *Palmes v. Southern Mechanical Co.*, 117 Ga. App. 672, 161 S.E.2d 413 (1968); *Liberty Nat'l Bank & Trust Co. v. Interstate Motel Developers, Inc.*, 346 F. Supp. 888 (S.D. Ga. 1972); *Southland Inv. Corp. v. McIntosh*, 137 Ga. App. 216, 223 S.E.2d 257 (1976); *Ricks v. United States*, 434 F. Supp. 1262 (S.D. Ga. 1976); *Crider v. First Nat'l Bank*, 144 Ga. App. 536, 241 S.E.2d 638 (1978); *DeKalb County Bank v. Haldi*, 146 Ga. App. 257, 246 S.E.2d 116 (1978); *Hart v. DeLowe Partners, Ltd.*, 147 Ga. App. 715, 250 S.E.2d 169 (1978); *United States v. Fulton Distillery, Inc.*, 571 F.2d 923 (5th Cir. 1978); *Sanders v. Fulton Nat'l Bank*, 148 Ga. App. 684, 252 S.E.2d 189 (1979); *Williams v. First Bank & Trust Co.*, 154 Ga. App. 879, 269 S.E.2d 923 (1980); *Union Commerce Leasing Corp. v. Beef 'N Burgundy, Inc.*, 155 Ga. App. 257, 270 S.E.2d 696 (1980); *Crutchfield v. Trust Co. Bank*, 157 Ga. App. 557, 278 S.E.2d 138 (1981); *Walter E. Heller & Co. v. Aetna Bus.*



### General Consideration (Cont'd)

Credit, Inc., 158 Ga. App. 249, 280 S.E.2d 144 (1981); Bobbitt v. Firestone Tire & Rubber Co., 158 Ga. App. 580, 281 S.E.2d 324 (1981); Deep S. Servs., Inc. v. Wade, 248 Ga. 80, 281 S.E.2d 561 (1981); Holcombe v. Eng, 163 Ga. App. 343, 294 S.E.2d 568 (1982); White v. Phillips, 679 F.2d 373 (5th Cir. 1982); Rice v. Georgia R.R. Bank & Trust Co., 183 Ga. App. 302, 358 S.E.2d 882 (1987); Bank of Loganville v. Lisle, 187 Ga. App. 763, 371 S.E.2d 215 (1988); Panasonic Indus. Co. v. Hall, 197 Ga. App. 860, 399 S.E.2d 733 (1990); Regan v. United States Small Bus. Admin., 926 F.2d 1078 (11th Cir. 1991); Greenwald v. Columbus Bank & Trust Co., 228 Ga. App. 527, 492 S.E.2d 248 (1997); Shah v. Taco Del Sur, Inc., 257 Ga. App. 224, 570 S.E.2d 654 (2002).

### Acts Discharging Surety

#### 1. In General

**“Creditor” whose acts relieve is opposite party.** — Under this section, acts of “the creditor,” the opposite party, are those that relieve. Perkins v. Terrell, 1 Ga. App. 250, 58 S.E. 133 (1907).

**Acts enumerated are disjunctive.** — The acts which may effect the discharge of the surety are divided into three distinct classes, not necessarily related to or affecting each other; and proof of any coming within one class will discharge the surety. Kenney v. Armour Fertilizer Works, 33 Ga. App. 126, 126 S.E. 284 (1924), rev'd on other grounds, 161 Ga. 477, 131 S.E. 281, later appeal, 34 Ga. App. 820, 131 S.E. 915 (1926).

The use of the disjunctive “or” shows that injury to the surety or loss is not the only thing which will discharge the surety. It may be loss, or increase of risk, or exposure to greater liability. Any one of these three, according to the words of this section, will discharge the surety. Kenney v. Armour Fertilizer Works, 33 Ga. App. 126, 126 S.E. 284 (1924), rev'd on other grounds, 161 Ga. 477, 131 S.E. 281, later appeal, 34 Ga. App. 820, 131 S.E. 915 (1926).

This section lays down three acts on the part of a creditor which will release a surety: (1) injury to the surety; (2) increasing the risk to the surety; and (3) exposing the surety to greater liability; any one of these

three acts will discharge a surety. W.T. Rawleigh Co. v. Kelly, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

**Injury necessarily involves something in past.** — The distinction between the first ground of discharge under this section and the other two is apparent, because the injury naturally refers to something in the past from which the injury resulted. Cloud v. Scarborough, 3 Ga. App. 7, 59 S.E. 202 (1907).

**Acts of creditor causing injury or increased risk.** — The surety is discharged by any act of the creditor which injures the surety or increases the surety's risk. Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co., 308 F. Supp. 297 (S.D. Ga. 1970).

Any breach of a contract between a principal debtor and the creditor, made at the time of the making of a loan to the principal debtor, which results in loss or increase of risk to sureties discharges the sureties. Seaboard Loan Corp. v. McCall, 61 Ga. App. 752, 7 S.E.2d 318 (1940).

**Any novation without the consent of the surety,** or increase in risk, discharges the surety. Dunlap v. Citizens & S. DeKalb Bank, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

**Unconsented increase in risk** is an independent ground for discharge of a surety. Uphaw v. First State Bank, 244 Ga. 433, 260 S.E.2d 483 (1979).

**Consent by guarantor in advance to changes.** — Landlord's failure to pursue the landlord's legal remedies as soon as the law allowed and the landlord's refusal to accept the tenant's insufficient rent payments after bringing an eviction action did not affect a guarantor's liability under a lease guaranty; in any event, the guaranty gave the landlord the authority to change the amount, time, or manner of payment of rent and to amend, modify, change, or supplement the lease, and thus, the guarantor consented in advance to changes in the lease. Hood v. Peck, 269 Ga. App. 249, 603 S.E.2d 756 (2004).

Alleged guarantor was not discharged from the obligations of a personal guarantee under O.C.G.A. §§ 10-7-21 and 10-7-22 because, although a subsequent agreement changed the terms of the original guaranty by granting an extension of time regarding the terms of purchase from a company and acted as a novation, the alleged guarantor

consented to those changes and, thus, an additional risk. *Staten v. Beaulieu Group, LLC*, 278 Ga. App. 179, 628 S.E.2d 614 (2006).

**Exposure to greater liability.** — A surety may be discharged where the creditor has so acted as to increase the surety's risk or expose the surety to greater liability than that for which the surety contracted. *Parker v. Fidelity Bank*, 151 Ga. App. 733, 261 S.E.2d 465 (1979).

**Change must be material.** — A surety will not be discharged from the contract unless the change or alteration in the contract is material. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

A compensated surety is discharged only if the change is material and causes some injury, loss, or prejudice to it. *Brock Constr. Co. v. Houston Gen. Ins. Co.*, 144 Ga. App. 860, 243 S.E.2d 83, *aff'd*, 241 Ga. 460, 246 S.E.2d 316 (1978).

**Loss need not be shown.** — In a contract of suretyship it is not essential, in order to prove a release, that the surety allege or prove a loss. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

A surety is discharged from the terms of the contract even though the surety is not injured by the contract change. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

**Some acts discharge in whole and some in part only.** — While the language of this section is broad, yet there is a distinction between certain things which will operate to discharge a surety in whole and others which will only discharge a surety in part. *Johnson v. Longley*, 142 Ga. 814, 83 S.E. 952 (1914), *later appeal*, 22 Ga. App. 96, 95 S.E. 315 (1918).

**Collateral injury discharges pro tanto.** — If a surety suffers injury arising collaterally and not affecting the contract itself, the discharge is only to the extent of the loss or injury, and, if that is not as great as the liability of the surety, then *pro tanto*. *Armour Fertilizer Works v. Kenney*, 161 Ga. 477, 131 S.E. 281, *later appeal*, 34 Ga. App. 820, 131 S.E. 915 (1926); *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

**Discharge pro tanto despite increased risk.** — If the plaintiff sought to recover

against the surety on a replevy bond and if, after the bond was executed and the plaintiff obtained a verdict and judgment in the plaintiff's favor establishing a lien upon the cotton (subject of the replevy bond and plaintiff's previous suit in trover), the plaintiff took possession of the cotton, the surety was not discharged from the entire indebtedness but was discharged only in the amount of the value of the cotton, even though this act of the plaintiff may have increased the risk of the surety. *Trice v. Cabero*, 41 Ga. App. 816, 155 S.E. 54 (1930).

**Act of creditor affecting contract itself.** — The principle regarding a release *pro tanto* has no relevancy where the act of the creditor affected the contract itself. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

**Accommodation party must show payee knew payee was surety.** — A promissory note signed by two persons as apparent principal makers, reciting, "We promise to pay," etc., where there is nothing to indicate that they are not principal makers, is *prima facie* a joint note; however, it may be shown by parol, in an action by the payee, that one of the persons so signing the note as an apparent maker was in truth a surety for the other signer, rather than a coprincipal, and where the one thus claiming suretyship claims a discharge or release by reason of some act increasing one's risk as surety, one must go further and show that the payee knew one was a surety at the time of the act in question. *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935).

**Act damaging surety's heirs held not to increase surety's risk.** — Although the plaintiff creditor, through the plaintiff's agent, may have induced the other heirs at law of the intestate surety to purchase the share of the principal debtor, also an heir at law, in the estate of the intestate, and pay the plaintiff therefor, the agent's actions could not have operated to increase the risk of the surety on the note, although it may have resulted in damage to the other heirs at law who had purchased such share. *Stephens v. Stone*, 46 Ga. App. 293, 167 S.E. 545 (1932).

**Act or omission authorized by law does not discharge surety.** — Neither the omission by the creditor of some act not specially enjoined by law nor the commission of some act expressly authorized by law which tends to increase the risk of the security will oper-



**Acts Discharging Surety (Cont'd)****1. In General (Cont'd)**

ate as a discharge. *Stewart v. Barrow*, 55 Ga. 664 (1876).

**Consent may be given in advance to act which otherwise would discharge surety.** — A surety or guarantor may consent in advance to a course of conduct which would otherwise result in the surety's discharge. *Dunlap v. Citizens & S. DeKalb Bank*, 134 Ga. App. 893, 216 S.E.2d 651 (1975).

Where the language of a guaranty specifically contemplated an increase in the obligor's debt and the creation of new obligations, and included waivers of any "legal or equitable discharge" and of any defense based upon an increase in risk, the protections of O.C.G.A. §§ 10-7-21 and 10-7-22 were waived. *Underwood v. NationsBanc Real Estate Serv., Inc.*, 221 Ga. App. 351, 471 S.E.2d 291 (1996).

By assenting in advance to a waiver of all legal and equitable defenses, the guarantor was foreclosed from asserting that the guarantor was discharged under O.C.G.A. § 10-7-21 or O.C.G.A. § 10-7-22. *Ramirez v. Golden*, 223 Ga. App. 610, 478 S.E.2d 430 (1996).

**Contract giving additional security does not discharge surety.** — Where a second contract simply gave the seller additional security for the payment of the debt, was not inconsistent with the first contract, and did not increase the risk of the surety, the second contract was not a novation of the first within the meaning of former Code 1933, § 103-202 and did not release the surety under either § 103-202 or former Code 1933, § 103-203. *W.T. Raleigh Co. v. Overstreet*, 71 Ga. App. 873, 32 S.E.2d 574 (1944).

**Extension of additional credit.** — Lender's extension of additional credit to the principal obligor did not affect the guarantor's liability under the guaranty where the amount sought by the lender from the guarantor did not exceed the limit in the note secured by the guaranty. *Evans v. Merrill Lynch Bus. Fin. Servs., Inc.*, 213 Ga. App. 808, 446 S.E.2d 215 (1994).

**Creditor's nonaction will not discharge surety unless collateral lost, consideration paid, or notice given.** — Mere nonaction by the creditor will not release the surety, unless

such nonaction made unproductive some collateral surety or was based upon a consideration paid by the principal debtor to the creditor, or the creditor was notified under former Code 1933, § 103-205 to collect the debt. *Lumsden v. Leonard*, 55 Ga. 374 (1876); *Jordan v. F & M Bank*, 5 Ga. App. 244, 62 S.E. 1024 (1908); *Chapman v. Miller*, 40 Ga. App. 138, 149 S.E. 70 (1929).

Some positive act must be done by the creditor, either before or after judgment, which injures the surety in some way; mere failure or negligence on the part of the creditor will not relieve the surety; the exceptions to this general rule will be found to be where the creditor omits to do something by which some collateral security in the creditor's hands is made unproductive or where the creditor is notified under § 10-7-24 to proceed and the creditor fails or refuses. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

**Creditor's loan extensions.** — Because creditor bank's loan extensions increased guarantor's risk of exposure to greater liability due to the marked diminution of the resale value of collateralized stock, guarantor's obligation was accordingly discharged under O.C.G.A. § 10-7-22. *Cantrell v. First Tenn. Nat'l Bank Ass'n*, 207 Ga. App. 458, 428 S.E.2d 368 (1993).

**Surety not discharged by failure to apply judicial sale proceeds to senior execution.** — That the plaintiff in the senior execution, after obtaining in the justice's court a judgment on the first bond, did not seek to have the proceeds of the sale of the property under the junior execution applied to the senior execution or object to the application of such proceeds to the junior execution would not afford a sufficient reason for discharging the surety under this section on the trial of an appeal entered to the judgment rendered against the surety and the surety's principal in the magistrate's court. *Reese v. Worsham & Co.*, 110 Ga. 449, 35 S.E. 680, 78 Am. St. R. 109 (1900).

**Failure of creditor to prosecute claim against surety's estate.** — Where the plaintiff creditor failed to apprise the heirs at law of the deceased surety of the fact that the plaintiff held an unpaid note, and to prosecute the claim against the then unrepresented estate, even though the plaintiff may have known that pending such delay



the personal property of the intestate had been turned over to the principal debtor and was being wasted by the debtor, the plaintiff's actions amounted to mere inaction on the plaintiff's part and were not such a positive act causing injury to the surety as would operate as a release. *Stephens v. Stone*, 46 Ga. App. 293, 167 S.E. 545 (1932).

**No provision of law requires that a surety be notified of the principal debtor's default.** *Barnett v. Leasing Int'l, Inc.*, 151 Ga. App. 715, 261 S.E.2d 452 (1979).

**Failing to give notice of default will not discharge surety.** — Where a contract for a future sale of goods is signed by the prospective vendor as creditor and the prospective purchaser as principal debtor and by sureties for such purchaser, whereby the obligation of continuing suretyship is imposed upon the sureties, guaranteeing payment for goods which the contract provides shall be furnished from time to time by the prospective vendor to the prospective purchaser, and the contract provides for weekly settlements for the goods furnished under the contract, but does not require that notice of any default in weekly payments shall be given by the creditor to the sureties, the securities are not released from liability to the creditor, or confined to the first weekly default, although such sureties are given no notice by the creditor of the original default and are unaware thereof. *Georgian Co. v. Jones*, 154 Ga. 762, 115 S.E. 490, answer conformed to, 29 Ga. App. 410, 116 S.E. 65 (1923).

**Failure to keep the collateral security insured amounts to an increase in risk** which will discharge the surety to the extent that the surety is injured thereby. *Evans v. American Nat'l Bank & Trust Co.*, 116 Ga. App. 468, 157 S.E.2d 816 (1967).

The failure of the bank, knowing the purchaser's insolvency, either to obtain insurance at the purchaser's expense or to notify the surety of the cancellation materially increased the risk and, to the extent of the insurance involved, discharged the surety from liability. *Evans v. American Nat'l Bank & Trust Co.*, 116 Ga. App. 468, 157 S.E.2d 816 (1967).

**Breach of agreement to procure life insurance discharges damaged surety.** — Even if an agreement by the creditor to procure insurance on the life of the maker of a note was an agreement subsequent to the making

and endorsing of the note and could be classified as a collateral agreement so as to bring the agreement without the rule that a surety is discharged by a breach thereof, the principle that a surety would be discharged to the extent of actual damage would apply, and in such case the damage would be sufficient to discharge the obligation. *Seaboard Loan Corp. v. McCall*, 61 Ga. App. 752, 7 S.E.2d 318 (1940).

**Allowing life insurance not made condition of contract to lapse.** — Where life insurance policy was allowed to lapse and the guarantor by not being informed in no manner increased the guarantor's risk, neither guarantor nor the makers having made the fact of life insurance a condition of the contract, the surety may not be discharged. *Parker v. Fidelity Bank*, 151 Ga. App. 733, 261 S.E.2d 465 (1979).

**Change in terms of payment to contractor discharges surety.** — A change by the obligee and principal in the terms of payments to the contractor from that provided in the building contract operates to discharge the surety. *Brunswick Nursing & Convalescent Ctr., Inc. v. Great Am. Ins. Co.*, 308 F. Supp. 297 (S.D. Ga. 1970).

**Contractor's failure to pay subcontractor does not discharge subcontractor's surety.** — Main contractor's breach of the contractor's contract with the subcontractor to pay the subcontractor for materials used in construction of the hospital was not such an increase of the risk of the surety on the subcontractor's bond, which was conditioned in part to pay all persons having contracts directly with the subcontractor for materials, as to discharge the surety. *Fidelity & Deposit Co. v. Pittman ex rel. Georgia Marble Co.*, 52 Ga. App. 394, 183 S.E. 572 (1936).

**Principal's misrepresentations increasing risk are defense to surety.** — Misrepresentations as to the shape and quality of the land by principal, inducing surety to sign a note and materially increasing the risk, constitute a good defense. *Satterfield v. Spier*, 114 Ga. 127, 39 S.E. 930 (1901).

If a false representation of an existing fact to the effect that a person had signed as surety to a contract induced another to sign as surety, such misrepresentation increased the risk and exposed to greater liability the person who signed by reason of such false representation, and it is not necessary to

**Acts Discharging Surety (Cont'd)****1. In General (Cont'd)**

prove loss to avoid the contract. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

An allegation to the effect that a surety was induced to sign by a false representation that a surety whose name appeared as such had already signed the contract of suretyship is not an effort to vary the terms of a written contract. *W.T. Rawleigh Co. v. Kelly*, 78 Ga. App. 10, 50 S.E.2d 113 (1948).

**Substitution of a promissory note for an original account indebtedness**, with the inclusion in the note of an extended time for payment, a higher face amount reflecting accrued interest, and a provision authorizing the recovery of attorney fees in the event of collection by an attorney, did not result in either a novation of the contract nor an increased risk and did not discharge the guarantors of the prior guaranty agreement from liability. *Columbia Nitrogen Corp. v. Mason*, 171 Ga. App. 685, 320 S.E.2d 838 (1984).

**Foreclosure of mortgage.** — A creditor had every right under the creditor's first and second preferred ship mortgages to bring an in rem foreclosure action against a fishing vessel, the subject of the loan proceeds. When it did so, there was no ground for discharge under O.C.G.A. § 10-7-22, even though the act allegedly increased the guarantors' risk. *United States v. Blue Dolphin Assocs.*, 620 F. Supp. 463 (S.D. Ga. 1985).

**Increased rate of interest.** — The comaker of the third series of renewal notes was discharged following subsequent renewals at an increased rate of interest, where the provisions of the note did not cover subsequent modifications of the interest rate and the comaker had not signed the subsequent notes. *Bank of Terrell v. Webb*, 177 Ga. App. 715, 341 S.E.2d 258 (1986).

**No discharge of debt due to bad faith or fraud.** — See *Delta Diversified, Inc. v. Citizens & S. Nat'l Bank*, 171 Ga. App. 625, 320 S.E.2d 767 (1984).

**Where the arrangement for the use of a pledged savings account did not deviate from the terms of the subject note as agreed to by plaintiffs**, no issue concerning the discharge defenses remained for jury determination, warranting summary judgment.

*Cohen v. Northside Bank & Trust Co.*, 207 Ga. App. 536, 428 S.E.2d 354 (1993).

**No evidence of increased risk meant no discharge of surety.** — Given that the broad language of a guaranty obligated the guarantor to the bank, absolutely and unconditionally guaranteeing the payment and performance of each and every debt that the debtor would owe, and because no issue of fact existed as to whether the guarantor was discharged by any increased risk or any purported novation, the guarantor remained obligated under the guaranty to the bank. *Fielbon Dev. Co. v. Colony Bank*, 290 Ga. App. 847, 660 S.E.2d 801 (2008).

**No material breach as surety not exposed to greater liability.** — Creditor did not commit a material breach of a guaranty by not providing monthly billings to the surety as the surety was not exposed to greater liability under O.C.G.A. § 10-7-22 as the guaranty capped the surety's liability at \$30,000. *General Steel, Inc. v. Delta Bldg. Sys.*, Ga. App. , S.E.2d , 2009 Ga. App. LEXIS 392 (Mar. 27, 2009).

**2. Loss of Collateral**

**Loss of collateral discharges surety to extent of injury.** — Where a creditor has control of liens, securities, or any other means whereby a creditor might satisfy the debt and parts with them, or by the creditor's negligence allows them to become lost or depreciated in value, thus cutting off the surety from the surety's right to be subrogated to such liens, etc., the surety is discharged to the extent of the surety's injury by the loss of such liens. *Stewart v. Barrow*, 55 Ga. 664 (1876); *Poullain v. Brown*, 80 Ga. 27, 5 S.E. 107 (1888), later appeal, 82 Ga. 412, 7 S.E. 1131 (1889); *Lewis v. Armstrong*, 80 Ga. 402, 7 S.E. 114 (1888).

**Failure to record lien in time.** — The failure of a creditor to preserve a lien which the creditor had on property of the principal debtor discharges a surety. For instance, where a creditor failed to record a mortgage within the time prescribed, it was held to operate as a discharge of the surety. *Stevens v. Zachary*, 27 Ga. 427 (1859); *Atlanta Nat'l Bank v. Douglass*, 51 Ga. 205, 21 Am. R. 234 (1874); *Bledsoe v. Ivey*, 27 Ga. App. 235, 107 S.E. 615 (1921); *Seymour v. Bank of Thomasville*, 157 Ga. 99, 121 S.E. 578



(1923), answer conformed to, 31 Ga. App. 602, 121 S.E. 579 (1924).

Where the defendant has signed the note as surety, and this fact was known to the plaintiffs when plaintiffs accepted the note, the failure of the plaintiffs to record the retention of title contract within the time required by law did not discharge the surety. *La Boon v. Wright & Locklin*, 42 Ga. App. 275, 155 S.E. 770 (1930).

**Filing claim in bankruptcy on judgment without reserving lien.** — Under this section and § 10-7-21 proof of debt in the bankruptcy court by the judgment creditor against the principal without an express reservation of the lien of the judgment will discharge the lien of the judgment, and the accommodation endorser or surety is discharged, but only to the extent of the injury received. *Jones v. Hawkins*, 60 Ga. 52 (1878) (no damage shown and surety counsel for principal in bankruptcy proceedings).

**Having execution returned without levy.** — If, when the execution is issued, it becomes a valid lien on property of the principal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy by procurement of the creditor, and the surety is thereby injured, the surety is discharged pro tanto. This is in accord with justice and common sense and is within the spirit, if not the very letter, of this section. *Griffeth v. Moss & Co.*, 94 Ga. 199, 21 S.E. 463 (1894).

**Failing to enter judgment after verdict.** — When a plaintiff, at a given term of the court, took a verdict against a principal and sureties but failed for several terms to enter a judgment thereon, the sureties were discharged. *Hayes v. Little*, 52 Ga. 555 (1874); *Hall v. Pratt*, 103 Ga. 255, 29 S.E. 764 (1898).

**Releasing notes taken as collateral.** — Where, in a suit on a note against two defendants as apparent joint makers, one of the defendants had signed the note as surety only, which fact was known to the plaintiff, the note sued on was a balance of a larger note, at the time of making the original note there was delivered to the plaintiff bank by the principal, as collateral security, described notes aggregating an amount in excess of the amount of the note sued on, and the plaintiff bank released the collateral notes to the principal without the knowledge or consent of the defendant surety, who did not

know that the plaintiff bank had released the collateral notes when the defendant signed the renewal note sued on, by reason of these facts the defendant surety has been injured and the defendant's risk increased, so that the defendant is discharged from all liability on the note sued on. *Kennedy v. Farmers' & Merchants' Bank*, 47 Ga. App. 104, 169 S.E. 769 (1933).

**Failing to enter judgment after default.** — An accommodation endorser of a promissory note, sued jointly with the maker thereof, was not discharged merely because the plaintiff, after an entry of "default" had been made upon the judge's docket, permitted one or more terms to elapse before entering up a final judgment in the case. *Hall v. Pratt*, 103 Ga. 255, 29 S.E. 764 (1898).

**Failing to issue execution.** — In the absence of notice to proceed, the surety is not discharged by failure to issue execution on a judgment obtained against the principal. *Crawford v. Gauden*, 33 Ga. 173 (1862); *Hall v. Langford*, 18 Ga. App. 73, 88 S.E. 918 (1916).

**Failing to docket execution in time.** — Omission to enter execution on general docket in ten days did not effect discharge of surety. *Williams v. Kennedy*, 134 Ga. 339, 67 S.E. 821 (1910).

**Failing to proceed against collateral.** — The mere failure of a creditor to proceed against collateral will not operate to discharge a surety. *Pippin v. Brigadier Indus. Corp.*, 150 Ga. App. 401, 258 S.E.2d 18 (1979).

The right of a payee of a note to resort to the sureties thereon is not lost because of the payee's failure to sell personal property held as collateral immediately on the maturity of the note. *Timmons v. Butler, Stevens & Co.*, 138 Ga. 69, 74 S.E. 784 (1912).

The mere failure of the payee of a note, who is the holder thereof, to institute suit to recover on the note against one of the sureties thereon, before the expiration of the period of limitation in which suit must be brought against this surety, does not amount to a release by the payee of the obligation to him of a cosurety on the note whose obligation is not barred by the statute of limitations, where the payee's act in refraining from instituting the suit as indicated was not procured by or consented or agreed to by the latter surety. *Scott v. Gauding*, 187



## Acts Discharging Surety (Cont'd)

### 2. Loss of Collateral (Cont'd)

Ga. 751, 2 S.E.2d 69, later appeal, 160 Ga. App. 306, 3 S.E.2d 766 (1939).

When no agreement to condition the surety's obligation upon the creditor's enforcement of security is found, the courts have not conditioned the creditor's right of recovery from the surety on the creditor's first using any security the creditor may have to satisfy or reduce the creditor's claim. *Trust Inv. & Dev. Co. v. First Ga. Bank*, 238 Ga. 309, 232 S.E.2d 828 (1977).

**Accepting payment from principal voidable in bankruptcy.** — By virtue of this section, the mere fact that the holder of a note in good faith accepts payment thereof from the maker at a time when the maker is insolvent, so that such payment is voidable in the event of the maker's bankruptcy and is thereafter actually voided by the trustee or voluntarily surrendered to the trustee by the holder, will not discharge the note or release a surety thereon. *Higdon v. Bell*, 25 Ga. App. 54, 102 S.E. 546 (1920) (See 11 U.S.C. §547(b)).

**Dismissing levy discharges surety.** — If the *fi. fa.* was levied upon the property of the principal defendant and the levy dismissed by the creditor, whereby injury resulted to the surety, it is just that such act inure to the surety's discharge. *Brown v. Executors of Riggins*, 3 Ga. 405 (1847); *Rawson v. Gregory*, 59 Ga. 733 (1887).

**Dismissal of levy on realty.** — The dismissal of a levy on the real property of the principal cannot hurt or discharge the surety, for the lien of the judgment on the property being realty cannot be removed, and the lien of the judgment is one to which the surety becomes entitled the moment the surety pays the debt. *Wiley v. Stanford*, 22 Ga. 385 (1857); *Manry v. Shepperd*, 57 Ga. 68 (1876).

**Placing property out of reach discharges surety pro tanto.** — Removal of principal's property outside the county and beyond reach of judgment by the plaintiffs in *fi. fa.* discharges the surety to the extent of the property removed. *Dasher v. Brannen & Bro.*, 29 Ga. App. 253, 116 S.E. 206 (1922).

Joint debtors have a right of contribution which may be enforced like that of cosureties, and if the creditor so acted as to

place the property of one of the joint debtors beyond the reach of the other, the creditor would be responsible to the latter for the injury done by such wrongful diversion; and this injury may be set up in a claim case, as a discharge, at least to the extent of the damage done, as well as by an action for damages. *Green v. Mann*, 76 Ga. 246 (1886).

**Removal by principal where creditor receives no consideration.** — The removal of personal property from one county in the state to another by the principal judgment debtor will not discharge the surety, though permitted by the plaintiff without action on the plaintiff's part and without the surety's consent, and though the property would be sufficient to satisfy the *fi. fa.*, no consideration being paid to the plaintiff-creditor by the principal debtor. *Lumsden v. Leonard*, 55 Ga. 374 (1876).

**Delivery of property awarded to trustee does not discharge sureties.** — Under this section, where in an equity cause between the remaindermen and the trustee certain property was awarded to the latter and it was not sought to hold him responsible therefor, the delivery of such property to him did not work a discharge to the sureties, and an allegation to that effect was properly stricken. *Haddock v. Perham*, 70 Ga. 572 (1883).

**Where a creditor transferred possession of some collateral to a codebtor, and express language of a guaranty agreement prevented the surety from subrogation until the creditor received full payment of all liabilities, the surety could not be discharged on the claim that the surety's rights to subrogation had been impaired.** *In re Broomfield*, 35 Bankr. 459 (Bankr. N.D. Ga. 1983).

### 3. Forbearance to Sue and Dismissal of Suit

**Failure to sue does not discharge surety.** — A mere failure to sue on a bond, required by the court to stay the collection of a judgment, as soon as the law allows or the negligence of the obligee to prosecute with vigor the obligee's legal remedies, unless for a consideration, will not release the surety. *Harris v. Woodward*, 142 Ga. 297, 82 S.E. 902 (1914).

**Forbearance towards principal.** — Mere forbearance towards the principal does not discharge the surety. *Hall v. Langford*, 18 Ga.

App. 73, 88 S.E. 918 (1916); *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917); *Hearn v. Durrence*, 33 Ga. App. 296, 125 S.E. 794 (1924).

If the consequence of forbearance is injury to the surety, the surety is discharged. *Brown v. Executors of Riggins*, 3 Ga. 405 (1847).

Where indulgence was granted to the acceptors in consideration of the payment of 18 percent interest and the acceptors became insolvent, the security was thereby released. *Parmelee v. Williams*, 72 Ga. 42 (1883).

**Failure to sue for consideration.** — A failure to sue for a consideration releases the surety. *Camp v. Howell*, 37 Ga. 312 (1867) (new note for usurious portion of interest given and paid in part).

Where subsequent to the sale by a borrower of the property securing its loan evidenced by a note and the assumption of the indebtedness by the purchaser, which assumption was consented to by the holder of the note, the latter grants a six-month extension to the purchaser with the knowledge, consent, or ratification of either of the signers of the note in consideration of the purchaser paying (apparently after maturity) \$500.00 on the note and thereafter 6 percent calculated upon the original amount of the note rather than 8 percent as specified in the note, on the balance, the alleged contract between the holder and the subsequent purchaser, not being supported by a consideration, would not be binding on the holder, and the signers, who, it is alleged had become sureties under the agreement, would not be released. *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937).

**Extension of time for definite period.** — If defendant is in fact a surety only and the payee, under a valid agreement with the principal and without the consent of the surety, extends the time of maturity as fixed by the obligation, a release of the defendant will result; but in order to discharge a surety by an extension of time granted to the principal, not only must there be an agreement for the extension, but the indulgence must be for a definite period fixed by a valid agreement. *Duckett v. Martin*, 23 Ga. App.

630, 99 S.E. 151 (1919); *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935); *Guaranty Mtg. Co. v. National Life Ins. Co.*, 55 Ga. App. 104, 189 S.E. 603 (1936), *aff'd*, 184 Ga. 644, 192 S.E. 298 (1937).

**Surety's reliance on promise to proceed against principal.** — Under this section, the mere promise by the holder of a promissory note, made to a surety thereon without consideration, to the effect that the creditor would proceed forthwith against the principal debtor, standing alone, would be a *nudum pactum* and would have no effect upon the obligation of the surety. If, however, the surety is induced by such an assurance to forego any means of indemnity or protection, an estoppel will arise to the extent of the resulting loss, and the surety will be discharged to that extent. *Johnson v. Longley*, 142 Ga. 814, 83 S.E. 952 (1914), later appeal, 22 Ga. App. 96, 95 S.E. 315 (1918).

**Agreeing to increase in interest, with note for increase.** — Where the holder of a promissory note on which the interest was 7 percent, without the assent of the surety, agreed with the principal to wait 12 months in consideration of the promise of 16 percent interest and for the 9 percent usurious interest took a new note with security, a portion of which usurious note was paid, and the time was given accordingly, the surety to the original note was discharged. *Camp v. Howell*, 37 Ga. 312 (1867).

**Debtor's promise to pay required interest during forbearance is not consideration.** — A promise by the principal debtor to pay interest upon the debt during the time of forbearance forms no consideration for such forbearance when the debtor is already bound to pay such interest. *Harrell v. Kutz & Co.*, 22 Ga. App. 235, 95 S.E. 717 (1918).

**Extension of time by mortgagee.** — Where the mortgagee has in fact assented to an assumption by the grantee to pay the mortgage and thus has recognized the relation of principal and surety between such a mortgagor and the grantee, a new agreement made by the mortgagee with the grantee who purchased the property and assumed the debt, extending the time of payment of the debt, if valid and made on a sufficient consideration, will discharge the original mortgagor from personal liability,



**Acts Discharging Surety (Cont'd)****3. Forbearance to Sue and Dismissal of Suit (Cont'd)**

unless the extension agreement is made with the consent of the mortgagor; but such an implied promise of suretyship with the incident rights of a surety to discharge does not arise where a purchase is made merely subject to the outstanding lien of a mortgage. *Nelson v. National Life & Accident Ins. Co.*, 51 Ga. App. 684, 181 S.E. 202 (1935).

Where A purchased land subject to a mortgage which A assumed and later sold the land to B under a like assumption; B sold the land to C, who did not assume; thereafter the mortgagee, at the request of C, extended the maturity of the mortgage and of a portion of the debt, without the knowledge or consent of A, it was held that if the mortgagee had knowledge of the new relationships, the grant of the extension operated to release A from liability. *Alropa Corp. v. Snyder*, 182 Ga. 305, 185 S.E. 352 (1936).

Where B conveys lands to C in consideration of the assumption by C of the obligation due to A, the relationship between B and C is that of principal and surety, but so far as A is concerned, such relationship between B and C is not effective as to A unless A assents to and accepts it; but after such assent by A, an extension of time of payment granted to C without the knowledge or consent of B releases B from B's obligation to A. *Federal Land Bank v. Conger*, 55 Ga. App. 11, 189 S.E. 567 (1936).

**Extension of time not shown.** — Where whether or not the defendant was a principal, endorser, or surety, there was no showing that the plaintiff entered an agreement with the principal, without the consent of the alleged surety, to extend the time of maturity as fixed by the obligation so as to release the surety, no issue of fact was created and the trial court did not err in granting a partial summary judgment, in that there was no discharge of defendant's liability by any novation or increase of the risk. *Barnett v. Leasing Int'l, Inc.*, 151 Ga. App. 715, 261 S.E.2d 452 (1979).

**Surety to pay judgment not discharged although judgment becomes dormant.** — If a principal and surety executed a bond required by the court to stay the collection of a judgment, conditioned to pay that judg-

ment in a certain contingency, in a suit brought thereon, seven years after the happening of such contingency, it is no defense to the surety that the judgment may have become dormant in the meantime. *Harris v. Woodard*, 142 Ga. 297, 82 S.E. 902 (1914).

**If no relationship of principal and surety exists** between B and C, the voluntary assumption by C of the debt owed by B to A does not make C the principal so far as A is concerned, nor does an extension of time granted to C release B from B's liability to A. *Federal Land Bank v. Conger*, 55 Ga. App. 11, 189 S.E. 567 (1936).

**Refusal to sue after notice by surety.** — See § 10-7-24 and notes thereto.

**Consideration for forbearance or notice to sue must be alleged.** — Under this section, the defense that the plaintiff was guilty of laches, in that the plaintiff did not bring suit earlier and thereby increased the risk of the surety, was properly stricken, because there was no allegation that there was a consideration for the postponement nor an averment that the security had given a written notice to sue. *Baumgartner v. McKinnon*, 10 Ga. App. 219, 73 S.E. 519 (1912).

**Surety not released by failure to prove debt in bankruptcy.** — As this section provides nonaction or failure to sue will not release a surety, the failure or refusal of the creditor to prove the creditor's debt in bankruptcy against the principal debtor will not discharge the surety. *Jordan v. F & M Bank*, 5 Ga. App. 244, 62 S.E. 1024 (1908); *Higdon v. Bell*, 25 Ga. App. 54, 102 S.E. 546 (1920).

**Surety on appeal bond is discharged by dismissal of suit.** — The risk of a surety on an appeal bond is increased and the surety is therefore discharged when the suit is dismissed by the creditor or by the court at the creditor's instance. *Armstrong v. Lewis*, 61 Ga. 680 (1878), later appeal, 64 Ga. 645 (1880).

**Dismissal of suit as to cosurety discharges other.** — The dismissal as to one surety of a suit already brought, for a consideration paid by the surety, and not bringing any further action against the surety, constituted such conduct as released the other surety on the administrator's bond. *Wilkinson v. Conley*, 133 Ga. 518, 66 S.E. 372 (1909).

**Surety is not discharged by dismissal as to principal.** — When a joint action is brought against the principal and the surety on a



joint and several promissory note, and the plaintiff, by amendment, voluntarily dismisses the plaintiff's action against the principal, the surety is not thereby ipso facto discharged from liability. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

When a joint action is brought against a principal and a surety and the plaintiff by amendment voluntarily dismisses the plaintiff's action against the principal, the surety is not thereby ipso facto discharged from liability. *Griffin v. H.C. Whitmer Co.*, 57 Ga. App. 203, 194 S.E. 895 (1938).

## OPINIONS OF THE ATTORNEY GENERAL

**Effect of failure to give notice of principal's default.** — Unless the creditor or trustee grants an indulgence based upon a consideration paid by a warehouseman or unless the bond specifies that immediate

notice of any known breach by the warehouseman be given, failure of the Commissioner of Agriculture as trustee for the obligees to give such notice will not release the surety. 1967 Op. Att'y Gen. No. 67-423.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 29, 32.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 107, 113.

**ALR.** — Agreement by principal to pay compound or additional interest, as releasing surety, 2 ALR 1569.

Consenting to continuance or extension of time in action as releasing surety, 7 ALR 376.

Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 ALR 1605.

Acceptance of interest in advance as consideration for, or evidence of, an extension of time which will release a guarantor, surety, or endorser, 59 ALR 988.

Guaranty of commercial credit of dealer as affected by latter's change of location or field of operation, 89 ALR 651.

Lessee as surety for rent after assignment, and effect of lessor's dealings (other than consent to assignment or mere acceptance of rent from assignee) to release lessee, 99 ALR 1238.

Guaranty as covering renewals, after revocation, of claims within coverage at time of revocation, 100 ALR 1236.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Failure of accommodation maker or endorser to disaffirm transaction, or his con-

tinued recognition of note after learning of its use for purpose other than intended, as ratification, or estoppel to assert, the diversion, 105 ALR 437.

Construction and application of provision of guaranty or surety contract against release or discharge of guarantor by extension of time or alteration of contract, 117 ALR 964.

Payments or advancements to building contractor by obligee as affecting rights as between obligee and surety on contractor's bond, 127 ALR 10.

Creditor's reservation of rights against surety in releasing or extending time to principal debtor, 139 ALR 85.

Discharge of accommodation maker or surety by release of mortgage or other security given for note, 2 ALR2d 260.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Extension of net credit in excess of specified amount as discharging or releasing guarantor, 57 ALR2d 1209.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR2d 734.

Change in name, location, composition, or structure of obligor commercial enterprise subsequent to execution of guaranty or surety agreement as affecting liability of guarantor or surety to the obligee, 69 ALR3d 567.

### 10-7-23. Refusal to deliver evidence of debt and securities on tender of amount of debt as discharging surety.

The surety may tender to the creditor the amount of his debt and demand that the evidence of and the securities for the same be delivered up to him to be enforced against his principal or cosureties; and a failure of the creditor to comply, when within his power, shall operate to discharge the surety. (Orig. Code 1863, § 2132; Code 1868, § 2127; Code 1873, § 2155; Code 1882, § 2155; Civil Code 1895, § 2973; Civil Code 1910, § 3545; Code 1933, § 103-204.)

**Law reviews.** — For article surveying developments in Georgia commercial law from

mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

### JUDICIAL DECISIONS

**Only person making tender is discharged.** — This section provides only for the discharge of the person whose tender was refused. *Hall v. First Nat'l Bank*, 145 Ga. App. 267, 243 S.E.2d 569 (1978).

**Burden upon surety to prove tender and demand.** — Where, to an action by the former state superintendent of banks, the surety pleaded that the surety was discharged by a refusal of a tender and demand allowable under this section, the burden was upon the surety to prove that the tender and demand had been made either to the superintendent of banks or to one duly authorized by the surety, as provided by statute, to make collections for the bank. *Bennett v. Simmons*, 30 Ga. App. 529, 118 S.E. 493 (1923), later appeal, 39 Ga. App. 272, 146 S.E. 799 (1929).

**Transfer of security proper.** — Summary judgment for a bank was properly entered after the bank demanded that a guarantor pay off an outstanding business debt, and upon demand of the guarantor, transferred the security for the loan, a mortgage on the homeowners' home, to the guarantor; under O.C.G.A. § 10-7-23, upon demand, the bank was required to transfer the securities to the guarantor paying off the debt or it would lose the ability to enforce the debt against the guarantor. *Phillips v. First Bank of Ga.*, 257 Ga. App. 342, 571 S.E.2d 410 (2002).

**Cited in** *Northcutt v. Crowe*, 116 Ga. App. 715, 158 S.E.2d 318 (1967); *Jessee v. First Nat'l Bank*, 154 Ga. App. 209, 267 S.E.2d 803 (1980).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 30, 32.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 106, 112.

**ALR.** — Release of payee from warranty constituting a part of the consideration for a note as releasing a surety, 7 ALR 1605.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, 57 ALR2d 855.

### 10-7-24. Refusal to sue principal after notice by surety as discharge.

Any surety, guarantor, or endorser, at any time after the debt on which he or she is liable becomes due, may give notice in writing to the creditor, his or her agent, or any person having possession or control of the obligation, to proceed to collect the debt from the principal or any one of the several

principals liable therefor; and, if the creditor or holder refuses or fails to commence an action for the space of three months after such notice (the principal being within the jurisdiction of this state), the endorser, guarantor, or surety giving the notice, as well as all subsequent endorsers and all cosureties, shall be discharged. To comply with the requirements of this Code section, the notice must specifically state that the creditor loses his or her rights to pursue the surety, guarantor, or endorser, as well as any cosureties, coguarantors, or endorsers, if the creditor does not commence legal action within three months after receiving the notice. Further, any notice which does not state the county in which the principal resides shall not be considered to be in compliance with the requirements of this Code section. (Laws 1826, Cobb's 1851 Digest, p. 595; Laws 1831, Cobb's 1851 Digest, p. 596; Ga. L. 1859, p. 54, § 1; Code 1863, § 2133; Ga. L. 1866, p. 23, § 1; Code 1868, § 2128; Code 1873, § 2156; Code 1882, § 2156; Civil Code 1895, § 2974; Civil Code 1910, § 3546; Code 1933, § 103-205; Ga. L. 1994, p. 746, § 1.)

**Law reviews.** — For article surveying developments in Georgia commercial law from mid-1980 through mid-1981, see 33 Mercer L. Rev. 33 (1981).

JUDICIAL DECISIONS

ANALYSIS

- GENERAL CONSIDERATION
- NOTICE
- SUIT BY CREDITOR
- WAIVER AND ESTOPPEL

General Consideration

**Editor's notes.** — In *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981), it was held that this section applied to compensated sureties. However, Ga. L. 1981, p. 870, § 1, amends O.C.G.A. § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. See the Editor's note to § 10-7-1.

**Section is in derogation of common law and strictly construed.** — This section was made in derogation of the common-law rule upon this subject and introduced a new principle of commercial law. It operates as a restriction upon the rights of the holder and should be strictly construed. *Howard v. Brown*, 3 Ga. 523 (1847).

The discharge under this section is statutory, and a strict compliance with the requirements of this section by one claiming benefit under the statute is mandatory. *Glasser v. Decatur Lumber & Supply Co.*, 95 Ga. App. 665, 99 S.E.2d 330 (1957).

**Section affects remedy only.** — This section does not affect either the nature, obligation, construction, or validity of the contract, but goes only to the remedy. *Sally v. Bank of Union*, 150 Ga. 281, 103 S.E. 460, answers conformed to, 25 Ga. App. 509, 103 S.E. 798 (1920); *Overstreet v. W.T. Rawleigh Co.*, 75 Ga. App. 483, 43 S.E.2d 774 (1947); *Fricks v. J.R. Watkins Co.*, 88 Ga. App. 276, 76 S.E.2d 518, rev'd on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953).

**Section is like limitation of actions.** — This section operates as the extinguishment of a remedy, and not of a right, and is therefore in the nature of a limitation of actions. *Vanzant, Jones & Co. v. Arnold, Hamilton & Johnson*, 31 Ga. 210 (1860); *Sally v. Bank of Union*, 150 Ga. 281, 103 S.E. 460, answers conformed to, 25 Ga. App. 509, 103 S.E. 798 (1920); *Overstreet v. W.T. Rawleigh Co.*, 75 Ga. App. 483, 43 S.E.2d 774 (1947); *Fricks v. J.R. Watkins Co.*, 88 Ga. App. 276, 76 S.E.2d 518, rev'd on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953);



**General Consideration (Cont'd)**

Hearn v. Citizens & S. Nat'l Bank, 154 Ga. App. 686, 269 S.E.2d 486 (1980).

**Any conflict between this section and the UCC** would be controlled by the UCC as the later expression of the legislature. Gunter v. True, 203 Ga. App. 330, 416 S.E.2d 768, cert. denied, 203 Ga. App. 906, 416 S.E.2d 768 (1992).

**Compensated as well as uncompensated sureties are governed by the provisions of O.C.G.A. § 10-7-24.** Morrison Assurance Co. v. Preston Carroll Co., 254 Ga. 608, 331 S.E.2d 520 (1985), cert. denied, 474 U.S. 1060, 106 S. Ct. 805, 88 L. Ed. 2d 781 (1986).

**Purpose of section.** — Object of this section was for the benefit and protection of securities. Bank of St. Marys v. Mumford & Tyson, 6 Ga. 44 (1849).

Essential purpose of O.C.G.A. § 10-7-24 is to accord sureties a mechanism to compel creditors to sue principal debtor upon accrual of creditor's cause of action. A.J. Kellos Constr. Co. v. Balboa Ins. Co., 661 F.2d 402 (5th Cir. 1981).

**Statutory bonds.** — This section has no reference to statutory bonds, such as a forthcoming bond, taken in the progress of a judicial proceeding. Hobbs v. Taylor, 11 Ga. App. 579, 75 S.E. 906 (1912), later appeal, 13 Ga. App. 451, 79 S.E. 356 (1913).

**Guaranty agreements under UCC.** — O.C.G.A. § 10-7-24 does not apply to guaranty agreements governed by the UCC. Gunter v. True, 203 Ga. App. 330, 416 S.E.2d 768, cert. denied, 203 Ga. App. 906, 416 S.E.2d 768 (1992).

**Section applicable to guarantor.** — A guarantor has the same right as a surety by written notice to compel the institution of a suit against the principal under this section. Fields v. Willis, 123 Ga. 272, 51 S.E. 280 (1905), later appeal, 132 Ga. 242, 63 S.E. 828 (1909).

**Contracts executed in another state.** — This section is applicable to a case where the contract sued on in Georgia was executed in another state. Watkins Co. v. Seawright, 168 Ga. 750, 149 S.E. 45 (1929), answer conformed to, 40 Ga. App. 314, 149 S.E. 389 (1929).

**Nonresident principal.** — Fact that the residence of the principal was in another state, and was so stated in the notice, would

not, under the terms of this section or the statutes from which it is condensed, preclude the sureties from the benefit thereof, the principal being in fact within the jurisdiction of the court. Fricks v. J.R. Watkins Co., 88 Ga. App. 276, 76 S.E.2d 518, rev'd on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953).

The discharge of an endorser for which provision is made in this section is not applicable where the principal in the promissory note resides outside this state. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330 (1957).

Where it appears that the corporate maker of a note is a foreign corporation, an endorser of the note is not discharged if the creditor, on request, neglects to proceed against the principal, in the absence of an offer of indemnity to the holder against the consequences, risk, delay, or expenses. Glasser v. Decatur Lumber & Supply Co., 95 Ga. App. 665, 99 S.E.2d 330 (1957).

**Cited in** McMullan v. Community Acceptance Corp., 78 Ga. App. 616, 51 S.E.2d 575 (1949); Kennedy v. Thruway Serv. City, Inc., 133 Ga. App. 858, 212 S.E.2d 492 (1975); Central Bank & Trust Co. v. Price, 136 Ga. App. 302, 221 S.E.2d 71 (1975); Trust Inv. & Dev. Co. v. First Ga. Bank, 238 Ga. 309, 232 S.E.2d 828 (1977); Noland Co. v. Commercial Ins. Co., 141 Ga. App. 285, 233 S.E.2d 259 (1977); American Druggist Ins. Co. v. Georgia Power Co., 145 Ga. App. 104, 243 S.E.2d 319 (1978); Vol T. Blacknall Co. v. Frazee, 148 Ga. App. 327, 251 S.E.2d 122 (1978); McGraw Edison Credit Corp. v. Motorola Communications & Elecs., Inc., 579 F.2d 885 (5th Cir. 1978); Balboa Ins. Co. v. A.J. Kellos Constr. Co., 247 Ga. 393, 276 S.E.2d 599 (1981); National Bank v. Moore, 159 Ga. App. 729, 285 S.E.2d 78 (1981); Goldstein v. GTE Prods. Corp., 160 Ga. App. 767, 287 S.E.2d 105 (1982); Ely & Walker v. Dux-Mixture Hdwe. Co., 732 F.2d 821 (11th Cir. 1984); Breedlove v. Hurst, 181 Ga. App. 4, 351 S.E.2d 212 (1986); Brice v. Northwest Ga. Bank, 186 Ga. App. 871, 368 S.E.2d 816 (1988); Pine Timber Co. v. Anthony, 191 Ga. App. 375, 381 S.E.2d 591 (1989); Johnson Controls, Inc. v. Safeco Ins. Co. of Am., 913 F.2d 907 (11th Cir. 1990); Johnson Controls, Inc. v. Safeco Ins. Co., 261 Ga. 364, 404 S.E.2d 556 (1991); Lewis v. Rogers, 201 Ga. App. 899, 412 S.E.2d 632 (1991); Everts v.

Century Supply Corp., 264 Ga. App. 218, 590 S.E.2d 199 (2003).

### Notice

**Notice may be given at any time.** — This section provides that the surety, “at any time” after the debt on which the surety is liable becomes due, may give the notice. *Sally v. Bank of Union*, 150 Ga. 281, 103 S.E. 460, answers conformed to, 25 Ga. App. 509, 103 S.E. 798 (1920).

**Notice after suit against surety.** — When a surety has been sued separately from a principal, it is not too late to give the notice. *Sally v. Bank of Union*, 150 Ga. 281, 103 S.E. 460, answers conformed to, 25 Ga. App. 509, 103 S.E. 798 (1920); *Overstreet v. W.T. Rawleigh Co.*, 75 Ga. App. 483, 43 S.E.2d 774 (1947).

**Notice must be written.** — The notice to the creditor by a surety to proceed against the principal debtor, required by this section, is written notice, an oral request will not suffice. *Timmons v. Butler, Stevens & Co.*, 138 Ga. 69, 74 S.E. 784 (1912); *Johnson v. Longley*, 142 Ga. 814, 83 S.E. 952 (1914), later appeal, 22 Ga. App. 96, 95 S.E. 315 (1918).

If it is not claimed that either of the endorser gave notice in writing to the creditor to proceed to collect the debt out of the principal, the creditor was not barred from bringing suit to recover several years later. *Chapman v. Miller*, 40 Ga. App. 138, 149 S.E. 70 (1929).

**Oral notice** is not a sufficient compliance with this section. *Gettis v. Gormley*, 49 Ga. App. 339, 175 S.E. 393 (1934).

**Creditor may waive requirement by filing suit and then discharge surety by dismissing it.** — If oral notice is given by a surety on a note to the creditor to sue on the note, and the creditor agrees to sue and in pursuance to such notice and agreement does actually enter suit, the creditor thereby treats such notice as sufficient and waives the requirements of this section, and the surety acquires a right and interest in the suit; and where such suit is dismissed without the permission of the surety, the creditor must bring another suit within three months from the date of the original notice and executed agreement to sue, and failure to do so will discharge the surety. *Gettis v. Gormley*, 49 Ga. App. 339, 175 S.E. 393 (1934).

**Reliance on assurance of suit will discharge surety to extent of loss.** — A parol notice or request to the creditor by a surety upon a promissory note to bring suit will not operate as a compliance with this section; if, however, the surety is assured by the holder of the note that suit will be brought at the next term of court, and because of such assurance the surety foregoes means of indemnity or protection, and the suit is not brought, the surety will be discharged to the extent of the loss. *Longley v. Johnson*, 22 Ga. App. 96, 95 S.E. 315 (1918).

**Evidence of oral notice.** — If it does not appear that the endorser parted with the means of protecting himself in consequence of any assurances made to him by the creditor and the record discloses nothing that would estop the creditor or relieve the endorser from the necessity of complying with the strict provisions of this section, the court does not err in excluding parol testimony to the effect that the endorser made an oral demand on the officers of the creditor to sue on the note while the principal was solvent and that demand was followed by a promise on the part of the creditor to do so and it failed to do so. *Smith v. Morris Fertilizer Co.*, 18 Ga. App. 217, 89 S.E. 174 (1916).

**Notice need not indicate benefit of section will be claimed.** — To entitle a security or endorser to the benefit of the provisions of this section for the endorser's relief, it is only necessary for the endorser to notify the holder to sue the note. It is not necessary that the endorser should, in addition, notify the holder that unless the endorser did proceed to collect the note that the endorser would claim the benefit of this section. *Denson v. Miller*, 33 Ga. 275 (1862).

**Notice must be positive demand to sue.** — It must be a positive demand to sue, and so understood by the parties at the time, in order to discharge the surety. If it appeared that it was a request of a favor, and so considered by the parties at the time, then the surety was not discharged by reason of a failure to sue in three months. *Bethune v. Dozier*, 10 Ga. 235 (1851).

**“Lose no time in suing” is a command to sue.** *Howard v. Brown*, 3 Ga. 523 (1847).

**Letters properly excluded which contain no command.** — Where two letters were written by the surety, one being mailed before the maturity of the debt and containing



**Notice (Cont'd)**

merely the expression of a desire on the part of the surety that the plaintiff would collect when the obligation became due and the other suggesting the advisability of bringing suit and expressing doubt whether the money could be made later, but containing no command, there was no notice given as required by this section, and the letters were rightly excluded. *Smith v. Morris Fertilizer Co.*, 18 Ga. App. 217, 89 S.E. 174 (1916).

**Notice must state county of principal's residence.** — No notice shall be considered a compliance with the requirements of this section which does not state the county of the principal's residence. *Smith v. Morris Fertilizer Co.*, 18 Ga. App. 217, 89 S.E. 174 (1916).

A notice which states that the principal's residence is "Waycross, Ga.," but which does not state the county of the principal's residence, is not the notice required by this section. *Seckinger v. Exchange Bank*, 38 Ga. App. 667, 145 S.E. 94 (1928).

Written notice that does not state the county of the principal's residence is not a sufficient compliance with this section. *Gettis v. Gormley*, 49 Ga. App. 339, 175 S.E. 393 (1934).

If the maker resides in this state, in order for the notice for which provision is made in this section to be effective, such notice must state the county in which the principal resides. *Glasser v. Decatur Lumber & Supply Co.*, 95 Ga. App. 665, 99 S.E.2d 330 (1957).

Notice to a creditor to proceed is ineffective unless the notice states the county in which the principal resides; this requirement is mandatory under the statute. *Motz v. Landmark First Nat'l Bank*, 154 Ga. App. 858, 270 S.E.2d 81 (1980).

**Actual notice is required.** Constructive notice, if there is any arising by virtue of an Act of the legislature incorporating a city, that the city is in a particular county, will not suffice as a compliance with this section. *Seckinger v. Exchange Bank*, 38 Ga. App. 667, 145 S.E. 94 (1928).

**Where city and county have same name.** — It is not a compliance with the section to say "of Macon, Georgia," there being in the state both a County of Macon and a City of Macon, and the notice not indicating that the county was meant rather than the city.

*Ware v. City Bank*, 59 Ga. 840 (1877).

**Where county of residence is in another state.** — If a surety gives notice in writing to the creditor, in compliance with this section, to make the debt out of the principal, which notice states that the principal is a resident of a particular county of another state, but also states facts showing that the principal is within the jurisdiction of this state and where the principal may be served by process, and where the creditor fails to commence an action against the principal within three months thereafter, such notice, upon being established as true, is sufficient to discharge the sureties under the provisions of this section. *Fricks v. J.R. Watkins Co.*, 88 Ga. App. 276, 76 S.E.2d 518, rev'd on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953).

**Receipt of notice by creditor does not cure defect as to county.** — A notice to sue, given by a surety under this section in order to afford a defense to a subsequent action brought against the surety by the creditor, must state the county of the residence of the principal debtor, since, under the mandate of the statute, "no notice shall be considered a compliance with the requirements of this section which does not state the county of the principal's residence"; a notice fatally defective in this respect, but received by the creditor with the remark "all right," could amount to nothing more than a mere promise by the creditor, without consideration, to proceed against the principal debtor, which would have no effect upon the obligation of the surety. *Bowen v. Mobley*, 40 Ga. App. 833, 151 S.E. 667 (1930).

**Notice by one surety is sufficient.** — A notice by one surety is as effectual as if all the sureties were to unite in the notice; a notice by one surety is as available to the creditor as a notice from all. *Jones v. Whitehead*, 4 Ga. 397 (1848).

**Notice is properly given to creditor holding note.** — Where a promissory note to which there is a surety is held by a creditor of the owner as a collateral security, such creditor is the proper person to be notified by the surety to sue the maker. *McCrary v. King*, 27 Ga. 26 (1859).

**Notice to agent, such as cashier of bank.** — Since notice to sue the principal maker of a note by the surety under this section was directed to the cashier of the bank which was the holder of the note, it was sufficient



notice to the bank, especially as it appeared that the bank acted upon such notice. *Bank of St. Marys v. Mumford & Tyson*, 6 Ga. 44 (1849).

**Wrongly designating person giving notice is not grounds for excluding notice.** — The fact that the person giving the written notice to sue under this section was designated as “endorser,” when, under both the pleading and the evidence, the person was a technical “surety,” was not cause for excluding such notice as evidence in the case. *Milam v. Lewis*, 47 Ga. App. 376, 170 S.E. 404 (1933).

**Nature of surety’s request may be question for jury.** — If it is doubtful whether the surety intended to request the creditor to sue the principal as a matter of law, it is proper to submit it to the jury to find from the facts how the parties understood the matter. *Bethune v. Dozier*, 10 Ga. 235 (1851).

### Suit by Creditor

**Surety is entitled under the law to have the creditor sue the principal debtor**, if the debtor can be found, as such was the purpose of the General Assembly in the enactment of this section. *W.T. Rawleigh Co. v. Overstreet*, 84 Ga. App. 21, 65 S.E.2d 50 (1951).

**After proper notice, failure to sue principal within state discharges surety.** — Under this section, the surety is required only to give the creditor: (a) notice to proceed to collect the debt from the principal; and (b) to state the county in which the principal resides; thereafter, if the principal is within the jurisdiction of the state, and if the creditor fails to commence an action within three months after such notice, the surety will be discharged. *Fricks v. J.R. Watkins Co.*, 88 Ga. App. 276, 76 S.E.2d 518, rev’d on other grounds, 210 Ga. 83, 78 S.E.2d 2 (1953).

**Failure of creditor to commence action.** — To the extent O.C.G.A. § 10-7-24 provides for the discharge of a guarantor based on the failure of the creditor to commence an action against the principal it is inconsistent with O.C.G.A. § 11-3-416(1). *Gunter v. True*, 203 Ga. App. 330, 416 S.E.2d 768, cert. denied, 203 Ga. App. 906, 416 S.E.2d 768 (1992).

**Filing of petition without service does not operate to commence suit** and no suit is pending until the suit has been served.

*Southeastern Fid. Ins. Co. v. Tesler*, 159 Ga. App. 60, 282 S.E.2d 703 (1981).

**Suing in wrong county does not comply with notice.** — The bringing of a suit by a creditor against a principal in a county other than the principal’s residence is the equivalent of no suit at all where process was not served on the principal and hence cannot be urged as a compliance upon service of notice provided for in this section. *Overstreet v. W.T. Rawleigh Co.*, 75 Ga. App. 483, 43 S.E.2d 774 (1947); *Southeastern Fid. Ins. Co. v. Tesler*, 159 Ga. App. 60, 282 S.E.2d 703 (1981).

**Suit on obligation on which sureties were not liable.** — A suit by a creditor against the principal debtor on the second of two obligations for which sureties were liable on only the first obligation will not suffice, under this section, as a suit within three months, since this section refers to the obligation on which the sureties sought to be held liable became obligated to pay the creditor. *W.T. Rawleigh Co. v. Overstreet*, 84 Ga. App. 21, 65 S.E.2d 50 (1951).

**New suit is unnecessary if one is pending when notice received.** — If a creditor brings suit against the sureties on a contract, and the sureties give the statutory notice to the creditor to proceed to collect the debt out of the principal, and if upon the trial the creditor admits the creditor’s failure to sue the principal within three months after receiving such notice, but shows that the creditor did file suit against the principal in the county of the residence of the principal after the debt was due, but before the creditor received the notice from the sureties and before the creditor brought suit against the sureties, the filing of another suit is unnecessary. *J.R. Watkins Co. v. Seawright*, 168 Ga. 750, 149 S.E. 45, answer conformed to, 40 Ga. App. 314, 149 S.E. 389 (1929).

**Creditor has full three months to sue so surety risks principal’s removal.** — If notice was given to the holder to sue the maker, but before the expiration of the three months allowed by this section, the maker removed out of the state, so that no suit could be instituted against the maker, the holder has the whole three months allowed by this section within which to sue, and the removal of the maker was at the risk of the endorser and not of the holder. *Howard v. Brown*, 3 Ga. 523 (1847).

**Suit by Creditor (Cont'd)**

**No duty to sue principal where third party not surety.** — A creditor is not required to proceed against the principal in order to preserve the creditor's rights to hold a third party liable where the third party is neither a surety, guarantor, nor an endorser, but has agreed to a primary obligation to pay for goods. *Ely & Walker v. Dux-Mixture Hdwe. Co.*, 582 F. Supp. 285 (N.D. Ga. 1982), *aff'd*, 732 F.2d 821 (11th Cir. 1984).

**Obtaining default judgment.** — A creditor who obtained a default judgment against the principal (maker of notes), fulfilled the creditor's duty under O.C.G.A. § 10-7-24. *United States v. Blue Dolphin Assocs.*, 620 F. Supp. 463 (S.D. Ga. 1985).

**Waiver and Estoppel**

**Surety may waive benefit of section.** — The right created by the legislature, as embodied in this section, was established solely for the benefit of one who has become surety for another, and such surety may therefore waive it without injuring others and without affecting the public interest. *J.R. Watkins Co. v. Fricks*, 210 Ga. 83, 78 S.E.2d 2 (1953).

**Provision agreeing creditor may extend time estops surety from giving notice.** — If the surety has in the surety's contract consented that the creditor may, within the creditor's discretion, extend the period of time within which the principal's indebtedness is due, the surety will be estopped to give notice under this section after the date the debt is due and claim the benefit of the shorter three-month "statute of limitation" within which the creditor must thereafter bring suit against the principal. *Hearn v.*

*Citizens & S. Nat'l Bank*, 154 Ga. App. 686, 269 S.E.2d 486 (1980).

If, for value received, the surety consents that the creditor "may grant any extension on the note that he deems proper," the surety cannot, by giving the notice contemplated in this section, revoke the surety's consent allowing the extension of time and be discharged from liability on the note merely because of a failure on the part of the creditor to commence an action against the principal debtor within the period of three months. *Armour Fertilizer Works v. Bond*, 139 Ga. 246, 77 S.E. 22 (1913).

**Surety waives notice by requesting indulgence to principal.** — If the surety gives notice and then asks the creditor for indulgence, the surety waives the notice, provided the surety's request was made before the expiration of three months after the notice, and provided it was a request for indulgence to the surety's principal, not to the surety. *Bailey v. New*, 29 Ga. 214 (1859).

**Request after three-month period.** — A request for indulgence made after the expiration of three months after the notice will not have the effect of a waiver of notice. *Bailey v. New*, 29 Ga. 214 (1859).

**Provision allowing suit against sureties first does not waive section.** — Where relationship of principal and surety exists, the creditor for whose protection the sureties become such may proceed against the sureties without first exhausting its remedies against the principal as a matter of law, with or without a provision to that effect in the contract. Therefore, the creditor acquires nothing by such a provision, and the sureties surrender nothing. *Overstreet v. W.T. Rawleigh Co.*, 75 Ga. App. 483, 43 S.E.2d 774 (1947).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 30, 32.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 147 et seq.

**ALR.** — Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Language or purport of notice to proceed against principal, noncompliance with which will relieve surety, 30 ALR 1285.

Endorsing payment upon note before maturity as releasing surety or endorser, 37 ALR 477.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 ALR 1262.

Failure to present claim against estate of deceased principal as releasing surety, 50 ALR 1214.

Insolvency of obligee as extending time allowed by fidelity bond for discovery of default, 56 ALR 1263.

Waiver by surety agreement of benefit of rule which releases surety in event of obligee's failure to comply with surety's demand that he proceed against principal, 89 ALR 570.

Effect of silence of surety or endorser after knowledge or notice of facts relied upon as releasing him, 101 ALR 1310.

Creditor's reservation of rights against

surety in releasing or extending time to principal debtor, 139 ALR 85.

Pledgor of property to secure another's obligation as within benefit of rule that requires obligee to comply with surety's demand to proceed against principal, 151 ALR 928.

Applicability to compensated surety or bonding company of statute discharging surety where creditor fails to bring suit against principal after notice, 42 ALR2d 1159.

## 10-7-25. Extending liability.

The creditor shall pursue his remedy against the surety within the time prescribed by law; and no payment or promise by the principal or by a cosurety shall extend the obligation of the surety or the remedy of the creditor against him. (Orig. Code 1863, § 2135; Code 1868, § 2130; Code 1873, § 2157; Code 1882, § 2157; Civil Code 1895, § 2975; Civil Code 1910, § 3547; Code 1933, § 103-206.)

## JUDICIAL DECISIONS

**Entering payment on note does not extend statute of limitations against surety.** — A payment and entry on a note by the principal did not prevent the bar of the statute of limitations from attaching in favor of the surety's security under former Code 1873, §§ 2157 and 2938. *McBride v. Hunter*, 64 Ga. 655 (1880).

**Credits on note do not extend statute of limitations whether made by principal or cosurety.** — Whether the credits on the notes were made by the principal or the maker thereof, or by the present plaintiff as surety, these payments or credits did not extend or revive the original liability, did not create new promises that were binding upon any of the other sureties who were not parties to such payments, and did not constitute new points for the running of the statute of limitations insofar as the rights of other sureties not parties to such payments

were concerned. This principle falls within the spirit, if not the letter, of this section. *McLin v. Harvey*, 8 Ga. App. 360, 69 S.E. 123 (1910).

**Waiver of contractual limitations on time to sue.** — Where surety company led bank to believe that claim under bond sued on would be paid by surety company, without suit, if the bank would by legal proceedings force exhaustion of administrator's bond before calling upon cashier's bond, and thus determine the amount due by the surety company on the cashier's bond on account of embezzlement of bank's cashier, the surety company could not take advantage of the provision in the policy requiring that action thereunder be brought within a stated time. *American Sur. Co. v. Peoples Bank*, 55 Ga. App. 28, 189 S.E. 414 (1936).

**Cited in** *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 30, 32.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 180 et seq.

**ALR.** — Release of payee from warranty

constituting a part of the consideration for a note as releasing a surety, 7 ALR 1605.

Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.



Endorsing payment upon note before maturity as releasing surety or endorser, 37 ALR 477.

Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 ALR 1262.

Extension of time or other modification of original contract as releasing indemnitor of surety or guarantor, 43 ALR 1368

Creditor's reservation of rights against

surety in releasing or extending time to principal debtor, 139 ALR 85.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Application of payments as between debts for which a surety or guarantor is bound and those for which he is not, 57 ALR2d 855.

Guarantor of nonnegotiable obligation as released by creditor's acceptance of debtor's note or other paper payable at an extended date, 74 ALR2d 734.

## 10-7-26. Promise to pay in ignorance of discharge.

If by an act of the creditor the surety is discharged and in ignorance of the fact of the discharge the surety promises to pay, the promise shall not be binding. (Orig. Code 1863, § 2136; Code 1868, § 2131; Code 1873, § 2158; Code 1882, § 2158; Civil Code 1895, § 2976; Civil Code 1910, § 3548; Code 1933, § 103-207.)

## JUDICIAL DECISIONS

**This section applies where there is discharge.** Langston v. Aderhold, 60 Ga. 376 (1878).

**New promise by surety not binding if discharge not known.** — If an endorser being discharged for want of notice of non-payment promises to pay, making the promise in ignorance of the endorser's legal rights, the endorser will not be bound. Langston v. Aderhold, 60 Ga. 376 (1878).

A new promise to pay the obligation, made by a surety in ignorance of the fact that the surety has been released and discharged, is not binding. Crandall v. Shepard, 166 Ga. 889, 144 S.E. 772 (1928).

**Cited in** Hattaway v. First Nat'l Bank, 175 Ga. 144, 165 S.E. 7 (1932).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 34.

## 10-7-27. Provisions of Uniform Commercial Code to control.

Code Sections 10-7-20 through 10-7-26 shall be superseded to the extent of any conflict by the provisions of Article 3 of Title 11, the "Uniform Commercial Code — Negotiable Instruments," relating to the discharge of any party to a negotiable instrument. (Ga. L. 1997, p. 143, § 10.)

**Cross references.** — Discharge of party to commercial paper, § 11-3-601 et seq.

JUDICIAL DECISIONS

**Current law on discharge of parties to instruments listed in § 11-3-601.** — The law governing discharge of sureties and other parties on instruments is currently governed by the Uniform Commercial Code provisions cited in Ga. L. 1962, pp. 156, 276 (see O.C.G.A. § 11-3-601). *Christian v. Atlanta Army Depot Fed. Credit Union*, 151 Ga. App. 403, 260 S.E.2d 533 (1979).

**Security for negotiable instruments.** — Some decisions of the Court of Appeals have applied the law to contracts of surety or guaranty securing obligations evidenced by instruments which were almost certainly ne-

gotiable instruments without reference to the Uniform Commercial Code. *Sewell v. Atkins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

**Construction with UCC.** — The commercial paper chapter of the Uniform Commercial Code controls in cases based on negotiable instruments. The law providing for the discharge of a surety or guarantor of a simple contract for the payment of money applies equally to a surety or guarantor of negotiable instruments. *Sewell v. Atkins*, 147 Ga. App. 454, 249 S.E.2d 274 (1978).

10-7-28. Process sued out and judgment entered against surety as such.

When the fact of suretyship appears on the face of the contract, the creditor shall sue out process against the surety and enter up judgment against him as such. (Laws 1845, Cobb's 1851 Digest, p. 598; Laws 1850, Cobb's 1851 Digest, p. 600; Code 1863, § 2137; Code 1868, § 2132; Code 1873, § 2159; Code 1882, § 2159; Civil Code 1895, § 2977; Civil Code 1910, § 3549; Code 1933, § 103-208.)

JUDICIAL DECISIONS

**Judgment may be amended to describe surety as such.** — Judgment is not void by reason of failing to describe the security as

security, but is amendable. *Saffold v. Wade*, 56 Ga. 174 (1876).

RESEARCH REFERENCES

**ALR.** — Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to

perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 ALR 81.

Right to bring action against guarantor before right to bring action against principal has arisen, 145 ALR 935.

10-7-29. Judgment against principal and surety at same time.

It shall be lawful to enter judgment against principal and sureties at the same time, as in cases of appeal, in all cases in law or equitable proceedings when a bond has been given by the losing party conditioned to pay the eventual condemnation money in the action; and it shall not be necessary to bring an action upon the bond. (Ga. L. 1893, p. 131, § 1; Civil Code 1895, § 2978; Civil Code 1910, § 3550; Code 1933, § 103-209; Ga. L. 1982, p. 3, § 10.)

**Cross references.** — Discharge of parties to commercial paper, § 11-3-601 et seq.

### JUDICIAL DECISIONS

**Prior to section, suit against sureties was required.** — Prior to the adoption of this section, in order to obtain judgment against sureties on bonds of losing parties in equitable proceedings, conditioned to pay the eventual condemnation money, it was necessary to bring suit on the bond. *Offerman & W. R.R. v. Waycross Air-Line R.R.*, 112 Ga. 610, 37 S.E. 871 (1901); *Miller v. A.M. Watson & Co.*, 135 Ga. 408, 69 S.E. 555 (1910).

**Purpose of this section** was to make the judgment so entered against the surety binding to the same extent as a judgment against the surety if rendered in a separate suit on the bond; in other words, that such a judgment should be a substitute for a judgment which might theretofore have been rendered in a separate suit on the bond. *Miller v. A.M. Watson & Co.*, 135 Ga. 408, 69 S.E. 555 (1910).

**Judgment may now be entered against surety without suit.** — Under this section, upon the entering of judgment against the principal, it is lawful to sign up judgment against the surety on the condemnation money bond at the same time without the necessity for bringing suit thereon. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969).

**Eventual condemnation money bond.** — Prior to Ga. L. 1893, p. 131, § 1, now embraced in this section, it was necessary to bring an independent suit on all bonds given in an equitable proceeding; and since the passage of the Act, judgment can be entered up against the principal and the principal's sureties at the same time in an equitable proceeding only in a case where a bond has been made by the losing party, conditioned to pay the eventual condemnation money in the action. *Jordan v. J.A. Callaway & Co.*, 138 Ga. 209, 75 S.E. 101 (1912); *United States Fid. & Guar. Co. v. Tucker*, 165 Ga. 283, 140 S.E. 866 (1927).

"Eventual condemnation money" is that which is recovered in the identical case in which the appeal is taken; it is the amount fixed and settled by the judgment or decree of the court in the case. *Harrell v. Kutz & Co.*, 22 Ga. App. 235, 95 S.E. 717 (1918).

If the bond given by the defendants is for the payment of the judgments which may be rendered in the case, it will be treated as a bond for the eventual condemnation money under this section. *Harrell v. Kutz & Co.*, 22 Ga. App. 235, 95 S.E. 717 (1918).

Under this section, while judgment against the sureties on a bond to dissolve an injunction and receivership cannot be entered in the main case, where the bond is conditioned otherwise than for the eventual condemnation money, yet, where the obligation of the bond was conditioned to pay unto the plaintiff whatever sum may be shown to be due the plaintiff under the contract and the liability was not limited to an amount other than that which might be ultimately fixed and settled by the judgment or decree in the case, a summary judgment in the same case against the sureties on the bond was permissible, and an affidavit of illegality, based on the contention that one of the sureties had not had a day in court could not properly be sustained. *Smith v. Newsome*, 26 Ga. App. 743, 107 S.E. 269 (1921).

An "eventual condemnation money bond" is one wherein makers agree to pay to the payee therein any judgment which the payee may recover against the principal in the suit in which such bond is given. *United States Fid. & Guar. Co. v. Tucker*, 165 Ga. 283, 140 S.E. 866 (1927).

Under this section, a bond must be an eventual condemnation money bond in order that judgment may be entered thereon in the particular case in which it was given, that is, without an independent suit. *Vickers v. Jones*, 200 Ga. 338, 37 S.E.2d 205 (1946).

**Bond must secure independent liability for which judgment may be taken.** — Since a "condemnation money bond" is given merely as security, necessarily there must be some independent liability that is thus secured, and it must be one for which judgment may be taken against the principal in the identical case, even if the bond had not been given. *Vickers v. Jones*, 200 Ga. 338, 37 S.E.2d 205 (1946).

**Recovery on bond creating only liability must be by independent suit.** — If a bond



itself creates the only liability, it is not an eventual condemnation money bond, and a recovery thereon can be had only in an independent suit. *Vickers v. Jones*, 200 Ga. 338, 37 S.E.2d 205 (1946).

**Injunction bond is not an eventual condemnation money bond** within the meaning of this section, and a recovery thereon may be had only in an independent suit. *Vickers v. Jones*, 200 Ga. 338, 37 S.E.2d 205 (1946).

**Bond of indemnity.** — See *United States Fid. & Guar. Co. v. Tucker*, 165 Ga. 283, 140 S.E. 866 (1927).

**Judgment may be entered if bond so provides.** — Judge of the superior court did not err in entering up judgment against the plaintiff and the plaintiff's surety upon a bond for the amount of the judgment obtained in the municipal court, which bond was voluntarily given in order to obtain a restraining order upon presentation of the petition for injunction for sanction by the judge and which provided that judgment might be entered thereon as in case of appeal, should the plaintiff fail in the plaintiff's equitable cause for injunction. *American Liberty Fire Ins. Co. v. McGlothlin*, 165 Ga. 173, 140 S.E. 354 (1927).

**Sureties on a condemnation money bond must remain silent witnesses** to the conflict between the parties to the suit, standing ready to fulfill at the end of the litigation the obligation the sureties have undertaken. *Ford v. Herbermann*, 125 Ga. App. 87, 186 S.E.2d 501 (1971).

**Bail or security takes the fortunes of the principal and is bound equally with the principal** by the judgment in the main action. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969).

Where, under former provisions therefor, a tenant arrested an eviction proceeding by giving bond with a surety to the landlord, conditioned for the payment of such sum with costs as may be recovered against the defendant tenant on the trial of the case, the surety took the fortunes of the principal and was bound by whatever judgment was rendered against the principal, even though the surety did not appear and plead and the judgment was by consent of the principal and not of the surety. *Ford v. Eskridge*, 53 Ga. App. 466, 186 S.E. 204 (1936).

**Liability of sureties is absolutely fixed by the judgment against their principal**, and the

sureties must stand or fall by the result of the surety's defense, such being the express undertaking in the bond. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969); *Ford v. Herbermann*, 125 Ga. App. 87, 186 S.E.2d 501 (1971).

**Notice or hearing not required.** — There is no requirement in this section that the surety be named as a party or be served, or otherwise notified and given an opportunity to be heard. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969).

Under the construction the courts have placed on this section, a surety takes the fortunes of the surety's principal; upon judgment being entered against the principal, it is lawful to enter judgment against the surety at the same time without the necessity of bringing suit. In such instance, the surety cannot complain of lack of notice or opportunity of being heard prior to that judgment. *Houston Gen. Ins. Co. v. Stein Steel & Supply Co.*, 134 Ga. App. 624, 215 S.E.2d 511 (1975).

**Surety cannot attack judgment for causes principal could have raised.** — If a judgment has been rendered against a surety by a court of competent jurisdiction, the surety is absolutely bound by the judgment, and will not be heard to impeach or attack the judgment in any way for causes which were or could have been matter of defense by the principal. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969); *Ford v. Herbermann*, 125 Ga. App. 87, 186 S.E.2d 501 (1971).

**Motion to set aside.** — In a motion to set aside, a surety may make no complaint relative to the merits of the judgment which could have been raised by the surety's principal, but must stand or fall by the result of the principal's defense. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969).

**Affidavit of illegality.** — The bail can no more go behind the judgment or attack the judgment by affidavit of illegality after the judgment is duly entered against both the bail and the principal than can the principal. *O'Leary v. Smith*, 119 Ga. App. 762, 168 S.E.2d 886 (1969).

**Finding in main case must fix liability according to terms of bond.** — Even if in a particular case judgment could be entered upon the bond under this section, it is a prerequisite that there be a finding fixing the surety's liability according to the condi-

tion in the surety's bond. *Jordan v. J.A. Callaway & Co.*, 138 Ga. 209, 75 S.E. 101 (1912) (bond to dissolve injunction and receivership).

Where, as a condition for the grant of an interlocutory injunction against interfering with the possession of land, plaintiff was required to file a bond to indemnify defendant for such rentals as the jury on the final trial of the case should find to be due by plaintiff to defendant according to such interest as defendant might be found to have in the land, under the terms of the bond, no recovery could be had thereon without a determination in the cause itself as to the interest of defendant and the amount of rentals due the defendant by the plaintiff if the defendant had an interest; this is true irrespective of whether or not, in the event of determination of these questions favorably to defendant, the defendant could summarily enter in the same case a judgment on the bond against the principal and the surety as in cases of appeal, under this section, or would have to resort to an independent action. *Fender v. Hendley*, 196 Ga. 512, 26 S.E.2d 887 (1943).

**Intervening surety is concluded by prior judgment.** — Surety on the eventual condemnation money bond given by the defendant in the distress warrant proceeding was

concluded by the prior judgment, even though the surety had been allowed to intervene in the distress warrant proceeding. *Price v. Carlton*, 121 Ga. 12, 48 S.E. 721, 68 L.R.A. 736 (1904).

**Binding judgment may be entered after dismissal set aside.** — Under former provisions as to eviction proceedings, after an order of reinstatement of such a proceeding against a tenant, because its dismissal at the same term of court was for want of prosecution, being presumptively proper and reciting that it was entered "for sufficient cause shown," the surety on the bond of the defendant became bound for such eventual condemnation money as might be determined under the evidence at the trial; the surety was not entitled to set aside the final judgment rendered against the surety and the defendant principal on the bond upon the grounds that the order of dismissal terminated the surety's liability as surety and that the order of reinstatement was entered by the consent only of the defendant and without notice to the surety. *Ford v. Eskridge*, 53 Ga. App. 466, 186 S.E. 204 (1936).

**Cited in** *Wright v. Florida-Georgia Tractor Co.*, 218 Ga. 824, 130 S.E.2d 736 (1963); *DeKalb County v. Georgia Paperstock Co.*, 226 Ga. 369, 174 S.E.2d 884 (1970).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 134.

**ALR.** — Right to judgment against surety where action fails against principal, 5 ALR 594.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 ALR 81.

Right of surety on bond given to prevent, or secure the release of, attachment, to attack attachment proceedings after recovery by plaintiff of judgment in attachment action, 89 ALR 266.

Right to join principal debtor and guarantor as parties defendant, 53 ALR2d 522.

Conclusiveness and effect, upon surety, of default or consent judgment against principal, 59 ALR2d 752.

## 10-7-30. Bad faith refusal of corporate surety to perform suretyship contract.

(a) For the purposes of this Code section, the term "obligee" shall include any obligee or beneficiary pursuant to the terms of the contract of suretyship.

(b) In the event of the refusal of a corporate surety to commence the remedy of a default covered by, to make payment to an obligee under, or otherwise to commence performance in accordance with the terms of a contract of suretyship within 60 days after receipt from the obligee of a notice of default or demand for payment, and upon a finding that such refusal was in bad faith, the surety shall be liable to pay such obligee, in addition to the loss, not more than 25 percent of the liability of the surety for the loss and all reasonable attorney's fees for the prosecution of the case against the surety. The amount of such reasonable attorney's fees shall be determined by the trial jury and shall be included in any judgment rendered in such action; provided, however, that such attorney's fees shall be fixed on the basis of competent expert evidence as to the reasonable value of such services, based on the time spent and legal and factual issues involved, in accordance with prevailing fees in the locality where the action is pending; provided, further, that the trial court shall have the discretion, if it finds such jury verdict fixing attorney's fees to be greatly excessive or inadequate, to review and amend such portion of the verdict fixing attorney's fees without the necessity of disapproving the entire verdict. The limitations contained in this Code section in reference to the amount of attorney's fees are not controlling as to the fees which may be agreed upon by the plaintiff and his attorney for the services of such attorney in the action against the surety. (Ga. L. 1973, p. 825, § 1; Ga. L. 1980, p. 1159, § 1; Ga. L. 1982, p. 3, § 10.)

**Editor's notes.** — In *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978), it was held that this chapter, with the exception of this section, was not intended to govern compensated sureties. However, Ga. L. 1981, p. 870, § 1,

amends O.C.G.A. § 10-7-1 so as to abolish the distinction between contracts of suretyship and guaranty. *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981). See the Editor's note to O.C.G.A. § 10-7-1.

### JUDICIAL DECISIONS

**O.C.G.A. § 33-4-6 is virtually identical to O.C.G.A. § 10-7-30**, except that the statute deals with the liability of insurance companies on their insurance contracts rather than the liability of corporate sureties on their suretyship contracts. *Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co.*, 166 Ga. App. 509, 304 S.E.2d 471 (1983).

**Strict construction.** — This section, being in derogation of the common law, must be strictly construed. *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976).

**Section refers to payment to obligee, not claimant.** — This section, which provides damages and attorney fees for default by a corporate surety, refers to the payment to the obligee of the penalty and not to a

claimant. *Travelers Indem. Co. v. Sasser & Co.*, 138 Ga. App. 361, 226 S.E.2d 121 (1976).

**Continued failure to pay the claim after the suit was filed may not be counted** as part of the 60-day deadline set forth in subsection (b) of O.C.G.A. § 10-7-30. *Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co.*, 166 Ga. App. 509, 304 S.E.2d 471 (1983).

**Estoppel.** — Indemnitors were estopped from contending that the insurer's failure to pay the owner's claim prior to trial constituted a breach of fiduciary duty on insurer's part, where the reason the insurer defended the owner's claim instead of paying the claim prior to trial was because the president of one of the indemnitors denied any liability



in the matter and resisted efforts to settle. *M-Pax, Inc. v. Dependable Ins. Co.*, 176 Ga. App. 93, 335 S.E.2d 591 (1985).

**Unavailable remedies.** — The 60-day performance period provided by subsection (b) of O.C.G.A. § 10-7-30 began to run on the date that the surety received the obligee's demand letter and not on the date that the surety was "aware of" the obligee's claim on the bond, and this period was not waived by the surety's denying, prior to 60 days, any obligation on the bond. *Consulting Eng'rs Group, Inc. v. Pace Constr.*, 613 F. Supp. 1192 (N.D. Ga. 1985).

Plaintiff may not recover a bad faith penalty or attorneys' fees pursuant to O.C.G.A. § 10-7-30 in a suit brought under the Miller Act. *United States v. All Am. Bldg. Sys.*, 847 F. Supp. 69 (N.D. Ga. 1994).

**No award for additional attorney's fees on appeal.** — Where the trial court did not err in striking the bad-faith penalty and attorney fees awarded to the plaintiff, its motion for an award of additional attorney fees on appeal will be perforce, denied, both because of this holding and because the Court of Appeals is not empowered by statute or otherwise to grant such relief. *Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co.*, 166 Ga. App. 509, 304 S.E.2d 471 (1983).

**Withdrawal of first notice of default.** — Where contractor's letter to the subcontractor

specified that no claim was being made against the performance bond "at this time," the prior notice of default was clearly intended to be withdrawn, and since the subcontractor was not again declared in default until less than 60 days before suit was filed, and since no demand for payment was made against the surety until that same date, it follows that the surety cannot be held liable for a bad-faith penalty and attorney fees. *Columbus Fire & Safety Equip. Co. v. American Druggist Ins. Co.*, 166 Ga. App. 509, 304 S.E.2d 471 (1983).

**Jurisdiction.** — Subcontractor's action against surety for breach of payment bond contract, bad faith and attorney fees was within superior court's subject matter jurisdiction. *Harry S. Peterson Co. v. National Union Fire Ins. Co.*, 209 Ga. App. 585, 434 S.E.2d 778 (1993).

**Cited in** *American Druggist Ins. Co. v. Georgia Power Co.*, 145 Ga. App. 104, 243 S.E.2d 319 (1978); *Houston Gen. Ins. Co. v. Brock Constr. Co.*, 241 Ga. 460, 246 S.E.2d 316 (1978); *Balboa Ins. Co. v. A.J. Kellos Constr. Co.*, 247 Ga. 393, 276 S.E.2d 599 (1981); *United States ex rel. Gen. Elec. Supply Co. v. Minority Elec. Co.*, 537 F. Supp. 1018 (S.D. Ga. 1982); *Blue Cross & Blue Shield of Georgia/Atlanta, Inc. v. Merrell*, 170 Ga. App. 86, 316 S.E.2d 548 (1984); *Ayers Enters., Ltd. v. Exterior Designing, Inc.*, 829 F. Supp. 1330 (N.D. Ga. 1993).

## RESEARCH REFERENCES

**ALR.** — Act or default of employee covered by fidelity bond or insurance, 62 ALR 411; 77 ALR 861; 98 ALR 1264.

Conclusiveness and effect, upon surety, of default or consent judgment against principal, 59 ALR2d 752.

Validity of statute allowing attorney's fee to successful claimant but not to defendant, or vice-versa, 73 ALR3d 515.

### 10-7-31. Rights of certain parties claiming protection under a payment bond or security deposit; notice of commencement of work.

(a) Where a payment bond or security deposit is provided pursuant to a contract for the construction of an improvement to property other than a public work, every person entitled to claim the protection of the payment bond or security deposit who has not been paid in full for labor or material furnished in the prosecution of the work referred to in such bond or security deposit after the last of the labor was done or performed by him or her or the material or equipment or machinery was furnished or supplied

by him or her for which such claim is made, or when he or she has completed his or her subcontract for which such claim is made, shall have the right to bring an action on such payment bond or security deposit in accordance with the terms thereof for the amount, or the balance thereof, unpaid at the time of the commencement of such action and to prosecute such action to final execution and judgment for the sum or sums due him or her; provided, however, that any person having no contractual relationship express or implied with the contractor furnishing such payment bond or security deposit on a project where the contractor has complied with the Notice of Commencement requirements in accordance with subsection (b) of this Code section shall not have the right to bring an action on such payment bond or security deposit in accordance with the terms thereof unless such person gave to the contractor within 30 days from the filing of the Notice of Commencement or 30 days following the first delivery of labor, material, machinery, or equipment, whichever is later, a written Notice to Contractor setting forth:

(1) The name, address, and telephone number of the person providing labor, material, machinery, or equipment;

(2) The name and address of each person at whose instance the labor, material, machinery, or equipment are being furnished;

(3) The name and location of the project set forth in the Notice of Commencement; and

(4) A description of the labor, material, machinery, or equipment being provided and, if known, the contract price or anticipated value of the labor, material, machinery, or equipment to be provided or the amount claimed to be due, if any.

(b) Where a payment bond or security deposit is provided pursuant to a contract for the construction of an improvement to property other than a public work, the contractor furnishing the payment bond or security deposit shall post on the project site and file with the clerk of the superior court of the county in which the project is located a Notice of Commencement no later than 15 days after the contractor physically commences work on the project and give a copy of the Notice of Commencement to any subcontractor, materialman, or person who makes a written request of the contractor. Failure to give a copy of the Notice of Commencement within ten calendar days of receipt of the written request from the subcontractor, materialman, or person shall render the notice to contractor requirement of subsection (a) of this Code section inapplicable to the subcontractor, materialman, or person making the request. The Notice of Commencement shall include:

(1) The name, address, and telephone number of the contractor;

(2) The name and location of the project being constructed and the legal description of the property upon which the improvements are being made;

- (3) The name and address of the true owner of the property;
  - (4) The name and address of the person other than the owner at whose instance the improvements are being made, if not the true owner of the property;
  - (5) The name and the address of the surety for the performance and payment bonds, if any;
  - (6) The name and address of the construction lender, if any; and
  - (7) The name and address of the holder of the security deposit provided, if any.
- (c) The failure to file a Notice of Commencement under subsection (b) of this Code section shall render the Notice to Contractor requirements of subsection (a) of this Code section inapplicable.
- (d) The clerk of the superior court shall file the Notice of Commencement provided for in this Code section within the records of that office and maintain an index separate from other real estate records or an index with the preliminary notices of lien specified in subsection (a) of Code Section 44-14-361.3. Each such Notice of Commencement shall be indexed under the name of the true owner and the contractor as contained in the Notice of Commencement. (Code 1981, § 10-7-31, enacted by Ga. L. 1994, p. 870, § 1.)

**Law reviews.** — For survey article on construction law, see 59 Mercer L. Rev. 55 (2007).

### JUDICIAL DECISIONS

**Judgment on the pleadings reversed.** — Construing the pleadings in a light most favorable to showing a question of fact in an action in which: (1) the pleadings did not disclose with certainty that a supplier would not be entitled to relief in the supplier's action against a general contractor and the contractor's surety; and (2) the appeals court did not consider the supplier's averments that the supplier's "Notice to Owner/Contractor" complied with O.C.G.A. §§ 10-7-31 and 44-14-361.5 or its admission that it received a copy of the notice of commencement to establish that the general contractor's notice of commencement was otherwise proper and timely filed as required by the statutes, the general contractor and the contractor's surety were not entitled to judgment on the pleadings. *Consol. Pipe & Supply Co. v. Genoa Constr.*

*Servs., Inc.*, 279 Ga. App. 894, 633 S.E.2d 59 (2006).

**Payment bond not substitute collateral.** — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the trial court erred by declaring that the payment bond obtained and recorded by the general contractor served as substituted collateral for the construction project and in discharging the materialmen's lien filed by the provider; O.C.G.A. § 10-7-31 was silent on the issue of how or whether the bond affected materialmen's liens, and, under O.C.G.A. § 44-14-364(a), the bond did not satisfy the essential requirements of a lien release bond since the bond was obtained before the provider filed its lien claim and there was nothing indicating that the bond was issued with good security approved by



the clerk. *Sierra Craft, Inc. v. T. D. Farrell Constr., Inc.*, 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, 2007 Ga. LEXIS 145 (Ga. 2007).

**Notice adequate.** — In the general contractor's action against the materials provider relating to the provider's request for payment under a payment bond, the general contractor's notice of commencement and the provider's notice to contractor complied with O.C.G.A. § 10-7-31; although the notice of commencement stated that the notice was pursuant to O.C.G.A. § 44-14-361.5 and the notice to contractor stated that the notice was sent under O.C.G.A. § 44-14-361, O.C.G.A. § 10-7-31 did not require that either of the notices be expressly labeled as being provided under the statute, the notices contained the pertinent information contemplated by O.C.G.A. § 10-7-31, including that the general contractor had provided a payment bond and that the provider had provided materials for the project through

improvements made by the subcontractor, and the notice of commencement was not misfiled under O.C.G.A. § 10-7-31(d) because it was labeled as provided under O.C.G.A. § 44-14-361.5, as the indexing requirements of both statutes were substantially identical. *Sierra Craft, Inc. v. T. D. Farrell Constr., Inc.*, 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, 2007 Ga. LEXIS 145 (Ga. 2007).

**Notice did not limit the future claims of supplier.** — Although the materials provider, in seeking payment under a payment bond, incorrectly stated in the notice to contractor that the contract price for its provision of materials was \$20,000, it was not limited to recovery of that amount. O.C.G.A. § 10-7-31(a)(4), dictating the contents of a notice to contractor, did not limit the future claims of a notifying supplier. *Sierra Craft, Inc. v. T. D. Farrell Constr., Inc.*, 282 Ga. App. 377, 638 S.E.2d 815 (2006), cert. denied, 2007 Ga. LEXIS 145 (Ga. 2007).

## ARTICLE 3

### RIGHTS OF SURETY AGAINST PRINCIPAL, COSURETIES, AND THIRD PERSONS

#### RESEARCH REFERENCES

**ALR.** — Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Duty of bank to sureties or endorsers as to application of general deposit by principal, 70 ALR 339.

Right of surety or one secondarily liable to bring an action before payment of obligation to set aside fraudulent conveyances by principal, 71 ALR 354.

Right of sureties on bond to take advantage of noncompliance with statutory requirement as to approval of bond, 77 ALR 1479.

Liability of surety on subcontractor's bond to principal contractor for public improvement or to his surety, in respect of claims for labor or materials furnished to subcontractor, 117 ALR 662.

Right of principal, cosureties, or coguarantors to benefit of discount at which obligation is purchased or discharged by a surety or guarantor, 118 ALR 416.

Right of surety on bond of trustee, execu-

tor, administrator, or guardian to terminate liability as regards future defaults of principal, 118 ALR 1261; 150 ALR 485.

Right of surety on fidelity bond to allowance or refund where obligee makes recovery from principal or other sources, 126 ALR 946.

Basis upon which surety paying part of creditor's claim may participate in dividends from insolvent estate of principal, where other part of claim is paid by proceeds of collateral security or by prior dividends, 138 ALR 517.

Release of one of joint and several defalcating tortfeasors as releasing insurer which was surety on fidelity bond of each, 35 ALR2d 1122.

Relative rights, as between surety on public work contractor's bond and unpaid laborers or materialmen, in percentage retained by obligee, 61 ALR2d 899.

Computation of net "loss" for which fidelity insurer is liable, 5 ALR5th 132.

**10-7-40. Attachment against principal.**

A surety or endorser is entitled to the process of attachment against his principal before payment of the debt under the same circumstances as any other creditor. (Orig. Code 1863, § 2138; Code 1868, § 2133; Code 1873, § 2160; Code 1882, § 2160; Civil Code 1895, § 2979; Civil Code 1910, § 3551; Code 1933, § 103-301.)

**JUDICIAL DECISIONS**

**Independent remedies provided surety.** — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

**Basis of liability.** — Liability between principals is not based on underlying notes but on inducement to action. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**Action in equity after debt falls due.** — Paying party may proceed in equity against other principal at any time after debt falls due even if the other principal has not yet been served. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**Call for contribution.** — One who discharges a note can call on one's joint debtor for contribution. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**Basis for contribution.** — The right to call on a joint debtor for contribution arises upon implied contract of joint debtor to bear the debtor's share of debt. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**Contribution in proportion to benefits received.** — Usually joint debtors are equally liable, but, upon highest equitable principles, if there is an inequality of benefits the debtors contribute not equally but in proportion to respective benefits accruing to each joint debtor from proceeds. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**Recovery on implied promise of accommodated party.** — Accommodation party can recover on implied promise of accommodated party to indemnify the accommodating party. *Moore v. Lindsey*, 662 F.2d 354 (5th Cir. 1981).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 75, 143.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 184 et seq., 200.

**10-7-41. Action for money paid, interest, and costs — Right of surety or endorser.**

Payment by a surety or endorser of a debt past due shall entitle him to proceed immediately against his principal for the sum paid, with interest thereon, and all legal costs to which he may have been subjected by the default of his principal. (Orig. Code 1863, § 2139; Code 1868, § 2134; Code 1873, § 2161; Code 1882, § 2161; Civil Code 1895, § 2980; Civil Code 1910, § 3552; Code 1933, § 103-302.)

**Cross references.** — Accommodation party's right of recourse on negotiable instrument against party accommodated, § 11-3-415(5).

## JUDICIAL DECISIONS

**Independent remedies provided surety.** — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

**Subrogation not applicable to rights under this section.** — Subrogation by which a guarantor takes rights of a creditor is not the same thing as a guarantor's right to recoup payment of a debt from the debtor's principal under O.C.G.A. § 10-7-41. *Fabian v. Dykes*, 214 Ga. App. 792, 449 S.E.2d 305 (1994).

**Voluntary payment entitles surety to proceed against principal.** — Voluntary payment by a surety of a past due debt entitles the surety to proceed immediately against the principal for the amount paid in the principal's behalf. *Shattles v. Baker*, 18 Ga. App. 300, 89 S.E. 373 (1916).

**Recovery upon note or upon other obligation.** — If one who signs a note ostensibly as a coprincipal is in fact a surety, one may, after paying the amount due by the principal, recover the amount in a suit against the principal, either in a suit upon the note after a transfer or upon an obligation of the defendant arising otherwise. *Campbell v. Rybert*, 46 Ga. App. 461, 167 S.E. 924 (1933).

**Effect of release of principal.** — Even though the creditor released the principal from liability on a note, the guarantor who paid the note on the principal's behalf and who was not a party to the release had an independent legal right to collect from the principal under O.C.G.A. § 10-7-41. *Fabian v. Dykes*, 214 Ga. App. 792, 449 S.E.2d 305 (1994).

**Right is not affected by paying fraudulent renewal note.** — When the surety has paid the debt, the surety is entitled to reimbursement under this section. The fact that the payment was accomplished by paying a fraudulent renewal note would not affect the right to recover on the original note. *Frye v. Sims*, 144 Ga. 74, 86 S.E. 249 (1915).

**Written assignment of note to surety is unnecessary.** — Where a negotiable promissory note, endorsed in blank and discounted at a bank, is paid to the bank at maturity by a surety thereon, title to the note passes to

the surety by mere delivery and no written assignment by the bank is necessary. *Electric City Brick Co. v. Hagler*, 168 Ga. 836, 149 S.E. 126 (1929).

**Dispute as to date debt was paid with stock and amount paid.** — Guarantor's were not entitled to summary judgment on indemnification claim since the guarantor failed to establish when the stock used to satisfy the debt, in part, was actually transferred to the creditor or when the creditor exercised control over it. *Lahaina Acquisitions, Inc. v. GCA Strategic Inv. Fund Ltd.*, 261 Ga. App. 800, 584 S.E.2d 51 (2003).

**Recovery of stipulated attorney's fees.** — Attorney's fees stipulated in note may be recovered by surety. *Youmans v. Puder*, 13 Ga. App. 785, 80 S.E. 34 (1913).

**Surety or endorser is subrogated to payee's rights to extent of payment.** — Where the plaintiff was a surety or endorser, the plaintiff is to be subrogated to the rights of the payee in the notes in controversy to the extent of payment. *Electric City Brick Co. v. Hagler*, 168 Ga. 836, 149 S.E. 126 (1929).

**Spouse is not entitled to be subrogated.** — Spouse of the grantor in the security deed paying debt secured by another deed was not entitled to be subrogated to the grantee's rights. *Hiers v. Exum*, 158 Ga. 19, 122 S.E. 784 (1924).

**Waiver.** — Guaranty executed by a guarantor contained a very broad waiver clause which plainly and unambiguously waived any claims the guarantor might have had against the debtor and extended to claims arising in equity, or under contract, statute, or common law, and which obviously included a claim under O.C.G.A. § 10-7-41; the trial court erred by denying summary judgment to the debtor and other defendants, and erred in granting summary judgment in favor of the guarantor. *Brookside Cmtys., LLC v. Lake Dow N. Corp.*, 268 Ga. App. 785, 603 S.E.2d 31 (2004).

**Cited in** *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932); *In re Seigel*, 43 F. Supp. 778 (N.D. Ga. 1942); *Continental Cas. Co. v. White*, 160 F. Supp. 611 (M.D. Ga. 1957); *Betts v. Brown*, 219 Ga. 782, 136 S.E.2d 365 (1964); *Redman Indus., Inc. v. Tower Properties, Inc.*, 517 F. Supp. 144 (N.D. Ga. 1981); *Ragsdale v. Bank*



S. (In re Whitacre Sunbelt, Inc.), 206 Bankr. 1010 (Bankr. N.D. Ga. 1997).

### RESEARCH REFERENCES

**ALR.** — Incapacity of principal to contract as affecting liability of guarantor or surety, 24 ALR 838; 43 ALR 589.

Liability of grantee assuming mortgage debt, to grantor, 76 ALR 1191; 97 ALR 1076.

Right of surety to recover against principal for expenses incurred in defeating a claim by the obligee, 124 ALR 1175.

Right of building contractor's surety who completes contract, to money earned by contractor but unpaid before default, 134 ALR 738; 164 ALR 613.

Construction and application of contractual provision regarding payment by surety of claim as evidence of principal's liability to surety ("conclusive evidence" clause), 144 ALR 521.

What constitutes action on bond, executed under law of United States, so as to be within Federal District Court's jurisdiction under 28 USCS § 1352, 105 ALR Fed. 716.

### 10-7-42. Action for money paid, interest, and costs — Effect of judgment against surety.

If the payment was made after judgment and the principal had notice of the pendency of the action against the surety, the amount of such judgment shall be conclusive against the principal as to the amount for which the surety was bound. If the payment was not made after judgment, the principal may dispute the validity of the payment as to the amount or as to the authority of the person to whom it was paid. (Orig. Code 1863, § 2140; Code 1868, § 2135; Code 1873, § 2162; Code 1882, § 2162; Civil Code 1895, § 2981; Civil Code 1910, § 3553; Code 1933, § 103-303.)

### JUDICIAL DECISIONS

**Independent remedies provided surety.** — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

**Joint or separate actions on joint and several note.** — The holder of a joint and several note may sue the obligors jointly or severally or sue any one of the signers alone. On such an obligation, one may sue the principal and surety jointly, or at one's option one may sue either the principal or the surety alone under former Civil Code 1910, §§ 3553 and 3559. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917); *Johnson v. Georgia Fertilizer & Oil Co.*, 21 Ga. App. 530, 94 S.E. 850 (1918); *Cone v. American Sur. Co.*, 29 Ga. App. 676, 116 S.E.

648 (1923); *Bank of Madison v. Bell*, 30 Ga. App. 458, 118 S.E. 439 (1923); *McKibben v. Fourth Nat'l Bank*, 32 Ga. App. 222, 122 S.E. 891 (1924); *Hicks v. Bank of Wrightsville*, 57 Ga. App. 233, 194 S.E. 892 (1938).

**How surety may defeat liability.** — A surety cannot defeat liability by proving merely that the surety received no monetary consideration; the surety would have to show that the surety's principal did not receive any consideration or benefit from paper sued on. *Pharr v. Burnette*, 158 Ga. App. 473, 280 S.E.2d 881 (1981).

**Dormant judgment against surety alone revivable although principal not notified.** — When a scire facias proceeding is brought to revive a dormant judgment rendered against a surety on a joint and several note and the defendant objects to the revival of such judgment on the ground that the defen-

dant's liability had been increased and that the defendant had been discharged from liability thereon because no judgment was rendered against the principal on the note, although no service of the suit was had on the principal, it was error for the judge to refuse to revive the judgment for that reason. *Hicks v. Bank of Wrightsville*, 57 Ga. App. 233, 194 S.E. 892 (1938).

**Sufficiency of allegations in action against endorser.** — In view of former Civil Code 1910, §§ 3541, 3553, and 3559, the plaintiff's pleading in an action against an endorser alleging that plaintiff was the owner and holder of the notes sued on in due course, bona fide and for value, states a cause of action and is not subject to dismissal for failure to allege defendant's relationship to the notes and to the other parties to the notes. *Meldrim v. Peoples Bank*, 28 Ga. App. 294, 111 S.E. 76 (1922).

**Effect of surety's payment of the judgment.** — Amount of the indemnity owed by an insurer to a surety was not affected by the outcome of the appeal as when the judgment was paid by the surety and when the

principal had notice of the action against the surety, the surety's payment of the judgment was conclusive of the amount and the surety could recover such sum from the principal under O.C.G.A. § 10-7-42. *Sec. Life Ins. Co. v. St. Paul Marine & Fire Ins. Co.*, 263 Ga. App. 525, 588 S.E.2d 319 (2003).

When the surety on a principal's appeal bond paid the judgment that had been entered and substituted itself for the principal's opponents, the surety's payment of the judgment was not conclusive of the principal's liability to the surety because the principal was still engaged in contesting the extent of the principal's liability, and the judgment was not final because the judgment was still on appeal, so the second sentence of O.C.G.A. § 10-7-42 was applicable to these facts, rather than the first sentence, which applied to situations in which a judgment had reached a state of finality. *Sec. Life Ins. Co. of Am. v. St. Paul Fire & Marine Ins. Co.*, 278 Ga. 800, 606 S.E.2d 855 (2004).

**Cited in** *Hunter v. Burson*, 168 Ga. 59, 147 S.E. 53 (1929); *Whipple v. American Sur. Co.*, 92 F.2d 673 (5th Cir. 1937).

## RESEARCH REFERENCES

**ALR.** — Construction and application of contractual provision regarding payment by surety of claim as evidence of principal's liability to surety ("conclusive evidence" clause), 144 ALR 521.

Judgment obtained by third person against indemnitee as conclusive against the latter, irrespective of its conclusiveness

against indemnitor, in indemnitee's action against indemnitor for amount paid in satisfaction of judgment, 24 ALR2d 329.

What constitutes action on bond, executed under law of United States, so as to be within Federal District Court's jurisdiction under 28 USCS § 1352, 105 ALR Fed. 716.

## 10-7-43. Action for money paid, interest, and costs — Recovery of usury paid by surety.

If the contract was originally usurious and the surety in making payment includes the usury, he shall recover the same from the principal unless previous to the payment he had notice of the intention of the principal to resist usury. (Orig. Code 1863, § 2141; Code 1868, § 2136; Code 1873, § 2163; Code 1882, § 2163; Civil Code 1895, § 2982; Civil Code 1910, § 3554; Code 1933, § 103-304.)

## JUDICIAL DECISIONS

**Surety may recover usury surety pays.** — Usury paid by a surety on a contract origi-

nally usurious may be recovered back by the surety. *Whitehead v. Peck*, 1 Ga. 140 (1846).

**Knowledge that contract was usurious.** — If the surety knew the contract to be usurious when the surety paid the debt, the surety cannot recover it back out of the surety's principal. *Jones v. Joyner*, 8 Ga. 562 (1850).

**Knowledge that principal intended to resist usury.** — A surety cannot recover usury paid by the surety if, previous to the payment, the surety had knowledge of the intention of the principal to resist the usury. *Lay v. Seago*, 47 Ga. 82 (1872).

**Failure of surety to plead known usury.** — If the surety had notice of the usury and

might have pleaded it, but did not, the surety is estopped to recover it of the principal. *Hargraves v. Lewis*, 3 Ga. 162 (1847), later appeals, 6 Ga. 207 (1848), 7 Ga. 110 (1849).

**Principal reimbursing surety cannot recover usury paid voluntarily from creditor.** — When a surety who is indemnified by a mortgage voluntarily pays a usurious note and is subsequently reimbursed by the surety's principal in property, the latter cannot recover of the creditor the excess of interest in an action for money had and received. *Whitehead v. Peck*, 1 Ga. 140 (1846).

## RESEARCH REFERENCES

C.J.S. — 72 C.J.S., Principal and Surety, § 183.

### 10-7-44. Foreclosure of mortgage or enforcement of security given by principal.

If the principal executes any mortgage or gives other security to the surety or endorser to indemnify him against loss by reason of his suretyship, the surety or endorser may proceed to foreclose such mortgage or enforce such other lien or security as soon as judgment shall be rendered against him on his contract. (Orig. Code 1863, § 2142; Code 1868, § 2137; Code 1873, § 2164; Code 1882, § 2164; Civil Code 1895, § 2983; Civil Code 1910, § 3555; Code 1933, § 103-305.)

## JUDICIAL DECISIONS

**Section prescribes general rule.** — This section prescribes a rule which was intended to be general, and the section comprehends all cases of the class mentioned. *Importers & Traders Bank v. McGhees & Co.*, 88 Ga. 702, 16 S.E. 27 (1892).

**Remedy in absence of contractual stipulation.** — This section simply provides a remedy for the endorser or surety in the absence of any stipulations in the contract between the principal and the surety on the subject. *Jones v. Norton*, 9 Ga. App. 333, 71 S.E. 687 (1911).

**Section authorizes surety to foreclose.** — Mortgage given to indemnify a surety may, under this section, be foreclosed by the surety when judgment is rendered against the surety on the contract. *Conley v. State*, 85 Ga. 348, 11 S.E. 659 (1890).

**Judgment against surety required prior to foreclosure.** — Under this section, no fore-

closure can be had ordinarily until after judgment against the mortgagee. *Importers & Traders Bank v. McGhees & Co.*, 88 Ga. 702, 16 S.E. 27 (1892); *Jones v. Norton*, 136 Ga. 835, 72 S.E. 337 (1911).

**Payment by surety required prior to foreclosure.** — By clear implication, this section negatives any right of foreclosure until the surety or endorser has paid something on the debt or judgment has been rendered against the surety on the surety's contract. *Importers & Traders Bank v. McGhees & Co.*, 88 Ga. 702, 16 S.E. 27 (1892).

**Foreclosure in manner stipulated in mortgage.** — This section recognizes the right of the principal to give to the principal's surety or endorser a mortgage or other security to secure and protect the surety on the surety's endorsement or suretyship, and, if it is legal for such a mortgage to be given, it can be provided in the mortgage that it may be



foreclosed or enforced in such way as the parties may stipulate, without reference to the statutory right referred to. *Jones v. Norton*, 9 Ga. App. 333, 71 S.E. 687 (1911).

**Surety giving creditor note may foreclose mortgage.** — Where the security to a promissory note was indemnified by a mortgage executed by the principal, and after the note became due, the security voluntarily gave the security's own note to the creditor, which was accepted by the security in full payment of the joint debt, and the joint note was given up to the security, the security was allowed to foreclose the security's mortgage against the principal and collect from the security what was actually due on the note in the hands of the original creditor. *Mims v. McDowell*, 4 Ga. 182 (1848).

**Defense by principal debtor.** — The principal debtor may make any defense to the note which the debtor could have made against the original creditor. *Mims v. McDowell*, 4 Ga. 182 (1848).

**Creditor cannot enforce mortgage without judgment.** — The creditor, prior to obtaining judgment under this section, cannot proceed in the creditor's own behalf to enforce the mortgage, even though the principal debtor and the endorser both are insolvent, the rights of the creditor depending, not upon the law of trust, but upon the law of subrogation. *Importers & Traders Bank v. McGhees & Co.*, 88 Ga. 702, 16 S.E. 27 (1892); *Burnett v. Gainesville Nat'l Bank*, 28 Ga. App. 255, 110 S.E. 753 (1922).

**Security deed cannot be enforced in absence of judgment.** — In the absence of any judgment against the surety upon the indebtedness represented by a note, there was no right in the surety to enforce any lien against the property arising out of a deed to secure a debt to the surety from the principal, and therefore no right existed in the surety to which the creditor could be subrogated. *Burnett v. Gainesville Nat'l Bank*, 28 Ga. App. 255, 110 S.E. 753 (1922).

**Assets cannot be impounded awaiting judgment.** — The creditor cannot, prior to obtaining judgment according to this section on the creditor's debt, maintain a bill or petition to impound the mortgaged assets to await the recovery of such judgment. Up to the rendition of judgment, the right to preserve the security is one personal to the endorser, and to which the creditor is not subrogated. *Importers & Traders Bank v. McGhees & Co.*, 88 Ga. 702, 16 S.E. 27 (1892).

**Deed of trust as voluntary assignment.** — Since a deed of trust to two of 16 accommodation endorsers was a voluntary assignment for the benefit of creditors and was not a mortgage or mere security under former Code 1882, § 2164, a compliance with the essential requirements of former Civil Code 1895, § 2700 et seq. was necessary to the security's validity. *Johnson v. Brewer*, 134 Ga. 828, 68 S.E. 590, 31 L.R.A. (n.s.) 332 (1910).

## RESEARCH REFERENCES

**ALR.** — Right of surety or his privies to require creditor to resort to security given by principal before enforcing security given by surety, 37 ALR 1262.

## 10-7-45. Proof of suretyship — By parol.

If the fact of suretyship does not appear on the face of the contract, it may be proved by parol, either before or after judgment (the creditor not being delayed in his remedy by such collateral issue between the principal and his surety), if before judgment the surety shall give notice to the principal of his intention to make such proof. (Laws 1826, Cobb's 1851 Digest, p. 593; Code 1863, § 2143; Code 1868, § 2138; Code 1873, § 2165; Code 1882, § 2165; Civil Code 1895, § 2984; Civil Code 1910, § 3556; Code 1933, § 103-306.)

**Cross references.** — Oral proof of accommodation party's status, § 11-3-415(3).

## JUDICIAL DECISIONS

## ANALYSIS

## GENERAL CONSIDERATION

## PROOF

## APPLICATION

## NOTICE

## General Consideration

**Purpose of section.** — This section was enacted for the purpose of protecting the securities on bond, note, or other contract. *Bank of St. Marys v. Mumford & Tyson*, 6 Ga. 44 (1849).

**Basis for section.** — The rule laid down in this section rests primarily upon the reason that where there is in fact a contract of suretyship and this is made to appear, the relative rights of the makers' interests can be fixed and the surety given the surety's right of subrogation generally without affecting the rights of the holder of the note. *Hill v. Driskell*, 15 Ga. App. 458, 83 S.E. 859 (1914).

**"Delay"**, as used in this section, is such as arises from fault or negligence of the surety. *Whitley v. Hudson*, 114 Ga. 668, 40 S.E. 838 (1902).

**Section only applies where surety seeks to enforce rights against principal.** — This section applies only to cases where the defendant seeks to establish the defendant as a surety, not by way of a defense to an action against the defendant on the contract, but for the purpose of enforcing the defendant's rights as a surety against the defendant's principal. *Brown v. Merchants Trading Co.*, 26 Ga. App. 331, 106 S.E. 208 (1921).

The statutes and cases barring a cosigner from introducing parol evidence that the cosigner signed the note as a surety are applicable only when the defense of suretyship is asserted by one who is primarily obligated on the note in an action brought by the payee or the cosigner's assign to collect on the note. That prohibition does not apply where the note was paid from the proceeds of a life insurance policy the cosigner had assigned to the creditor, the creditor assigned the note and security deed to the creditor's estate, and the maker then sued the creditor and the cosigner's executor to cancel the security deed. *Aultman v. United Bank*, 259 Ga. 237, 378 S.E.2d 302 (1989).

**Right to control judgment.** — The law allows sureties to make "special defense," i.e., to show that they are sureties for the purpose of acquiring the right to control the judgment under § 9-13-77, and to do this even after judgment. *Brown v. Harris*, 20 Ga. 403 (1856).

**Cited in** *Carlton v. White*, 99 Ga. 384, 27 S.E. 704 (1896); *Patterson v. Clark*, 101 Ga. 214, 28 S.E. 623 (1897); *Shank v. Washington Exch. Bank*, 124 Ga. 508, 52 S.E. 621 (1905); *Underwood v. Bass & Heard*, 1 Ga. App. 623, 57 S.E. 953 (1907); *Hardy v. Boyer*, 7 Ga. App. 472, 67 S.E. 205 (1910); *Baggs v. Funderburke*, 11 Ga. App. 173, 74 S.E. 937 (1912); *Maril v. Boswell*, 12 Ga. App. 41, 76 S.E. 773 (1912); *Bishop v. Georgia Nat'l Bank*, 13 Ga. App. 38, 78 S.E. 947 (1913); *J.B. Colt Co. v. Miller*, 30 Ga. App. 148, 117 S.E. 113 (1923); *Durden v. Royster Guano Co.*, 158 Ga. 234, 123 S.E. 603 (1924); *Evans v. Jones*, 47 Ga. App. 351, 170 S.E. 541 (1933); *Scott v. Gaulding*, 60 Ga. App. 306, 3 S.E.2d 766 (1939); *Ehlers v. Butler*, 127 Ga. App. 9, 192 S.E.2d 398 (1972); *Yancey Bros. Co. v. Sure Quality Framing Contractors*, 135 Ga. App. 465, 218 S.E.2d 142 (1975); *Wilson v. Sheppard*, 136 Ga. App. 475, 221 S.E.2d 671 (1975).

## Proof

**This section allows proof of suretyship by parol.** *Decatur Coca-Cola Bottling Co. v. Variety Vending Corp.*, 277 F. Supp. 393 (N.D. Ga. 1967).

**Use of parol evidence.** — If the fact of suretyship does not appear on the face of a note, it may be proved by parol under this section; and the relative position of the makers' names is immaterial, if one is surety of the other. *Trammell v. Swift Fertilizer Works*, 121 Ga. 778, 49 S.E. 739 (1905).

Where a written contract for the sale of personalty is executed by two persons ostensibly as purchasers, it may be shown by parol that one of such persons executed the con-

tract, not as a principal obligor, but as a surety only. *Nunnally v. J.B. Colt Co.*, 34 Ga. App. 247, 129 S.E. 119 (1925); *West v. Nottingham*, 71 Ga. App. 282, 30 S.E.2d 651 (1944).

One who signs a note ostensibly as a coprincipal may in fact be a surety, and this may be established by parol. *Campbell v. Rybert*, 46 Ga. App. 461, 167 S.E. 924 (1933); *Levinson v. American Thermex, Inc.*, 196 Ga. App. 291, 396 S.E.2d 252 (1990).

One who signs a note with another apparently as a joint principal may, in an action by the payee, plead and prove that the payee had no interest in the paper and was only surety for the accommodation of the other and principal signer, and that the plaintiff took the note with knowledge of such facts. *Benson v. Henning*, 50 Ga. App. 492, 178 S.E. 406 (1935).

Even though the notes did not show that defendant signed as surety and not as principal, the defendant could establish by parol evidence that the defendant signed the notes as surety and not as principal. *Wofford v. Waldrip*, 80 Ga. App. 562, 56 S.E.2d 816 (1949).

Although the contract recites that the contract is made for "value received" and is prima facie a contract of guaranty, parol evidence is admissible to show that there was no independent consideration flowing to those signing as guarantors and the contract is one of suretyship. *Wolkin v. National Acceptance Co.*, 222 Ga. 487, 150 S.E.2d 831 (1966); *Kennedy v. Thruway Serv. City, Inc.*, 133 Ga. App. 858, 212 S.E.2d 492 (1975). (As to abolishment of distinction between contracts of suretyship and guaranty, see O.C.G.A. § 10-7-1 and the Editor's note thereto).

**Burden is on surety to prove relationship and knowledge of creditor.** — Where a married woman signs a note ostensibly as a maker jointly with her husband when in fact she is a surety only, before she can establish the fact of her suretyship as against the payee of the note, it must be made to appear, despite her apparent relationship as principal, that the payee, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. *Bennett v. Danforth*, 36 Ga. App. 466, 137 S.E. 285 (1927).

Where the wife signs the note as an appar-

ent principal, the burden is on her to prove that she signed as surety only, and that the payee of the note, with knowledge of the facts which would constitute her a surety, contracted with her as a surety. *Lovelady v. Moss*, 50 Ga. App. 652, 179 S.E. 168 (1935).

In an action by the payee against all the makers as joint principals it may be shown by parol evidence that some of the makers are sureties for others, the burden being on those setting up suretyship to establish it; and where they claim to be discharged by some act increasing their risk as sureties, they must further show that the payee knew they were sureties at the time of the occurrence of such act. *Northcutt v. Crowe*, 116 Ga. App. 715, 158 S.E.2d 318 (1967).

**Establishment of suretyship requires proof payee knew signer of note was obligating signer to pay another's debt.** — In order to establish as a fact that the ostensible maker of a promissory note executed the note as surety only and not as a principal, it must be shown that the payee contracted with the principal as a surety; and if the payee did not at the time know that the person signing the note was obligating himself for the payment of the debt of another, it is not established that the payee contracted with the obligor as a surety. *Northcutt v. Crowe*, 116 Ga. App. 715, 158 S.E.2d 318 (1967).

**Prayer for relief.** — Surety's pleading must contain an appropriate prayer for independent affirmative relief. *Morrison v. Citizens & S. Bank*, 19 Ga. App. 434, 91 S.E. 509 (1917).

**Nature of transaction is jury question.** — Whether a note and deed to secure debt or mortgage were made by the wife as a part of a transaction to secure a debt of her husband or for the purpose of paying the debts of her husband is for the jury, and it may be shown by parol that the wife signed the note as surety. *Almond v. Mount Vernon Bank*, 53 Ga. App. 565, 186 S.E. 581 (1936).

**New trial proper where surety denied right to prove alleged suretyship.** — If a party defendant to an action upon a contract by the defendant's answer alleges that the defendant signed the paper as a security and is by an erroneous ruling denied the right to establish before judgment the fact thus set up, the defendant is entitled to a new trial, and granting the new trial will not violate



**Proof (Cont'd)**

that portion of this section which declares that in such a case the creditor is not to be "delayed in his remedy." *Whitley v. Hudson*, 114 Ga. 668, 40 S.E. 838 (1902); *Ryle v. Farmers' & Merchants' Bank*, 33 Ga. App. 459, 127 S.E. 233 (1925) (ruling held harmless under circumstances).

**Suretyship shown in contract as pleaded need not appear in judgment.** — When the fact of suretyship sufficiently appears upon the face of the contract as pleaded, it is probably unnecessary for the defendant's protection for the fact to be made to appear in the judgment. *Loewenherz v. Weil*, 33 Ga. App. 760, 127 S.E. 883 (1925).

**Application**

**Self estoppel by party.** — Where the written assignment of the note signed by the payee recites that, for value received, the payee transferred and assigned the note with full recourse on himself, the payee was estopped from testifying that as a matter of fact the payee was an accommodation endorser only. This section is clearly not applicable to such facts. *Phillips v. Bridges*, 20 Ga. App. 489, 93 S.E. 115 (1917).

**Presumption that signers of note are principals may be rebutted.** — Where two or more persons sign a note apparently as joint principals, and there is nothing in the instrument indicating that some of the makers are principals and others sureties, the presumption of law is that all are joint principals. This presumption, however, may be rebutted, and in an action by the payee against all the makers as joint principals it may be shown by parol evidence that some of the makers are sureties for others, the burden being on those setting up suretyship to establish it. *Hill v. Driskell*, 15 Ga. App. 458, 83 S.E. 859 (1914); *Duckett v. Martin*, 23 Ga. App. 630, 99 S.E. 151 (1919); *Bank of Lumpkin County v. Justus*, 150 Ga. 286, 103 S.E. 794 (1920); *Seymour v. Bank of Thomasville*, 157 Ga. 99, 121 S.E. 578 (1923), answers conformed to, 31 Ga. App. 602, 121 S.E. 579 (1924); *Northcutt v. Crowe*, 116 Ga. App. 715, 158 S.E.2d 318 (1967).

**Judgment is not void if plaintiff consents to proof of suretyship without notice.** — A judgment against one signer of a note as principal and another as surety is not abso-

lutely void and subject to collateral attack, although no pleading alleging suretyship was filed or any notice of intention to make proof thereof was given to the principal, where by consent of the plaintiff's attorney one of the signers was permitted to show that the signer was only security on the note. *Freeman v. Bank of LaFayette*, 20 Ga. App. 334, 93 S.E. 34 (1917).

**Co-debtor was not a surety** of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties that one was signing as the principal debtor and the other was signing as a surety. *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

**Notice**

**Notice of intention to prove suretyship must have been given principal.** — The surety's pleading setting up the fact of suretyship and praying that the judgment be molded accordingly must also show that previous notice had been given the principal of the surety's intention to make such proof. *Johnson v. Georgia Fertilizer & Oil Co.*, 21 Ga. App. 530, 94 S.E. 850 (1918).

**Notice where suretyship appears on face of contract.** — This section requires notice of an intention to prove suretyship only when the fact of suretyship does not appear upon the face of the contract. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923).

**Notice where suretyship is raised as defense.** — Prior to 1979, a female defendant whose name appeared as a principal on the face of the contract sued on could plead in defense that she was in fact a surety only and that, being a married woman at the time she entered into the contract, the contract of suretyship was void; and it was not necessary to the validity of such defense that it appear that notice was given to the alleged principal, as required by this section, of her intention to make such defense. *Brown v. Mer-*

chants Trading Co., 26 Ga. App. 331, 106 S.E. 208 (1921) (decided under former Code 1933, § 53-503, repealed in 1979).

An apparent maker of a note is not limited by the provisions of this section to relief over against a principal after payment of the debt, nor in a suit by the payee, where the apparent maker pleads that the maker is surety only and alleges grounds of discharge of liability to the payee, have the provisions of this section prescribing notice to the principal any application to such defense. *Seymour v. Bank of Thomasville*, 157 Ga. 99, 121 S.E. 578 (1923), answers conformed to, 31 Ga. App. 602, 121 S.E. 579 (1924).

**Creditor has no interest in notice.** — It is obvious from the language of this section that the statute's provision as to notice applies solely to a collateral issue between the principal and the principal surety in which the creditor has no interest, and it is therefore no concern of the principal whether the surety, in a case covered by this section, gives notice to the principal of the surety's intention to make proof of suretyship. *Bank of Lumpkin County v. Justus*, 150 Ga. 286, 103 S.E. 794 (1920).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 147, 198.

**C.J.S.** — 72 C.J.S., Principal and Surety, §§ 193, 194.

### 10-7-46. Proof of suretyship — After judgment.

If judgment has been rendered without such proof of suretyship, the surety shall give at least ten days' notice to his principal of his intention to apply at the next term of the court where the judgment was entered to make such proof and to have the fact of his suretyship entered of record, together with an order for the control of such judgment and execution thereon against the principal, on payment of the same by him. (Laws 1850, Cobb's 1851 Digest, p. 599; Code 1863, § 2144; Code 1868, § 2139; Code 1873, § 2166; Code 1882, § 2166; Civil Code 1895, § 2985; Civil Code 1910, § 3557; Code 1933, § 103-307.)

### JUDICIAL DECISIONS

**Surety making part payment may have fact put in record for contribution.** — A surety without paying in full the joint debt, but upon paying, either before or after judgment, a portion only thereof, may maintain against a cosurety, for the purpose of compelling contribution, the statutory proceeding for having such fact entered of record; and where such a proceeding is instituted after judgment it is not essential for the petitioner to show that the execution issued thereon has been assigned to the petitioner. *Cooper v. Chamblee*, 114 Ga. 116, 39 S.E. 917 (1901).

**Surety must follow section if not named as surety in execution.** — If one defendant to a fi. fa., not named as security therein but claiming to be such, seeks to control it

against a codefendant who is set forth as a security, to force contribution, one must proceed to obtain the legal control thereof under this section and § 10-7-53. *Burke v. Lee*, 59 Ga. 165 (1877).

**Right to control execution lost if O.C.G.A. §§ 10-7-45 and 10-7-46 not followed.** — If one of joint judgment debtors has paid off the judgment, claiming to have been only a surety of the other, but without taking such steps as are required under this section and § 10-7-45 to have his true relation defined on the record, he is not entitled, in a contest exclusively between himself and others who are judgment creditors of the alleged principal, arising on a rule for the distribution of money realized from the sale of property of the latter under another execution, to con-

trol the execution so paid by him for the purpose of competing with other creditors

claiming the money. *Patterson v. Clark*, 101 Ga. 214, 28 S.E. 623 (1897).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 129 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 13.

### 10-7-47. Control of execution and judgment by surety — Subrogation to plaintiff's rights.

Any surety on the original contract, or on stay of execution, or on appeal, or in any other way, or the representative of a deceased surety, who shall have paid off or discharged the judgment or execution in whole or in part and shall have the fact of such payment by him entered on such execution by the plaintiff or his attorney or the collecting officer, shall have the control of such execution and the judgment upon which it is founded, to the same extent as if he were the original plaintiff therein, and be subrogated to all the rights of such plaintiff, for the purpose of reimbursing himself from his principal. (Laws 1810, Cobb's 1851 Digest, p. 592; Laws 1826, Cobb's 1851 Digest, p. 594; Laws 1831, Cobb's 1851 Digest, p. 595; Laws 1845, Cobb's 1851 Digest, p. 598; Code 1863, § 2145; Code 1868, § 2140; Code 1873, § 2167; Code 1882, § 2167; Civil Code 1895, § 2986; Civil Code 1910, § 3558; Code 1933, § 103-308.)

### JUDICIAL DECISIONS

**Benefits of this section are for an actual surety** who becomes such on the authority of the principal. Therefore, one who is not a surety would not be entitled to control a judgment or fi. fa. merely because the surety had agreed with the creditor to become such. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923).

**Applicability to involuntary payments.** — The language, "who shall have paid off or discharged the judgment," as employed in this section, applies to an involuntary as well as a voluntary payment. *Ezzard v. Bell*, 100 Ga. 150, 28 S.E. 28 (1897).

**Levy on and sale of surety's property.** — A surety whose property, under an execution against the surety's principal and himself, has been levied upon and sold in satisfaction of the sum due the judgment creditor, "pays off and discharges" the debt of the principal, within the meaning of this section. *Ezzard v. Bell*, 100 Ga. 150, 28 S.E. 28 (1897).

**Applicability to partner paying joint judgment.** — Section 9-13-78, taken in connection with this section, gives a partner paying

off a judgment binding on himself and a copartner the right to enforce it to its full amount against the partnership assets. *Higdon v. Williamson*, 10 Ga. App. 376, 73 S.E. 528 (1912) (both partners served), later appeal, 140 Ga. 187, 78 S.E. 767 (1913).

**No legal right to subrogation unless surety or compelled to protect interest.** — The legal right of subrogation arising out of the payment of the debt of another extends only in favor of a surety for the payment of the debt or in favor of one who is compelled to pay the debt to protect one's own right or interest, and there is no right of subrogation where, at the time of the payment of the debt, the plaintiff had no claim against or lien upon the property in question. *Hiers v. Exum*, 158 Ga. 19, 122 S.E. 784 (1924).

**Lien takes effect from date of judgment.** — When a surety takes control of the execution against the surety's principal under this section, the lien of the judgment against the surety's principal in the surety's hands takes effect from the date of that judgment. *Bailey v. Mizell*, 4 Ga. 123 (1848).



**Payment after principal's death entitles surety to proceed against principal's property.** —

Where a judgment was rendered against an intestate in the intestate's lifetime, as principal, and the principal's surety, which judgment was paid by the surety since the death of the intestate, such payment, under the statutes of this state, had relation to the date of the judgment so as to enable the surety to remunerate the surety out of the property of the surety's principal. *Ray v. Dennis*, 5 Ga. 357 (1848).

**Payment must be entered on execution.** —

If entry of payment is not made on the execution, the surety will not be able to enforce the contribution against a cosurety provided by § 10-7-53. *Cureton v. Cureton*, 120 Ga. 559, 48 S.E. 162 (1904).

**Entry may be made by justice of peace.** —

A justice of the peace is a collecting officer as to debts sued in the justice's court and may make, upon an execution issued from the justice's court against joint defendants, the entry of payment by one of the justices which is required by this section. *Higdon v. Williamson*, 10 Ga. App. 376, 73 S.E. 528 (1912), later appeal, 140 Ga. 187, 78 S.E. 767 (1913).

**Entry may be made by attorney for plaintiff.** —

Where there was no entry on the fi. fa. showing its payment by the endorser, pending a claim case arising under a levy made for the benefit of such endorser, the attorney for the plaintiff in fi. fa. could make the entry. *Thomason v. Wade*, 72 Ga. 160 (1883).

**Surety making payment is protected against fraudulent conveyance.** —

Under this section, surety on bail bond who pays judgment in trover is entitled to the protection afforded creditors as against a conveyance by the debtor to avoid payment of the judgment. *Banks v. McCandless*, 119 Ga. 793, 47 S.E. 332 (1904).

**Surety's right limited to reimbursement for actual payment.** —

If a surety bought a judgment at a discount or, after levy of it upon the surety's property, obtained control

of it by compromise at a price less than the amount apparently due on it, the surety would be entitled to enforce it against the principal for only the amount necessary for reimbursement, after receiving which the execution would be paid off and discharged. *Stanford v. Connery*, 84 Ga. 731, 11 S.E. 507 (1890).

**Part payment gives surety no right of control without tender of amount due.** —

That a security has paid a part of the amount due on a fi. fa. does not give the security the right to control the same so as to reimburse the security. The security's rights are secondary to those of the holder of the fi. fa., and in order to control it without the consent of the latter, the security must comply with the requirements of § 10-7-23 as to tender. *Cherry v. Singleton*, 66 Ga. 206 (1880).

**Transferee from surety cannot enforce execution against surety's property.** —

Under former Code 1882, §§ 2167, 2168 and 2169, where a surety paid off a fi. fa. against a principal and the surety personally and takes a transfer thereof, the debt was extinguished as to the surety and the surety became the creditor of the principal; and if the surety thereafter transfers the fi. fa. to another, the surety's transferee had no right to enforce it against the surety's property, but only against the property held by the principal. *Jennings v. National Bank*, 74 Ga. 782 (1885).

**Surety was not entitled to capias against principal.** —

Where the principal and sureties in a promissory note were sued and judgment and fi. fa. went against them jointly, the sureties paid off the fi. fa., and the sheriff made an entry to that effect on the fi. fa., the sureties had no right to return the fi. fa. and take out a ca. sa. and arrest the principal. *Elam v. Rawson*, 21 Ga. 139 (1857).

**Cited in** *Keith v. Welch*, 9 Ga. 179 (1850); *Elam v. Rawson*, 21 Ga. 139 (1857); *Camp v. Simmons*, 62 Ga. 73 (1878); *Gilbert v. United States Fid. & Guar. Co.*, 180 F. Supp. 794 (M.D. Ga. 1959).

## OPINIONS OF THE ATTORNEY GENERAL

**Surety's right limited to actual expenses.**

— A surety who completes a contract when the surety's principal defaults is entitled to

moneys due to the principal only to the extent of the actual expenses of the surety. 1954-56 Op. Att'y Gen. p. 662.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 139.

**Am. Jur. Pleading and Practice Forms.** — 23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

**ALR.** — Payment of entire claim of third person as condition of subrogation, 9 ALR 1596; 32 ALR 568; 46 ALR 857; 53 ALR 304; 91 ALR 855.

Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default, 45 ALR 379; 134 ALR 738; 164 ALR 613.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 ALR 551.

Right of surety on supersedeas or appeal bond to subrogation, 77 ALR 452.

Right to and form of judgment against one discharged in bankruptcy in order to sustain attachment or garnishment or to perfect a right of action against one second-

arily liable as surety on a bond given to dissolve the same, 81 ALR 81.

Right of subrogation of fiduciary's surety to claim of the estate against third person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 ALR 997.

Surety's right to be subrogated to obligee's right against third person as affected by equities in favor of latter which are insufficient to prevent his liability to obligee, 137 ALR 700.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 ALR 421.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 166 ALR 870.

Rights and remedies of property insurer as against third-person tortfeasor who has settled with insured, 92 ALR2d 102.

### 10-7-48. Control of execution and judgment by surety — When sued separately.

If the surety is sued separately from his principal, on payment by him of the judgment against him, he shall be entitled to control the judgment and execution against his principal in the same manner as if the judgment and execution were joint; and, if he does not appear as surety in the judgment against him, he may give notice and make the proof and obtain the control in the same manner as provided in cases of joint judgments. (Laws 1850, Cobb's 1851 Digest, p. 600; Code 1863, § 2146; Code 1868, § 2141; Code 1873, § 2168; Code 1882, § 2168; Civil Code 1895, § 2987; Civil Code 1910, § 3559; Code 1933, § 103-309.)

**Cross references.** — Proving suretyship, §§ 10-7-45 and 10-7-46.

## JUDICIAL DECISIONS

**Independent remedies provided surety.** — Former Civil Code 1910, §§ 3551, 3553, 3559, and 3560 were remedies to which the surety can resort for the surety's protection, independently of any voluntary action by the creditor. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

**Separate action against surety.** — A surety may be sued separately from the surety's

principal under this section. *Amos v. Continental Trust Co.*, 22 Ga. App. 348, 95 S.E. 1025 (1918); *Stanfield v. McConnon & Co.*, 25 Ga. App. 226, 102 S.E. 908 (1920); *Wesley v. Lewis Bros.*, 33 Ga. App. 783, 127 S.E. 660 (1925).

**Principal and surety are joint and several obligors, although obligation is joint in form.** — If an obligation, joint in form, is

executed by one party as principal and another as surety, they are to be deemed joint and several obligors, since by former Civil Code 1910, § 3539 the obligation of the surety is accessory to that of the principal. *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932).

**Obligation on which one party is maker and another is accommodation endorser.** —

An obligation in the form “we promise to pay” but signed by one party as maker and endorsed by another as an accommodation endorser is a joint and several obligation, since the endorser is a mere surety. *Smith v. Moore*, 45 Ga. App. 708, 165 S.E. 765 (1932).

**Holder of a joint and several note may sue the obligors jointly or severally** or sue any one of the signers. On such an obligation the holder may sue either the principal or the surety by virtue of former Civil Code 1910, §§ 3553 and 3559. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917); *Johnson v. Georgia Fertilizer & Oil Co.*, 21 Ga. App. 530, 94 S.E. 850 (1918); *Cone v. American Sur. Co.*, 29 Ga. App. 676, 116 S.E. 648 (1923); *Bank of Madison v. Bell*, 30 Ga. App. 458, 118 S.E. 439 (1923); *McKibben v. Fourth Nat'l Bank*, 32 Ga. App. 222, 122 S.E. 891 (1924); *Burson v. Shields*, 160 Ga. 723, 129 S.E. 22 (1925).

The holder of a joint and several note may sue the principal and surety jointly, or at the holder's option the holder may sue either the principal or surety alone. *Hicks v. Bank of Wrightsville*, 57 Ga. App. 233, 194 S.E. 892 (1938).

**Judgment against surety is valid without serving principal.** — As a surety may be sued separately from a principal, the fact that service was not perfected upon the principal debtor to whom the goods were furnished would not affect the validity of the judgment properly obtained against the surety. *Wesley v. Lewis Bros.*, 33 Ga. App. 783, 127 S.E. 660 (1925).

**Judgment may be revived although no service or judgment had against principal.** — When a proceeding is brought to revive a dormant judgment rendered against a surety on a joint and several note and the defendant

objects to the revival of such judgment on the ground that the defendant's liability had been increased and that the defendant had been discharged from liability thereon because no judgment was rendered against the principal on the note, although no service of the suit was had on the principal, it was error for the judge to refuse to revive the judgment for that reason. *Hicks v. Bank of Wrightsville*, 57 Ga. App. 233, 194 S.E. 892 (1938).

**Execution may be issued against surety alone on joint judgment.** — Insofar as an affidavit of illegality asserts the defense that the execution did not follow the judgment, since it was issued against the surety alone, while the suit and the judgment were against another as principal and the surety only as security, and that the execution is therefore void, because the defendant was thereby deprived of the defendant's right to control the execution against the principal, the affidavit of illegality is without merit. Assuming that the better practice would have been — if this ground was sustained by the record in the proceeding — to have issued a single fi. fa. against both the principal and the surety, describing them respectively as such, the fact that a separate fi. fa. was issued against the surety without describing the surety as such would not deprive the surety of the rights accorded the surety by this section and §§ 10-7-45 through 10-7-47, against the surety's principal, or render the execution void. *Fowler v. King*, 29 Ga. App. 500, 116 S.E. 54 (1923).

**Pleading against endorser need not allege relationship to notes.** — In view of this section and §§ 10-7-4 and 10-7-42 relative to sureties, the plaintiff's pleading in an action against an endorser alleging that plaintiff was the owner and holder of the notes sued on in due course, bona fide and for value, states a cause of action and is not subject to dismissal for failure to allege defendant's relationship to the notes and to the other parties to the notes. *Meldrim v. Peoples Bank*, 28 Ga. App. 294, 111 S.E. 76 (1922).

**Cited in** *Hunter v. Burson*, 168 Ga. 59, 147 S.E. 53 (1929); *Woodward v. La Porte*, 181 Ga. 731, 184 S.E. 280 (1936).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 139.

**ALR.** — Right of surety or his privies to require creditor to resort to security given by



principal before enforcing security given by surety, 37 ALR 1262.

Right to and form of judgment against one discharged in bankruptcy in order to

sustain attachment or garnishment or to perfect a right of action against one secondarily liable as surety on a bond given to dissolve the same, 81 ALR 81.

#### 10-7-49. **Payment pending action; judgment for plaintiff for use of surety.**

If the surety pays off the debt pending the action against the principal and himself or against the principal alone, such payment shall operate only to cause the action to proceed for the benefit of such surety; and the judgment may be entered in the name of the original plaintiff for the use of such surety. (Ga. L. 1857, p. 111, § 1; Code 1863, § 2147; Code 1868, § 2142; Code 1873, § 2169; Code 1882, § 2169; Civil Code 1895, § 2988; Civil Code 1910, § 3560; Code 1933, § 103-310.)

### JUDICIAL DECISIONS

**Independent remedies provided surety.** — Former Civil Code 1910, §§ 3551, 3553, 3559 and 3560 were remedies to which the surety can resort for the surety's protection,

independently of any voluntary action by the creditor. *McMillan v. Heard Nat'l Bank*, 19 Ga. App. 148, 91 S.E. 235 (1917).

### RESEARCH REFERENCES

**ALR.** — Right of building contractor's surety who completes contract to money earned by contractor but unpaid before

default, 45 ALR 379; 134 ALR 738; 164 ALR 613.

#### 10-7-50. **Compelling contribution — After paying more than equal share; effect of surety's insolvency.**

Where several are sureties for the same principal for the same sum of money, either by one or by distinct instruments, and one pays more than an equal share of the sum, he may compel contribution from his cosureties. If one of the cosureties is insolvent, the deficiency in his share must be borne equally by the solvent sureties. (Laws 1840, Cobb's 1851 Digest, p. 597; Code 1863, § 2151; Code 1868, § 2146; Code 1873, § 2173; Code 1882, § 2173; Civil Code 1895, § 2992; Civil Code 1910, § 3564; Code 1933, § 103-401.)

### JUDICIAL DECISIONS

**Codification of common law.** — This section is but a codification of the principle of contribution of the common law and is not of statutory origin. *Bigby v. Douglas*, 123 Ga. 635, 51 S.E. 606 (1905).

**Modification of common law.** — The only amendment or modification of the common-law rule governing the amount which each of the cosureties must contribute

to the one who has paid more than one's equal share of the indebtedness is found in the last sentence of this section. *Higdon v. Bell*, 25 Ga. App. 54, 102 S.E. 546 (1920).

**Doctrine of contribution is limited to cosureties.** — The doctrine of contribution under this section, as applied to sureties, is limited to cosureties. *Snow v. Brown*, 100 Ga. 117, 28 S.E. 77 (1897).

**No right of contribution between successive sureties.** — A surety upon a guardian's bond, after obtaining the surety's discharge, although liable to the ward for any past default of the guardian, is not liable to a surety of the guardian upon a second bond who has answered for that default in consequence of the surety's own statutory liability upon the second bond. This liability of the second surety is primary, as between the second surety and the first surety, and the second surety has no right of contribution from the first surety. *Tittle v. Bennett*, 94 Ga. 405, 21 S.E. 62 (1894); *Snow v. Brown*, 100 Ga. 117, 28 S.E. 77 (1897).

**Cosurety is entitled to binding contract requiring contribution.** — The parol agreement of one surety was not sufficient to bind a cosurety as the surety was entitled to a valid, binding contract on which he could require contribution. *English v. Bank of Ga.*, 76 Ga. 537 (1886).

**Sureties paying debt may sue jointly for contribution on instrument.** — Three of four sureties, who have paid the debt of their principal, may jointly sue their cosurety for contribution founding their action upon the obligation containing the contract of suretyship. *Train v. Emerson*, 141 Ga. 95, 80 S.E. 554, 49 L.R.A. (n.s.) 950 (1913).

**Sureties may sue jointly on implied promise.** — Two or more sureties who have paid the debt of their insolvent principal may jointly sue a cosurety for contribution, even where their action is based upon their right to contribution predicated upon the implied promise springing from the payment of the debt alone and is not based upon notes paid off and transferred to them, where the plaintiff sureties jointly paid the debt, although it was paid by their individual funds. *Durden v. Youmans*, 37 Ga. App. 182, 139 S.E. 91 (1927).

**Action by surety against cosurety on original indebtedness is for contribution.** — There is no authority which allows a cosurety to convert the cosurety's action for contribution into something else merely by finding the cosurety's action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and plaintiff is bound by the substantive rules pertaining to contribution. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

It is not some independent right but the

right to contribution which is being enforced, and it is suit on the original evidence of indebtedness by way of subrogation to the creditor's remedy which is allowed to the surety merely as a form of action in aid of the right to contribution from cosureties. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Trial court erred in failing to award appellant partner prejudgment interest under O.C.G.A. § 10-7-51, as the judgment was for contribution under O.C.G.A. § 10-7-50 and the law of the case by appellee partner for sums appellant partner paid in excess of that paid by appellee partner since both were equally bound on the same instruments. *Murphy v. McCaughey*, 262 Ga. App. 570, 586 S.E.2d 16 (2003).

**Judgment must be limited to proportion due from each cosurety.** — Since the substantive right and liability being enforced is that of contribution between coobligors, each is liable only for an equal proportionate share of the debt. This liability is several and not joint, and a joint obligor who has paid the joint obligation is entitled to judgment against each of the coobligors only for the proportion for which each is liable — judgment should not be entered against any one of them or against all of them jointly for the aggregate amount due from them. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**Where co-obligors have received unequal benefits from the common obligation,** the portion of the contribution that each must bear is according to the benefit that each has received, and the presumption that each co-obligor benefited in an equal degree is subject to rebuttal by proof that there was an inequality of benefits received. *Steele v. Grot*, 232 Ga. App. 847, 503 S.E.2d 92 (1998).

**Joint and several judgment for aggregate amount due surety is not authorized.** — There is no authority for the proposition that a surety or other coobligor, however the surety may have found the surety's action for contribution, may obtain a joint and several judgment against the surety's several cosureties for the aggregate amount due the surety. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**In case of insolvency of one surety, solvent sureties bear burden equally.** — The rule in

equity in case of insolvency of a surety is that the solvent sureties bear equally the burden of payment. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**Time for bringing action depends on basis therefor.** — Under this section, the surety entitled to contribution may sue the cosureties upon the written evidence of indebtedness (in which case the period of limitation would be that applicable to instruments of its class) or upon the implied contract raised by law in favor of one surety against the cosureties for contribution (in which instance the period of limitation would be that of an implied promise). *Bigby v. Douglas*, 123 Ga. 635, 51 S.E. 606 (1905); *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932). (See also O.C.G.A. §§ 9-3-23 to 9-3-25).

Sureties founding their action for contribution upon the obligation containing the contract of suretyship will have the same time within which to bring the action as the creditor would have on the same instrument. *Train v. Emerson*, 141 Ga. 95, 80 S.E. 554, 49 L.R.A. (n.s.) 950 (1913).

**Accommodation party is not surety now without express agreement.** — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see now O.C.G.A. §§ 11-3-101 through 11-3-805), an accommodation party is no longer a surety for the party accommodated as a legal consequence of the accommodation undertaking. The rule now is that the fact of suretyship must be written in the endorsement or there must be an express agreement that the accommodation party is signing as surety. *Bell v. Kleinberg*, 102 Ga. 623, 117 S.E.2d 262 (1960).

**Accommodation party who is not surety may only sue on implied promise.** — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see O.C.G.A. §§ 11-3-101 through 11-3-805), the ruling in *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893), to the effect that an action by an accommodation party against another party could be brought on the instrument as well as on the basis of an implied contract to reimburse, has not been the law. *Bell v. Kleinberg*, 102 Ga. App. 623, 117 S.E.2d 262 (1960) (four-year statute of limitations as to implied contracts applies and *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932), will not be followed).

**Signatures on separate agreements held not consequential.** — The fact that corporate officers were not signatories to the same guaranty agreement but rather signed separate agreements, each of which contained language providing that the agreement inured only to the benefit of a bank and the undersigned, was of no consequence. Because both parties were sureties for the obligations of the corporation, and one of the parties paid the corporate obligation to the bank, that party was entitled to contribution from the other party. *Dever v. Lee*, 188 Ga. App. 483, 373 S.E.2d 224, cert. denied, 188 Ga. App. 911, 373 S.E.2d 224 (1988).

**Statute of limitations.** — Four-year statute of limitations is applicable to claims for the right of contribution filed by one co-maker of a debt against another pursuant to O.C.G.A. § 10-7-50; thus, because a plaintiff filed a claim for contribution some four years and 10 months after the plaintiff paid the debt for which the plaintiff sought contribution from the defendants, the claim was time-barred. *Gray v. Currie*, F. Supp. 2d , 2005 U.S. Dist. LEXIS 31407 (N.D. Ga. Nov. 21, 2005).

**Interest award reversed.** — Award of interest for a client against an attorney from the date that the client satisfied an underlying judgment against the client, the client's son, and the attorney had no legal basis and was reversed; it had been established that the client, the client's son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a co-surety's payment of a joint obligation, it applied to contribution actions arising from joint instruments executed by the sureties, not to joint tortfeasors. The issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribution from a joint defendant and the statute did not purport to control an award of interest; O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from the date of entry. *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

**Cited in** *Nixon v. Nixon*, 196 Ga. 148, 26 S.E.2d 711 (1943); *Holland v. Holland Heating & Air Conditioning*, 208 Ga. App. 794, 432 S.E.2d 238 (1993).



## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 180 et seq.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 226 et seq.

**ALR.** — Exhaustion of remedies against, or insolvency of, principal as condition of enforcing contribution between coguarantors or cosureties, 29 ALR 273.

Right to contribution or indemnity of executor, administrator, guardian, testamentary trustee, or sureties against a cofiduciary or sureties, in respect of losses or defaults for which the fiduciaries are answerable, 66 ALR 1147.

Right of surety or guarantor who pays judgment to preservation thereof as against his cosureties or coguarantors, 71 ALR 300.

Rights and liabilities as between sureties on successive bonds given by executor, administrator, trustee, or guardian, 76 ALR 904.

Transmission of fund from ancillary to domiciliary jurisdiction, or liability of sureties on bond given in the latter jurisdiction, as affecting liability of sureties on bond given in the former jurisdiction, 78 ALR 575.

Joinder in one action of sureties on different bonds relating to same matter, 106 ALR 90; 137 ALR 1044.

Rights and liabilities as between sureties on successive bonds given in course of litigation, 117 ALR 583.

Right of one cojudgment debtor who pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 ALR 495.

Right of surety on recognizance or bail bond to indemnity or contribution, 170 ALR 1161.

Limitation by surety of amount of his liability as affecting liability to contribution, 172 ALR 1447.

Apportionment of liability between automobile liability insurers one or more of whose policies provide against any liability if there is other insurance, 46 ALR2d 1163.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 ALR3d 680.

### 10-7-51. Compelling contribution — Interest on sum recovered as contribution.

The sum recovered as contribution shall bear interest from the time the original obligation was paid by the surety and shall be deemed and held a liquidated demand. (Orig. Code 1863, § 2152; Code 1868, § 2147; Code 1873, § 2174; Code 1882, § 2174; Civil Code 1895, § 2993; Civil Code 1910, § 3565; Code 1933, § 103-402.)

### JUDICIAL DECISIONS

**Partner entitled to interest on contribution award.** — Trial court erred in failing to award appellant partner prejudgment interest under O.C.G.A. § 10-7-51 as the judgment was for contribution under O.C.G.A. § 10-7-50 and the law of the case by appellee partner for sums appellant partner paid in excess of that paid by appellee partner since both were equally bound on the same instruments. *Murphy v. McCaughey*, 262 Ga. App. 570, 586 S.E.2d 16 (2003).

**Interest award reversed.** — Award of interest for a client against an attorney from the

date that the client satisfied an underlying judgment against the client, the client's son, and the attorney had no legal basis and was reversed; it had been established that the client, the son, and the attorney were joint tortfeasors and while O.C.G.A. § 10-7-51 authorized the award of interest running from the date of a co-surety's payment of a joint obligation, it applied to contribution actions arising from joint instruments executed by the sureties, not to joint tortfeasors; the issue was not controlled by O.C.G.A. § 9-13-78 as it provided a method of enforcing contribu-

tion from a joint defendant and it did not purport to control an award of interest and O.C.G.A. § 7-4-12 provided that all money judgments bore post-judgment interest from

the date of entry. *Gerschick v. Pounds*, 281 Ga. App. 531, 636 S.E.2d 663 (2006), cert. denied, 2007 Ga. LEXIS 95 (Ga. 2007).

#### RESEARCH REFERENCES

**C.J.S.** — 72 C.J.S., Principal and Surety, § 226 et seq.

**ALR.** — Rights of one entitled to contribution to recover interest, 27 ALR2d 1268.

#### 10-7-52. Compelling contribution — Duty to account for indemnification from principal; compelling transfer of security from principal.

A surety suing for contribution must first account for all money or other things received from the principal to indemnify him against loss; and, if he has paid the entire debt, he may compel his cosurety to transfer to him any mortgage or other security taken from the principal for the protection of such cosurety, by relieving him of all liability for contribution. (Orig. Code 1863, § 2153; Code 1868, § 2148; Code 1873, § 2175; Code 1882, § 2175; Civil Code 1895, § 2994; Civil Code 1910, § 3566; Code 1933, § 103-403.)

#### RESEARCH REFERENCES

**ALR.** — Rights and liabilities as between sureties on successive bonds given by executor, administrator, trustee, or guardian, 76 ALR 904.

Right of surety to share in benefit of security or indemnity taken by another

surety on or before becoming such, 95 ALR 305.

Validity, construction, and application of guaranty of corporate stock, or dividends thereon, by one other than corporation, 107 ALR 1171

#### 10-7-53. Compelling contribution — Controlling action on debt and judgments therein.

Code Sections 10-7-40 through 10-7-49 shall apply to cases where there is more than one surety, so as to enable a surety discharging a joint debt, in whole or in part, either pending the action or after joint or several judgments, to control the same against his cosureties for the purpose of compelling them to contribute their respective shares of the amount so paid by him. (Laws 1840, Cobb's 1851 Digest, p. 597; Laws 1850, Cobb's 1851 Digest, p. 599; Ga. L. 1857, p. 111, § 3; Code 1863, § 2148; Code 1868, § 2143; Code 1873, § 2170; Code 1882, § 2170; Civil Code 1895, § 2989; Civil Code 1910, § 3561; Code 1933, § 103-311.)

#### JUDICIAL DECISIONS

**Entry of payment must be endorsed on execution.** — A surety who did not have any entry of payment endorsed on the fi. fa. as required by former Civil Code 1895, § 2986 was not equitably subrogated to the rights of

the plaintiff in the judgment so as to enforce contribution against a cosurety. *Cureton v. Cureton*, 120 Ga. 559, 48 S.E. 162 (1904).

**Cited in** *Burke v. Lee*, 59 Ga. 165 (1877); *Holland v. Holland Heating & Air Condi-*

tioning, 208 Ga. App. 794, 432 S.E.2d 238 (1993).

### RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, § 172.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 226 et seq.

**ALR.** — Right of surety or guarantor who pays judgment to preservation thereof as against his cosureties or coguarantors, 71 ALR 300.

Joinder in one action of sureties on different bonds relating to same matter, 106 ALR 90; 137 ALR 1044.

Limitation by surety of amount of his liability as affecting liability to contribution, 172 ALR 1447.

Right of guarantor or surety, in order to avoid paying amount in excess of his proportionate share, to compel coguarantors or cosureties to pay their share to creditor, 38 ALR3d 680.

### 10-7-54. Endorser's right to control judgment on debt and execution thereon.

Every endorser who shall pay off and discharge the debt on which he is endorser, either pending the action or after judgment, whether the judgment against the principal and the endorsers is joint or several, shall be entitled to control the judgment and execution founded thereon against the principal and all prior endorsers, in the same manner, upon the same proof, and under the same circumstances as provided in this article in the case of sureties; and, if such endorser shall collect the same from a prior endorser, the latter shall have the same control of the judgment or judgments against the principal or any endorser prior to him. (Laws 1839, Cobb's 1851 Digest, p. 596; Laws 1845, Cobb's 1851 Digest, p. 598; Laws 1850, Cobb's 1851 Digest, p. 600; Ga. L. 1855-56, p. 227, § 1; Code 1863, § 2149; Code 1868, § 2144; Code 1873, § 2171; Code 1882, § 2171; Civil Code 1895, § 2990; Civil Code 1910, § 3562; Code 1933, § 103-312.)

**Cross references.** — Order of liability of endorsers of commercial paper, § 11-3-414(2).

### JUDICIAL DECISIONS

**Right of control formerly limited to bankable instruments.** — Neither Laws 1839, Cobb's 1851 Digest, p. 596, nor Georgia Laws 1845, Cobb's 1851 Digest, p. 598 (from which this section was derived), passed for the relief of endorsers, gave the control of executions to endorsers who had paid off the same against prior endorsers except such executions as had been issued on judgments founded on bankable instruments. Evans v.

Rogers, 1 Ga. 463 (1846), later appeal, 8 Ga. 143 (1850).

**Right of control limited to payment after judgment.** — Under Georgia Laws 1839, 1845, and 1850, Cobb's 1851 Digest, pp. 596, 598, and 600, where pending suit against a principal and endorser jointly, the endorser paid the note, this payment was a bar to the further prosecution of the suit, even though the further prosecution of the suit might be



at the instance, and for the benefit of, the endorser. *Griffin v. Hampton*, 21 Ga. 198 (1857).

**“Shall pay off or discharge” defined.** — When the codifiers used the expression “shall pay off and discharge” in this section, they intended that those words should have the same significance as “compelled to pay.” *Ezzard v. Bell*, 100 Ga. 150, 28 S.E. 28 (1897).

**Section applies to involuntary payment as well as voluntary.** *Stiles v. Eastman*, 1 Ga. 205 (1846); *Ezzard v. Bell*, 100 Ga. 150, 28 S.E. 28 (1897).

A voluntary payment is compulsory within legal contemplation, and there is no reason why a compulsory payment should not likewise fall within the spirit of this section. *Ezzard v. Bell*, 100 Ga. 150, 28 S.E. 28 (1897).

**Plaintiff’s attorney may enter payment on**

**execution after levy.** — Under this section, it having been discovered that there was no entry on the fi. fa. showing its payment by the endorser, pending a claim case arising under a levy made for the benefit of such endorser, the attorney for the plaintiff in fi. fa. could then make the entry. *Thomason v. Wade*, 72 Ga. 160 (1883).

**Surety cannot control execution if cosureties do not consent to relationship.** — If an accommodation endorser agreed with the creditor to become surety for all signers of the note, but those signing did not have notice of nor accept such relation, she could not control the fi. fa. under this section, merely by reason of her agreement with the creditor. *Taff v. Larey*, 29 Ga. App. 631, 116 S.E. 866 (1923).

### 10-7-55. Protection of bona fide purchasers when surety controls judgment.

When the surety does not appear to be such in the judgment and execution, the lien of such judgment, when controlled by the surety, shall not interfere with bona fide purchasers without notice from the principal, whose rights were vested before the order giving control to the surety was granted. (Laws 1845, Cobb’s 1851 Digest, p. 598; Code 1863, § 2150; Code 1868, § 2145; Code 1873, § 2172; Code 1882, § 2172; Civil Code 1895, § 2991; Civil Code 1910, § 3563; Code 1933, § 103-313.)

### 10-7-56. Subrogation to rights of creditor — Priority of claim.

A surety who has paid the debt of his principal shall be subrogated, both at law and in equity, to all the rights of the creditor and, in a controversy with other creditors, shall rank in dignity the same as the creditor whose claim he paid. (Ga. L. 1857, p. 111, § 4; Code 1863, § 2155; Code 1868, § 2150; Code 1873, § 2176; Code 1882, § 2176; Civil Code 1895, § 2995; Civil Code 1910, § 3567; Code 1933, § 103-501.)

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION APPLICATION

##### General Consideration

**“Subrogation” defined.** — “Subrogation” is the substitution of another person in the place of the creditor whose obligation is paid, so that the person in whose favor it is exercised succeeds to all the rights of the creditor; it is of equitable origin, being

founded upon the dictates of refined justice, its basis is the doing of complete, essential, and perfect justice between the parties, and its object is the prevention of injustice. *First Nat’l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Construction by courts.** — The courts

incline to extend rather than restrict the principle of subrogation. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Effect of UCC.** — Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976); *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

**Surety need not file under UCC to preserve surety's priority.** — A surety is "secured" by the surety's right of subrogation, which relates back to the issuance of the bond, to defeat intervening creditors. The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation, and a surety is not required to file under the UCC to preserve the surety's priority under the equitable right of subrogation. *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

**Cumulative remedy.** — Only a cumulative remedy is afforded by this section, as the doctrine of subrogation existed by general law prior to its adoption in the statutes. *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427 (1847) (see O.C.G.A. § 10-7-56).

**Section not applicable to rights under § 10-7-41.** — Subrogation under O.C.G.A. § 10-7-56 is not the same thing as a guarantor's right to recoup payment of a debt from the guarantor's principal under O.C.G.A. § 10-7-41. *Fabian v. Dykes*, 214 Ga. App. 792, 449 S.E.2d 305 (1994).

**Legal and equitable right.** — Regardless of its origin in equity, subrogation under former Code 1933, §§ 103-501 and 103-502 was now a legal as well as an equitable right. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Former Code 1882, §§ 2176 and 2177 made subrogation a legal as well as an equitable right.** *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

What former Code 1882, §§ 2176 and 2177 did was to break down the exclusiveness of equity and carry the right of subrogation into law, so as to make equity and law concurrent and coequal with respect to this subject matter. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Whether right is legal or equitable is now immaterial.** — Whether former Civil Code 1910, §§ 3567 and 3568 serve to convert the right of substitution from an equitable to a legal right was quite immaterial, since enforcement of equitable and legal rights was permitted in the same action in a court having jurisdiction to administer both. *Train v. Emerson*, 141 Ga. 95, 80 S.E. 554, 49 L.R.A. (n.s.) 950 (1913); *Durden v. Youmans*, 37 Ga. App. 182, 139 S.E. 91 (1927).

**Section reaffirms subrogation founded upon equity, not contract.** — Subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. The doctrine was not limited or abrogated by this section, but positively reaffirmed. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976).

Legal subrogation arises as a matter of equity without any agreement to that effect. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983).

**Origins of legal subrogation.** — The doctrine of subrogation is not founded on contract but has its origin in a sense of natural justice. The equitable principle of the surety's subrogation was incorporated into the 1863 Code as former Code 1863, §§ 2155 and 2156. Since the 1863 Code, this action is for the enforcement of a legal, as contradistinguished from an equitable, right. *Fender v. Fender*, 30 Ga. App. 319, 117 S.E. 676 (1923).

**Conventional subrogation.** — There is a well-recognized distinction between the right to sue on a claim of legal subrogation, which is of an equitable nature, and the right to sue on conventional subrogation, based on an agreement of the parties. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

There are known to the law two kinds of subrogation, legal and conventional. Legal subrogation arises by operation of law, where one having a liability or a right or a fiduciary relation in the premises pays a debt due by another under such circumstances that one is in equity entitled to the security or obligation held by the creditor whom one has paid. Conventional subrogation depends upon a lawful contract, and occurs where one having no interest in or relation to the matter pays the debt of another, and by agreement

**General Consideration (Cont'd)**

is entitled to the securities and rights of the creditor so paid. *Erwin v. Brooke*, 159 Ga. 683, 126 S.E. 777 (1925).

Subrogation is of two kinds. One is legal subrogation, which takes place as a matter of equity, without any agreement to that effect made with the person paying the debt. The other is conventional subrogation, which is applied where an agreement is made with the person paying the debt that one shall be subrogated to the rights and remedies of the original creditor. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

Conventional subrogation depends upon contract and upon payment of the debt of another who then is entitled to the securities and rights of the creditor so paid. *Bank of Danielville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983).

**Conventional subrogation can take effect only by agreement**, and has been said to be synonymous with assignment. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Conventional subrogation agreement need not be written.** — A conventional subrogation agreement is not required to be in writing. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Subrogation under section does not depend on judicial proceeding.** — Former Code 1882, §§ 2176 and 2177 intended to effect the substitution of the surety by their own vigor and not leave it to be done by any court or any judicial proceedings. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

As soon as the debt is paid by the surety, the surety is subrogated by virtue of this section to all the rights of the creditor by vigor of the law, and not dependent upon any judicial proceedings. *Sherling v. Long*, 122 Ga. 797, 50 S.E. 935 (1905); *Fender v. Fender*, 30 Ga. App. 319, 117 S.E. 676 (1923).

**Payment of debt is necessary.** — Subrogation inures only to a surety who has paid the debt of the surety's principal. *Jessee v. First Nat'l Bank*, 154 Ga. App. 209, 267 S.E.2d 803 (1980).

Where note maker brought action to cancel security deed after creditor assigned note and security deed to cosigner's estate when

note was paid from cosigner's life insurance policy, the trial judge correctly refused to cancel the security deed which the creditor transferred to cosigner's estate. *Aultman v. United Bank*, 259 Ga. 237, 378 S.E.2d 302 (1989).

**Full amount of debt must be tendered.** — Where less than the total amount of the debt is tendered, subrogation is not permitted; the reason for this rule is that if the surety upon making a partial payment became entitled to subrogation pro tanto and thereby became entitled to the position of an assignee of the property to the extent of such payment, it would operate to place such surety upon a footing of equality with the holders of the unpaid part of the debt, and, in case the property was insufficient to pay the remainder of the debt for which the guarantor was bound, the loss would logically fall proportionately upon the creditor and upon the surety. *Jessee v. First Nat'l Bank*, 154 Ga. App. 209, 267 S.E.2d 803 (1980).

**Writing "paid" on instrument does not extinguish surety's rights.** — Under former Civil Code 1910, §§ 3567 and 3568, the fact that when a note was paid by the surety and it, with the mortgage securing it, was surrendered by the creditor to the surety, the word "Paid," dated and signed, was written across the face of the note and the mortgage, amounts to nothing more than a receipt for the money by the creditor to the surety, and does not operate legally to extinguish the rights of the surety against the principal or against other creditors of the principal contending for the mortgaged property, unless it is made to appear that it was the intent that such payment by the surety should operate to satisfy and extinguish the instruments; especially would this be true where it does not appear that the contending creditor had knowledge of such entry. *Dabney v. Brigman Motors Co.*, 32 Ga. App. 652, 124 S.E. 370 (1924).

**Surety making payment to state acquires its security, not remedies.** — The right of subrogation does not apply to the remedies which the state has against a citizen, but as to the security which the state has. That security passes to the surety who pays off a debt to the state. *Irby v. Livingston*, 81 Ga. 281, 6 S.E. 591 (1888).

**Surety acquires no greater rights than state had.** — The lien which the state had under



the Motor Fuel Tax Law of 1937 (now repealed and replaced by present §§ 48-9-1 to 48-9-17) upon the property of a distributor for excise taxes collected by the distributor on the sale or use of motor fuel or kerosene did not have priority over the lien of a judgment creditor, where the rights of such creditor attached prior to the time the state revenue commissioner filed notice of the state's lien in the office of the clerk of the superior court; and where a surety upon such distributor's bond to the state became subrogated to the rights of the state by payment of such taxes to the state, the surety took the position of the state and acquired no greater rights with respect thereto than the state had at the time the surety became subrogated. *Royal Indem. Co. v. Mayor of Savannah*, 209 Ga. 383, 73 S.E.2d 205 (1952).

**Section gives surety title to instrument paid off.** — This section clothes the surety with the legal title to the security which the surety pays off. By legal subrogation, the paper becomes the surety's property, and the creditor has no right to withhold it from the surety's possession. *Dabney v. Brigman Motors Co.*, 32 Ga. App. 652, 124 S.E. 370 (1924).

**Section permits surety to sue on original obligation.** — Since the adoption of this section and § 10-7-57, not only can a surety paying the debt of the surety's principal maintain a suit in equity against the surety's principal upon the implied promise of indemnification, but, being legally subrogated to the rights of the creditor, the surety may sue on the original indebtedness. *Fender v. Fender*, 30 Ga. App. 319, 117 S.E. 676 (1923); *Dabney v. Brigman Motors Co.*, 32 Ga. App. 652, 124 S.E. 370 (1924).

The surety entitled to contribution may sue the cosureties upon the written evidence of indebtedness or upon the implied contract raised by law in favor of one surety against the cosureties for contribution. *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932).

**Cited in** *Lumpkin v. Mills*, 4 Ga. 343 (1848); *Foster ex rel. Tompkins v. Whitaker*, 12 Ga. 57 (1852); *American Nat'l Bank v. Fidelity & Deposit Co.*, 129 Ga. 126, 58 S.E. 867 (1907); *Travis v. Sams*, 23 Ga. App. 713, 99 S.E. 239 (1919); *Reid v. Whisenant*, 161 Ga. 503, 131 S.E. 904, 44 A.L.R. 599 (1926);

*McWhorter v. Bank of Menlo*, 162 Ga. 627, 134 S.E. 606 (1926); *Hinson v. Farmers' Bank*, 41 Ga. App. 715, 154 S.E. 468 (1930); *Gilbert v. United States Fid. & Guar. Co.*, 180 F. Supp. 794 (M.D. Ga. 1959); *Betts v. Brown*, 219 Ga. 782, 136 S.E.2d 365 (1964).

### Application

**Accommodation party is not surety now without express agreement.** — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see O.C.G.A. § 11-3-101 et seq.), an accommodation party is no longer a surety for the party accommodated as a legal consequence of the accommodation undertaking. The rule now is that the fact of suretyship must be written in the endorsement or there must be an express agreement that the accommodation party is signing as surety. *Bell v. Kleinberg*, 102 Ga. 623, 117 S.E.2d 262 (1960).

**Accommodation party who is not surety may now only sue on implied promise.** — Since the enactment in Georgia of the former Negotiable Instruments Law in 1924 (see O.C.G.A. § 11-3-101 et seq.), the ruling in *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893), to the effect that an action by an accommodation party against another party could be brought on the instrument as well as on the basis of an implied contract to reimburse, has not been the law. *Bell v. Kleinberg*, 102 Ga. App. 623, 117 S.E.2d 262 (1960); *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932) (four-year statute of limitations as to implied contracts applies and will not be followed).

**Surety paying debt may collect from principal.** — Where person making a payment of the debt of another pays an indebtedness for which one is surety, and is therefore under a contractual obligation to pay it, one is entitled, by subrogation to the rights of the creditor, to collect from the debtor the amount of the payment thus made. *Hartley v. Hartley*, 50 Ga. App. 848, 179 S.E. 245 (1935).

**Surety may recover from cosurety.** — A surety who has paid the debt of the surety's principal is subrogated, both at law and in equity, to all the rights of the creditor and is entitled to recover from the cosurety (where there are only two sureties) half of the amount paid by the surety, with interest

**Application (Cont'd)**

thereon and attorney's fees, provided the debt paid by the surety was past due and the statutory notice of suit was given. *Reed v. Liberty Nat'l Bank & Trust Co.*, 44 Ga. App. 544, 162 S.E. 154 (1932).

Where several persons who are directors of a banking corporation borrow money which is used for the benefit of the bank and obligate themselves to repay it, all of the obligors are equally bound to bear the common burden, and where all of the obligors except one make a payment on the obligation, which payment represents their aggregate pro rata shares, and where all of the obligors execute a promissory note for the unpaid amount of the debt which represents the proportionate share of the obligor who did not pay, which is then paid in full by all the obligors except the one who had not paid and is transferred to them by the creditor, although no suit has been filed upon it, they are sureties and are subrogated to the rights of the creditor and are entitled to recover the amount of the note against the principal, who is the obligor who had not paid. *Holton v. Smith*, 44 Ga. App. 832, 163 S.E. 516 (1932).

**Joint action for contribution on original obligation is proper.** — Three of four sureties, who have paid the debt of their principal, may jointly sue their cosurety for contribution, founding their action upon the obligation containing the contract of suretyship, and will have the same time within which to bring suit as the creditor would have had on the same instrument. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893); *Train v. Emerson*, 141 Ga. 95, 80 S.E. 554, 49 L.R.A. (n.s.) 950 (1913).

**If payment is by several, separate action is improper.** — Where accommodation endorser has paid off more than their pro rata share of a note, one of the endorser subrogated under this section cannot sue severally on the note for that one's pro rata share of the contribution to which the surety and the coowners of the note are entitled. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Separate action proper for amount paid and not on original indebtedness.** — Where, of several endorser for accommodation, some pay off the whole debt, though each of these has no several right of action upon the

note for contribution against a coendorser who has paid nothing, yet each may sue severally for contribution to the extent of each one's own share thereof in an action for money paid for the defendant's use, payment to the creditor having been made, not out of a joint fund, but out of individual assets contributed by each paying endorser from one's own resources. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Action is for contribution only, even if founded upon original indebtedness.** — There is no authority which allows a cosurety to convert one's action for contribution into something else merely by founding one's action on the original evidence of indebtedness. It is still a suit to enforce contribution from cosureties, and plaintiff is bound by the substantive rules pertaining to contribution. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

Although a surety, after payment of the principal's debt, was subrogated to the rights and remedies of the creditor and entitled to found the surety's action for contribution directly on the original evidence of indebtedness, it does not follow that the surety is entitled to enforce these obligations against the cosureties in exactly the same manner and in the same amounts as could the creditor. The surety is bound by the substantive rules of contribution, while the creditor is not. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**Section does not allow surety to escape part of deficiency if cosurety is insolvent.** — Former Code 1933, §§ 103-501 and 103-502 have never been construed to allow a cosurety to escape paying part of the deficiency in the share of an insolvent cosurety. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**Section does not apply to successive sureties.** — An exception to the general rule, laid down in this section, exists where in a legal proceeding there are successive sureties. In such a case the last surety is regarded as the primary one, and if the surety pays the debt of the surety's principal, the surety has no right of subrogation against the preceding sureties. This is true whether the dispute is between successive sureties in the legal proceeding itself or between the surety given in the legal proceeding and the surety in the original transaction upon which the legal



proceeding is based. *National Sur. Co. v. White*, 21 Ga. App. 471, 94 S.E. 589 (1917).

**Section does not give subrogation where creditor has received mortgaged property in part payment.** — The rights of subrogation given the surety by this section cannot be enjoyed where the creditor, who by the same contract has personal security and a mortgage upon personal property, has after maturity of the debt received the mortgaged property by contract with the principal debtor, in part payment at more than its full value at the time the creditor received it. *Marshall v. Dixon*, 82 Ga. 435, 9 S.E. 167 (1889).

**Joint obligor is not like a surety** subrogated to the rights of the creditor under this section, but the obligor may enforce contribution on the implied contract on the obligor's part to share the common burden. *Sherling v. Long*, 122 Ga. 797, 50 S.E. 935 (1905).

**Surety is not bound to pay and be subrogated.** — The surety may pay up the debt and be subrogated to the rights of the creditor against the surety's principal, but the surety is not bound to do this. *Curan v. Colbert*, 3 Ga. 239, 46 Am. Dec. 427 (1847).

**Surety may renounce right by surety's actions.** — Although a surety, if the surety so elects, may, under former Code 1882, §§ 2176 and 2177, have the right to be subrogated to the creditor's status, yet a foreclosure by the surety of the mortgage given to indemnify the surety was a renunciation of that right. *Flannagan v. Forrest*, 94 Ga. 685, 21 S.E. 712 (1894).

**Spouse of grantor in security deed paying another debt is not subrogated.** — Under former Civil Code 1910, §§ 3558, 3567 and 3568, because the wife of the grantor in a security deed paid a debt secured by another deed, the spouse was not entitled to be subrogated to the grantee's rights. *Hiers v. Exum*, 158 Ga. 19, 122 S.E. 784 (1924).

**Venue.** — A creditor holding a promissory note may sue the maker and sureties thereon in the county of the residence of either, and a surety paying the note succeeds to this right, and may bring action upon the note either in the county of the residence of the maker or in that of the residence of a cosurety, at the surety's option, as the surety is subrogated in law and equity to all the rights of the creditor. *Anderson v.*

*Armistead*, 18 Ga. App. 387, 89 S.E. 525 (1916).

**In action on conventional subrogation, subrogee need not prove superior equity.** — In this state an action based on conventional subrogation, clearly established by an agreement reduced to writing or otherwise shown, in which no equitable relief is prayed, is a legal action and is not controlled by principles of equity; and a conventional subrogee does not have the burden of showing the superior equity in itself as plaintiff to authorize a recovery. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Subrogation rights inchoate until principal unable to pay.** — A contractor's surety has subrogation rights with respect to any funds earned and paid to the contractor and still in the contractor's hands. Until the surety is called upon to perform the surety's obligation under a payment or performance bond, however, the right of subrogation is an inchoate one, which becomes choate only upon the maturing and performance of the obligation to pay, which occurs only when the principal finds itself unable to pay and calls upon the surety to pay in accordance with the terms of the bond. *Cotton States Mut. Ins. Co. v. Citizens & S. Nat'l Bank*, 168 Ga. App. 83, 308 S.E.2d 199 (1983).

**Obtaining rights under negotiable promissory notes.** — Fidelity bond insurer who paid insured's claim for loss based on employee's improper receipt of personal loan would not obtain subrogation rights under negotiable promissory notes bank received from employee at time of loan until notes were negotiated to the insurer. *Bank of Danielsville v. Seagraves*, 167 Ga. App. 135, 305 S.E.2d 790 (1983).

**Applicability in bankruptcy proceedings.** — The assignment of a creditor's security interest to a co-debtor who paid the debt of a principal did not amount to inequitable conduct justifying subordination of the co-debtor's secured claim in bankruptcy proceedings, because the co-debtor had a clear right, under both state and federal law, to succeed to the creditor's position. Even in the absence of the assignment, the co-debtor would have been subrogated to the rights of the creditor. *Estes v. Cranshaw (In re N & D Properties, Inc.)*, 54 Bankr. 590 (N.D. Ga. 1985), *aff'd in part and rev'd in part on*



**Application** (Cont'd)

other grounds, 799 F.2d 726 (11th Cir. 1986).

**Genuine issues of material fact existed as to whether equitable subrogation applied.** — In a declaratory judgment action brought by a senior lienholder against a junior lienholder of certain real property, a trial

court erred by granting summary judgment to the senior lienholder based on equitable subrogation as, although the senior lienholder met the prima facie requirements for equitable subrogation, material issues of fact existed as to whether equitable subrogation applied to the case. *Secured Equity Fin., LLC v. Washington Mut. Bank, F. A.*, 293 Ga. App. 50, 666 S.E.2d 554 (2008).

**RESEARCH REFERENCES**

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 139, 211.

**Am. Jur. Pleading and Practice Forms.** — 23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

**ALR.** — Right of surety on warehouseman's bond to be subrogated to rights of owner of property stored as against third person, 4 ALR 518.

Payment of entire claim of third person as condition of subrogation, 9 ALR 1596, 32 ALR 568; 46 ALR 857; 53 ALR 304; 91 ALR 855.

Right of surety who discharges obligation due to government, to be subrogated to rights of latter against third persons, 24 ALR 1523.

Right of building contractor's surety who completes contract to money earned by contractor but unpaid before default, 45 ALR 379; 134 ALR 738; 164 ALR 613.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 ALR 551.

Right as between surety on contractor's bond and assignee of money to become due on contract, 76 ALR 917.

Right of surety on supersedeas or appeal bond to subrogation, 77 ALR 452.

Right of a third person who has paid corporation's indebtedness to be subrogated

to creditors' right to enforce stockholders' statutory liability, 78 ALR 611.

Right of surety on fidelity bond to be subrogated to obligee's right as against third person who caused or contributed to loss or failed in his duty to discover it, 95 ALR 269.

Right of subrogation of fiduciary's surety to claim of the estate against third person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 ALR 997.

Surety's right to be subrogated to obligee's right against third person as affected by equities in favor of latter which are insufficient to prevent his liability to obligee, 137 ALR 700.

Right of one cojudgment debtor who pays judgment to be subrogated thereto as against the other cojudgment debtors, 157 ALR 495.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 ALR 421.

Rights and remedies incident to subrogation to one but not both elements of a single cause of action for injury to person and damage to property, 166 ALR 870.

Right of indemnitee's insurer defending action against indemnitee, to recover costs and attorneys' fees from indemnitor, 77 ALR2d 1143.

**10-7-57. Subrogation to rights of creditor — As to securities held by creditor.**

A surety who has paid the debt of his principal shall also be entitled to be substituted in place of the creditor as to all securities held by him for the payment of the debt. (Orig. Code 1863, § 2156; Code 1868, § 2151; Code 1873, § 2177; Code 1882, § 2177; Civil Code 1895, § 2996; Civil Code 1910, § 3568; Code 1933, § 103-502.)

## JUDICIAL DECISIONS

**Section reaffirms equitable doctrine of subrogation.** — Subrogation is not founded upon contract, express or implied, but upon principles of equity and justice. The doctrine was not limited or abrogated by this section, but positively reaffirmed. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976).

**Effect of UCC.** — The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation. *Argonaut Ins. Co. v. C & S Bank*, 140 Ga. App. 807, 232 S.E.2d 135 (1976); *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

**Subrogation defined.** — “Subrogation” is the substitution of another person in the place of the creditor whose obligation is paid, so that the person in whose favor it is exercised succeeds to all the rights of the creditor; it is of equitable origin, being founded upon the dictates of refined justice, its basis is the doing of complete, essential, and perfect justice between the parties, and its object is the prevention of injustice. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Subrogation is legal as well as equitable right.** — Former Code 1882, §§ 2176 and 2177 made subrogation a legal as well as equitable right. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

What former Code 1882, §§ 2176 and 2177 did was to break down the exclusiveness of equity and carry the right of subrogation into law, so as to make equity and law concurrent and coequal with respect to this subject matter. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

Regardless of its origin in equity, subrogation under former Code 1933, §§ 103-501 and 103-502 was now a legal as well as an equitable right. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Subrogation rights inchoate until principal unable to pay.** — A contractor's surety has subrogation rights with respect to any funds earned and paid to the contractor and still in the contractor's hands. Until the surety is called upon to perform the surety's obligation under a payment or performance bond,

however, the right of subrogation is an inchoate one, which becomes choate only upon the maturing and performance of the obligation to pay, which occurs only when the principal finds itself unable to pay and calls upon the surety to pay in accordance with the terms of the bond. *Cotton States Mut. Ins. Co. v. Citizens & S. Nat'l Bank*, 168 Ga. App. 83, 308 S.E.2d 199 (1983).

**Construction by courts.** — The courts incline to extend rather than restrict the principle of subrogation. *First Nat'l Bank v. American Sur. Co.*, 71 Ga. App. 112, 30 S.E.2d 402 (1944).

**Contract of suretyship alone does not give surety interest in security.** — A surety has not, by virtue of the contract of suretyship alone, any right, title, or interest in property which the surety's principal has pledged to a creditor as security for a debt. *Conley v. Kelley*, 43 Ga. App. 822, 160 S.E. 532 (1931).

**Subrogation of surety.** — As soon as a debt is paid, the surety paying the debt is subrogated to the creditor's rights and to any and all remedies for the enforcement thereof for the surety's own reimbursement and is substituted in place of the creditor to all securities held by the latter for the payment of the debt. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Payment of debt is necessary.** — Since the note maker brought action to cancel security deed after the creditor assigned the note and security deed to cosigner's estate when note was paid from cosigner's life insurance policy, the trial judge correctly refused to cancel the security deed which the creditor transferred to cosigner's estate. *Aultman v. United Bank*, 259 Ga. 237, 378 S.E.2d 302 (1989).

**Subrogation requires full payment.** — A pro tanto assignment or subrogation will not be made upon payment of part of the debt. All of the debt must be paid before there is any subrogation. *Erwin v. Brooke*, 159 Ga. 683, 126 S.E. 777 (1925).

Where less than the total amount of the debt is tendered, subrogation is not permitted. *Jessee v. First Nat'l Bank*, 154 Ga. App. 209, 267 S.E.2d 803 (1980).

**Party paying is surety.** — To be substituted under this section for the creditor, it is necessary only that the payment of the debt

should be made by a surety, it matters not whether the surety is a maker, endorser, drawer, acceptor, or what not. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Right extends to original security on which surety is bound.** — “All securities” as used in this section will include the identical security, the judgment, promissory note, bill, bond, or other contractual instrument, upon which the surety and the cosureties are bound with and for the principal debtor. Though there was a conflict on the question, the better opinion was that the primary and original security, as well as all others, was embraced in the equitable right of subrogation as it existed prior to the Code, irrespective of any statute. *Hull v. Myers*, 90 Ga. 674, 16 S.E. 653 (1893).

**Co-debtor was not a surety** of a debtor within the meaning of O.C.G.A. §§ 10-7-1, 10-7-45, and 10-7-57 as: (1) the note was executed so that both parties could buy a tract of land; (2) both parties received an equal benefit; (3) the debtor was solely liable for that portion of the loan that represented the payout of the previous mortgage on the debtor's property, and both parties were required to put up property in addition to the land they bought with the borrowed money; and (4) there was nothing in the agreement showing any intent by the parties that one was signing as the principal debtor and the other was signing as a surety. *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 S.E.2d 664 (2004).

**Surety acquires state's security, not remedies.** — The right of subrogation does not apply to the remedies which the state has against a citizen, but as to the security which the state has. That security passes to the surety who pays off a debt to the state. *Irby v. Livingston*, 81 Ga. 281, 6 S.E. 591 (1888).

**Section does not allow surety to escape part of deficiency if cosurety is insolvent.** — Former Code 1933, §§ 103-501 and 103-502 have never been construed to allow a cosurety to escape paying part of the deficiency in the share of an insolvent cosurety. *Todd v. Windsor*, 118 Ga. App. 805, 165 S.E.2d 438 (1968).

**Filing under UCC not necessary to preserve surety's priority.** — A surety is “secured” by the surety's right of subrogation, which relates back to the issuance of the bond, to defeat intervening creditors. The Uniform Commercial Code does not abrogate, modify, affect, or abridge the equitable doctrine of subrogation, and a surety is not required to file under the UCC to preserve the surety's priority under the equitable right of subrogation. *Pembroke State Bank v. Balboa Ins. Co.*, 144 Ga. App. 609, 241 S.E.2d 483 (1978).

**Sureties are discharged if creditor takes mortgaged property.** — Where a creditor on a promissory note signed by three persons, two of whom were sureties, having as further security for the debt a mortgage upon personal property, takes charge of such personally, such property being sufficient in value to discharge the debt, and fails to appropriate it to a payment of the note, the sureties will be discharged from liability thereon. *Barrett v. Bass Bros. & Co.*, 105 Ga. 421, 31 S.E. 435 (1898).

**Cited in** *Flannagan v. Forrest*, 94 Ga. 685, 21 S.E. 712 (1894); *Jones v. Norton*, 9 Ga. App. 333, 71 S.E. 687 (1911); *Fender v. Fender*, 30 Ga. App. 319, 117 S.E. 676 (1923); *Hinson v. Farmers' Bank*, 41 Ga. App. 715, 154 S.E. 468 (1930); *Kennedy v. Farmers' & Merchants' Bank*, 47 Ga. App. 104, 169 S.E. 769 (1933); *Betts v. Brown*, 219 Ga. 782, 136 S.E.2d 365 (1964).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 74 Am. Jur. 2d, Suretyship, §§ 139, 211.

**Am. Jur. Pleading and Practice Forms.** — 23 Am. Jur. Pleading and Practice Forms, Subrogation, § 2.

**C.J.S.** — 72 C.J.S., Principal and Surety, § 181 et seq.

**ALR.** — Payment of entire claim of third person as condition of subrogation, 9 ALR

1596; 32 ALR 568; 46 ALR 857; 53 ALR 304; 91 ALR 855.

Adjudication as essential to right of surety or endorser to be subrogated to payee's rights in collateral, 62 ALR 551.

Right as between surety on contractor's bond and assignee of money to become due on contract, 76 ALR 917.

Right of subrogation of fiduciary's surety



to claim of the estate against third person who knew or was chargeable with notice that fiduciary's transaction with him involved breach of fiduciary's obligation, 134 ALR 997.

Surety's right to be subrogated to obligee's right against third person as affected by

equities in favor of latter which are insufficient to prevent his liability to obligee, 137 ALR 700.

Right of surety who has not paid debt to judicial protection of right of subrogation to creditor's securities, 160 ALR 421.

## CHAPTER 8

## ECONOMIC DEVELOPMENT COUNCIL

Sec.

10-8-1 through 10-8-5 [Repealed].

**10-8-1 through 10-8-5.**

Reserved. Repealed by Ga. L. 1987, p. 325, § 1, effective July 1, 1987.

**The 2009 amendment**, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, designated this chapter as reserved.

of Code Sections 10-8-1 [repealed] through 10-8-5, was based on Ga. L. 1976, p. 1098, §§ 1-4; Ga. L. 1977, p. 865, § 1; and Ga. L. 1978, p. 1434, §§ 1-2.

**Editor's notes.** — This chapter, consisting

CHAPTER 9

GEO. L. SMITH II GEORGIA WORLD CONGRESS CENTER

Article 1		Sec.	
General Provisions			
Sec.			tion of commercial activity prohibition.
10-9-1.	Short title.	10-9-14.1.	Bylaws, resolutions, regulations, or ordinances governing use of facilities; exclusion of persons; grants for particular uses.
10-9-2.	Re-creation of "Geo. L. Smith II Georgia World Congress Center Authority."	10-9-15.	Power of authority with regard to ensuring maximum use of project; rules and regulations for operation and use; security guards.
10-9-3.	Definitions.	10-9-16.	Duties of Attorney General.
10-9-4.	Purpose of authority; powers generally.	10-9-16.1.	Authority to contract with local entities to act on its behalf with regard to local trade and convention center; provision of goods and services; reimbursement for costs, liabilities, and expenses; liability.
10-9-4.1.	Adoption and enforcement of ordinances relating to property, affairs, and administration of authority; penalties.	10-9-16.2.	Disposition of real property not required by authority; excepted property.
10-9-5.	Transfer of duties of Department of Economic Development; actions to be performed by authority under contract with and on behalf of department; costs; ratification of past actions.	10-9-17.	Powers declared supplemental and additional.
10-9-6.	Appointment and terms of members of board of governors of authority; vacancies; travel expenses and per diem; status of members in office on November 1, 1982.	10-9-18.	Liberal construction of chapter.
10-9-7.	Management of business and affairs of authority; bylaws, rules, and regulations; quorum; delegation of authority to committees.	10-9-19.	Accounts and audits.
10-9-8.	Meetings of board; notice; removal of members from board.	Article 2	
10-9-9.	Officers of board; terms of officers; authority of officers; compensation.	Overview Committee	
10-9-10.	Exemption of authority from taxation.	10-9-20.	Geo. L. Smith II Georgia World Congress Center Authority Overview Committee created; composition; officers; duties.
10-9-11.	Venue and jurisdiction of actions under chapter.	10-9-21.	Cooperation of other state agencies; staff members and independent consultants.
10-9-12.	Acceptance of grants, contributions, and gifts of money, property, or services.	10-9-22.	Authority to cooperate with committee; enforcement actions; annual committee reports.
10-9-13.	Moneys received considered trust funds; exception.	10-9-23.	Criteria for evaluating authority.
10-9-14.	Authority to fix charges for use; use of earnings; terms and conditions for use of project; contract required; penalty for viola-	10-9-24.	Expenditure of funds; expenses of committee members.
		10-9-30 through 10-9-35	[Repealed].
		Article 3	
		Revenue Bonds	
		10-9-40.	Issuance of bonds authorized; purpose.



Sec.		Sec.	
10-9-41.	Terms and conditions of bonds; form.		holder, receiver, or indenture trustee.
10-9-42.	Signatures; seal.	10-9-53.	Payment of sale proceeds to trustee.
10-9-43.	Tax exemption.	10-9-54.	Use of services of Georgia State Financing and Investment Commission; professional services for projects.
10-9-44.	Sale of bonds; interest rate.		
10-9-45.	Use of proceeds; issuance of additional bonds in case of deficit; use of surplus.	10-9-55.	Refunding bonds.
10-9-46.	Interim revenue receipts, certificates, or bonds.	10-9-56.	Bonds made securities for investment and deposit purposes.
10-9-47.	Replacement of mutilated, destroyed, or lost bonds.	10-9-57.	Validation of bonds; applicability of "Revenue Bond Law."
10-9-48.	Proceedings and conditions for issuance; resolution.	10-9-58.	Legislative findings; state covenants.
10-9-49.	Lease of facilities; terms and conditions; contracts with public entities.	10-9-59.	Inapplicability of "Georgia Uniform Securities Act of 2008."
10-9-50.	Enforceability against authority; limitation on state liability.	10-9-60.	Jurisdiction over actions.
10-9-51.	Security; provisions in resolution or trust indenture for protection of bondholder rights and remedies; sinking fund.	10-9-61.	Cumulative nature of authority powers; power to pledge or assign rents, revenues, earnings, and funds as security for indebtedness.
10-9-52.	Enforcement of rights by bond-		

JUDICIAL DECISIONS

**Main purpose of the General Assembly** in passing this chapter was to construct and operate a World Congress Center. Greer v. State, 233 Ga. 667, 212 S.E.2d 836 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

ARTICLE 1

GENERAL PROVISIONS

10-9-1. Short title.

This chapter may be known and cited as the "Geo. L. Smith II Georgia World Congress Center Act." (Ga. L. 1974, p. 174, § 1; Code 1981, § 10-9-1, enacted by Ga. L. 1982, p. 1122, § 1.)

10-9-2. Re-creation of "Geo. L. Smith II Georgia World Congress Center Authority."

There is re-created the "Geo. L. Smith II Georgia World Congress Center Authority" as a body corporate and politic, which shall be an instrumentality of the State of Georgia and a public corporation. (Code 1981, § 10-9-2, enacted by Ga. L. 1982, p. 1122, § 1.)

**10-9-3. Definitions.**

As used in this chapter, the term:

(1) “Authority” means the Geo. L. Smith II Georgia World Congress Center Authority.

(2) “Cost” with respect to the terms “cost of the project” or “cost of the facilities” includes but is not limited to the following:

(A) All costs of the purchase, lease, or any other form of acquisition by agreement, eminent domain, or otherwise or improvement, construction, reconstruction, repair, or maintenance of the project or any facility or component of either;

(B) All costs of real or personal property required for the purposes of such project and of all facilities related thereto, including land and any rights or undivided interest therein, easements, franchises, water rights, fees, permits, approvals, licenses, and certificates and the security of such franchises, permits, approvals, licenses, and certificates and the preparation of any application therefor;

(C) All machinery, equipment, furnishings, and fixtures required for such project or facilities;

(D) Financing charges and interest prior to and during construction and during such additional period as the authority may reasonably determine to be necessary for the placing of such project or facilities in operation;

(E) Costs of engineering, architectural, and legal services;

(F) Fees paid to fiscal agents for financial and other advice or supervision;

(G) Cost of plans and specifications and all expenses necessary or incidental to the construction, purchase, or acquisition of the completed project or facilities or to determine the feasibility or practicality of the project or facilities;

(H) Fees paid pursuant to the “Georgia Allocation System” established by Article 8 of Chapter 82 of Title 36;

(I) Fees for letters of credit, bond insurance, debt service or debt service reserve insurance, surety bonds, or similar credit enhancement instruments;

(J) Costs of the payment or performance of any obligation of the authority with respect to any lease to or by the authority of or with respect to the project or any facilities or any component thereof;

(K) Administrative expenses and such other expenses as may be necessary or incidental to the financing authorized in this chapter;

(L) The repayment of any loans made for the advance payment of any part of such cost, including the interest thereon; and

(M) A fund or funds for the creation of a debt service reserve, a renewal and replacement reserve, and such other reserves as may be reasonably required by the authority with respect to the financing and operation of its projects or facilities and as may be authorized by any bond resolution or trust agreement or indenture pursuant to the provisions of which the issuance of any such bonds may be authorized.

Any obligation or expense incurred for any of the purposes set forth in subparagraphs (A) through (M) of this paragraph shall be regarded as part of the cost of the project and may be paid or reimbursed as such out of the proceeds of revenue bonds or notes issued under this chapter.

(3) "Project" means a comprehensive international trade and convention center consisting of a complex of facilities suitable for multipurpose use for housing trade shows, conventions, and cultural, political, musical, educational, entertainment, athletic, or other events; for displaying exhibits of Georgia's counties, municipalities, industries, and attractions; and for promoting the agricultural, historical, natural, and recreational resources of the State of Georgia, including all facilities necessary or convenient to such purposes, regardless of whether such facilities are contiguous, including, by way of illustration and not limitation, the following facilities: exhibit halls; auditoriums; theaters and amphitheaters; stadiums or coliseums and related athletic fields, courts or other surfaces, and clubhouses and gymnasiums; restaurants and other facilities for the purveying of foods, beverages, publications, souvenirs, novelties, and goods and services of all kinds, whether operated or purveyed directly or indirectly through concessionaires, licensees or lessees, or otherwise; parking facilities and parking areas in connection therewith; facilities deemed necessary or convenient within the structure of any facility, including any stadium or coliseum facility; meeting room facilities, including meeting rooms providing for simultaneous translation capabilities for several languages; museum facilities; facilities used for plazas, parks, pavilions, and pedestrian ways; related lands, buildings, structures, fixtures, equipment, and personalty appurtenant or convenient to the foregoing; and extension, addition, and improvement of such facilities. The project shall be located in the City of Atlanta and shall be known as the "Geo. L. Smith II Georgia World Congress Center," except that any facility included within the project may be otherwise designated by the authority. As used in this chapter, the project described by the term "Geo. L. Smith II Georgia World Congress Center" shall include the same project formerly known as and referred to as the "Georgia World Congress Center" and the authority may be referred to as the "Georgia World Congress Center Authority." (Ga. L. 1974, p. 174, § 3; Code 1981, § 10-9-2; Code 1981, § 10-9-3, enacted by Ga. L. 1982, p.



1122, § 1; Ga. L. 1988, p. 556, § 1; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 1195, §§ 1, 2; Ga. L. 1994, p. 421, § 1.)

**Code Commission notes.** — Pursuant to spelling of “concessionaires” was substituted Code Section 28-9-5, in 1988, the correct in the first sentence of paragraph (3).

#### 10-9-4. Purpose of authority; powers generally.

(a) Without limiting the generality of any provision of this chapter, the general purpose of the authority is declared to be that of acquiring, constructing, equipping, maintaining, and operating the project, in whole or in part, directly or under contract with the Department of Economic Development or others, and engaging in such other activities as it deems appropriate to promote trade shows, conventions, and political, musical, educational, entertainment, recreational, athletic, or other events and related tourism within the state so as to promote the use of the project and the use of the industrial, agricultural, educational, historical, cultural, recreational, commercial, and natural resources of the State of Georgia by those using the project or visiting the state or who may use the project or visit the state.

(b) The authority shall have the following powers:

(1) To bring actions, complain, and implead in any judicial, administrative, arbitration, or other action or proceeding and, to the extent permitted by law, to have actions brought against it, to be impleaded, and to defend in such proceedings;

(2) To have a seal and alter the same at its pleasure;

(3) To make and alter bylaws, rules, and regulations, not inconsistent with law, for the administration and regulation of its business and affairs;

(4) To elect, appoint, or hire officers, employees, and other agents of the authority, including experts and fiscal agents, define their duties, and fix their compensation;

(5) To acquire, by purchase, gift, lease, or otherwise and to own, hold, improve, and use and to sell, convey, exchange, transfer, lease, sublease, and dispose of real and personal property of every kind and character, or any interest therein, for its corporate purposes;

(6) To make all contracts and to execute all instruments necessary or convenient to its purposes;

(7) To accept loans or grants of money or materials or property of any kind from the United States of America or any agency or instrumentality thereof; the State of Georgia, its departments, agencies, or authorities; or any county or municipality of this state, upon the terms and conditions as may be imposed thereon to the extent the terms and conditions are not

inconsistent with the limitation and laws of this state and are otherwise within the power of the authority;

(8) To exercise the power of eminent domain and acquire by condemnation, in accordance with the provisions of any and all existing laws applicable to the condemnation of property for public use, real property or rights of easement therein or franchises necessary or convenient for its corporate purposes;

(9) To borrow money for any of its corporate purposes and to provide for the payment of same, as may be permitted under the Constitution and the laws of the State of Georgia;

(10) To issue revenue bonds as is more fully provided for in this chapter;

(11) To contract with the state and its departments or any county, municipal corporation, political subdivision, public corporation, or public authority with respect to activities, services, or facilities the contracting parties are authorized by law to undertake or provide;

(12) To exercise any power usually possessed by private corporations performing similar functions which is not in conflict with the Constitution and the laws of the State of Georgia; and

(13) To do all things necessary or convenient to carry out the powers expressly given in this chapter.

(c) Said authority shall comply with all applicable state budgetary processes and procedures as relate to compensation of employees of the authority.

(d) The authority shall have the power to borrow money and to issue revenue bonds regardless of whether the interest payable by the authority incident to such loans or revenue bonds or income derived by the holders of the evidence of such indebtedness or revenue bonds is, for purposes of federal or state taxation, includable in the taxable income of the recipients of such payments or is otherwise not exempt from the imposition of such taxation on the recipient.

(e) The authority shall have the power to sell or dispense, upon obtaining a license from the Department of Revenue, or to permit others to sell or dispense, upon obtaining a license from the Department of Revenue, alcoholic beverages for consumption on the premises but only upon and within the territorial limits of property of or under the management and control of the authority. The authority shall not have the power to sell or dispense alcoholic beverages in unbroken packages for the purpose of permitting such unbroken packages to be carried off the premises. The authority shall determine and regulate by resolution, as it may amend from time to time, the conditions under which such sales or dispensing of

alcoholic beverages for consumption on the premises shall be made or shall be permitted, including the hours and days during which the sale or dispensing of alcoholic beverages shall be made or shall be permitted. (Ga. L. 1972, p. 245, § 2; Ga. L. 1974, p. 174, § 4; Code 1981, § 10-9-4, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1984, p. 22, § 10; Ga. L. 1988, p. 556, § 2; Ga. L. 1989, p. 14, § 10; Ga. L. 1989, p. 1641, § 4; Ga. L. 1989, p. 1195, § 3; Ga. L. 1992, p. 2097, § 1; Ga. L. 2004, p. 690, § 3.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1992, a comma was inserted following “others” and “and” was inserted following “conventions,” in subsection (a).

**Editor’s notes.** — Ga. L. 1989, p. 1641,

which amended this Code section, provides in § 18, not codified by the General Assembly: “In the event of any substantive conflict between this Act and any other Act of the 1989 General Assembly, such other Act shall control over this Act.”

### JUDICIAL DECISIONS

**Nature of functions performed.** — The functions performed by the World Congress Center Authority are primarily, if not exclusively, executive. *Greer v. State*, 233 Ga. 667,

212 S.E.2d 836 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

#### 10-9-4.1. Adoption and enforcement of ordinances relating to property, affairs, and administration of authority; penalties.

(a) In addition to and not in derogation of its other powers under this chapter, the authority is empowered to exercise such of the police powers of the state as may be necessary to maintain peace and order.

(b) The authority shall have legislative power to adopt reasonable ordinances relating to the property, affairs, and administration of the authority for which no provision has been made by general law and which are not inconsistent with the general laws and Constitution of the State of Georgia and the laws and Constitution of the United States. The officers of the Georgia World Congress Center Police, including the Security Guard Division thereof, and law enforcement officers acting within the jurisdiction of the authority under paragraph (3) of subsection (d) of Code Section 10-9-15, and subject to the requirements of Chapter 8 of Title 35, the “Georgia Peace Officer Standards and Training Act,” shall be authorized to serve and execute warrants and to make arrests for violation of ordinances adopted by the authority. For the purposes of exercising the powers and responsibilities of such officers as peace officers under paragraph (8) of Code Section 35-8-2, including their duties and responsibilities with respect to matters occurring within the limits of the facilities of the authority or requests by another law enforcement agency to provide aid and assistance, such officers shall have the same authority, powers, privileges, and immunities regarding enforcement of laws as law enforcement officers employed by the state. Prosecutions for violations of the ordinances of the authority shall be in the magistrate court sitting in the county in which such violation



occurs as provided in Article 4 of Chapter 10 of Title 15. The authority may provide that ordinance violations may be tried upon citations with or without a prosecuting attorney as well as upon accusations in the manner prescribed in Code Section 15-10-63.

(c) The maximum punishment for violation of such an ordinance shall be stated in the ordinance and shall not exceed a fine of \$500.00 or imprisonment for 60 days, or both.

(d) Nothing in this Code section shall prevent prosecution of any act which is a violation of an ordinance of the authority under any law applicable to such act. (Code 1981, § 10-9-4.1, enacted by Ga. L. 1996, p. 916, § 1.)

**10-9-5. Transfer of duties of Department of Economic Development; actions to be performed by authority under contract with and on behalf of department; costs; ratification of past actions.**

The authority is authorized and directed to contract with the Department of Economic Development to exercise on behalf of the department such future responsibility in connection with the acquisition, construction, operation, management, and maintenance of the project as is now or may be vested in the department; and the Department of Economic Development is authorized by such contract to delegate to the authority all of its responsibilities and powers with respect to the project and to transfer to the authority any and all contracts, plans, documents, or other papers of said department relating to the project, together with any and all funds heretofore or hereafter appropriated to it for the acquisition, construction, operation, management, or maintenance of the project or for all other purposes related to the project, other than appropriations made specifically for debt service purposes, as compensation to the authority under such contract. Under contract with the Department of Economic Development, as herein authorized, the authority on behalf of the Department of Economic Development shall plan, construct, erect, acquire, own, repair, remodel, maintain, add to, extend, improve, equip, operate, and manage the project, as hereinabove defined, on property owned by or leased by the State of Georgia in the City of Atlanta, Georgia, the cost of any such project to be paid in full or in part from the proceeds of general obligation bonds issued by the State of Georgia as the General Assembly may authorize or from such proceeds and other funds as may be available for such purposes, including any grant from the United States of America or any agency or instrumentality thereof. All actions of the authority and the Department of Economic Development, or their predecessors, heretofore taken in connection with such contractual relationship, are ratified and confirmed and shall not be affected by any provision of this chapter. Nothing herein shall affect the powers or duties of the Georgia State Financing and Investment Commission or of the State Properties Commission. Nothing in this Code

section nor anything in any contract between the authority and the Department of Economic Development shall prevent the Department of Economic Development from contracting with the Georgia Building Authority for the provision of a parking facility or for any other exercise of its powers necessary or convenient to the department. (Ga. L. 1974, p. 174, § 5; Code 1981, § 10-9-5, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 224, § 3; Ga. L. 1989, p. 1641, § 5; Ga. L. 2004, p. 690, § 4.)

**Editor's notes.** — Ga. L. 1989, p. 1641, which amended this Code section, provides in § 18, not codified by the General Assembly: "In the event of any substantive conflict

between this Act and any other Act of the 1989 General Assembly, such other Act shall control over this Act."

**10-9-6. Appointment and terms of members of board of governors of authority; vacancies; travel expenses and per diem; status of members in office on November 1, 1982.**

(a) The board of governors of the authority shall consist of 15 members. Each member shall serve for a term of four years, with the beginning and ending dates of terms to be specified by the Governor except that the four additional positions added in 1999 shall be appointed for initial terms ending July 1, 2002, but their successors shall be appointed for four-year terms. All members of the board shall be appointed by the Governor of the State of Georgia and shall serve until the appointment and qualification of a successor. Said members shall be appointed from the general public; and no person holding any other office of profit or trust under the state shall be appointed to membership.

(b) All successors shall be appointed in the same manner as original appointments. Vacancies in office shall be filled in the same manner as original appointments. An appointment to fill a vacancy shall be for the unexpired term. No vacancy on the board shall impair the right of the quorum of the remaining members then in office to exercise all rights and perform all duties of the board.

(c) The members of the board of governors shall be entitled to and shall be reimbursed for their actual travel expenses necessarily incurred in the performance of their duties and, for each day actually spent in performance of their duties, shall receive the same per diem as do members of the General Assembly.

(d) The members of the authority in office on November 1, 1982, shall continue in office as members of the board of governors for the remainder of the terms for which they were appointed and until their successors are appointed and qualified pursuant to this Code section. (Ga. L. 1972, p. 245, § 1; Ga. L. 1974, p. 174, § 2; Ga. L. 1975, p. 435, § 1; Ga. L. 1980, p. 1176, § 1; Code 1981, § 10-9-3; Code 1981, § 10-9-6, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 149, § 10; Ga. L. 1991, p. 1686, § 1; Ga. L. 1992, p. 6, § 10; Ga. L. 1999, p. 1040, § 1.)

**Code Commission notes.** — Pursuant to was substituted for “four year” in the second Code Section 28-9-5, in 1991, “four-year” sentence of subsection (a).

### JUDICIAL DECISIONS

**Legislators may not constitutionally be authority members.** — A legislator who participates as a member of the governing body of a public corporation such as the World Congress Center Authority is performing executive functions in violation of Ga. Const. 1976, Art. I, Sec. II, Para. IV (see Ga. Const. 1983, Art. I, Sec. II, Para. III). *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

**Former invalid provisions did not make rest of chapter unconstitutional.** — The former provisions of this section relating to legislative membership on the governing board held to be unconstitutional and stricken therefrom did not render the entire chapter unconstitutional. *Greer v. State*, 233 Ga. 667, 212 S.E.2d 836 (1975) (decided under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

### OPINIONS OF THE ATTORNEY GENERAL

**Former provisions were unconstitutional.** — The former provisions of this section were invalid to the extent that membership on the authority created thereby included officers of the legislative branch of state govern-

ment, violating Ga. Const. 1976, Art. I, Sec. II, Para. IV (see Ga. Const. 1983, Art. I, Sec. II, Para. III). 1974 Op. Att’y Gen. No. 74-109 (rendered under Ga. L. 1974, p. 174, prior to amendment by Ga. L. 1975, p. 435, § 1).

### 10-9-7. Management of business and affairs of authority; bylaws, rules, and regulations; quorum; delegation of authority to committees.

(a) The management of the business and affairs of the authority shall be vested in the board of governors, subject to the provisions of this chapter and to the provisions of bylaws adopted by the board of governors as authorized by this chapter.

(b) The board of governors shall have the power to make the bylaws, rules, and regulations for the government of the authority and the operation, management, and maintenance of the project as it may determine appropriate.

(c) A majority of the number of members of the board then in office shall constitute a quorum for the transaction of business. The vote of a majority of the members of the board present at the time of the vote, if a quorum is present at such time, shall be the act of the board unless the vote of a greater number is required by law or by the bylaws of the board of governors.

(d) If the bylaws of the authority so provide, the board of governors, by resolution adopted by a majority of the full board of governors, may designate from among its members an executive committee and one or more other committees, each consisting of two or more members of the board and each of which, to the extent provided in such resolution or the bylaws of the authority, shall have and may exercise such authority as the



board of governors may delegate to it. Unless otherwise provided in the bylaws of the authority, any such committee shall act by a majority of its members. The designation of any such committee and the delegation thereto of authority shall not operate to relieve the board of governors or any member thereof of any responsibility imposed by law. (Code 1981, § 10-9-7, enacted by Ga. L. 1982, p. 1122, § 1.)

**Code Commission notes.** — Pursuant to “governors” was substituted for “full board of Code Section 28-9-5, in 1985, in the first directors”. sentence of subsection (d) “full board of

#### **10-9-8. Meetings of board; notice; removal of members from board.**

(a) Meetings of the board of governors, regular or special, shall be held at the time and place fixed by or under the bylaws or, if not so fixed, by the board. Regular meetings of the board may be held with or without notice as prescribed in the bylaws. Special meetings of the board shall be held upon such notice as is prescribed in the bylaws. Unless otherwise prescribed in the bylaws, written notice of the time and place of special meetings of the board shall be given to each member either by personal delivery or by mail, telegram, or cablegram at least two days before the meeting. Neither the business to be transacted at, nor the purpose of, any regular or special meeting of the board need be specified in the notice or waiver of notice of such meeting unless required by the bylaws. Meetings of the board may be called by the chairman of the board or by any other person or persons authorized by the bylaws.

(b) Upon receipt of a resolution by a majority of the number of members of the board authorized by this chapter which so certifies and requests, adopted after notice to the defaulting member, the Governor of the state may by executive order remove from membership a member of the board who has failed to attend three consecutive meetings of the board. The action of the Governor shall be final and nonreviewable. (Code 1981, § 10-9-8, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1984, p. 22, § 10.)

#### **10-9-9. Officers of board; terms of officers; authority of officers; compensation.**

(a) The board of governors shall elect or appoint such officers as may be provided in the bylaws and may delegate to such officers, who need not be members of the board, such authority and responsibility as the board may determine appropriate.

(b) Each officer and employee of the authority shall serve at the pleasure of the authority and shall hold office for the term for which he is elected or appointed and until his successor has been elected or appointed and has qualified or until his earlier resignation, removal from office, or death.

(c) All officers and agents of the authority shall have such authority and perform such duties in the management of the authority as may be provided in the bylaws or as may be determined by action of the board not inconsistent with law or with the bylaws.

(d) The board of governors shall have authority to fix the compensation of its officers and employees, except that officers or employees who are also members of the board shall serve without additional compensation for such service.

(e) The authority shall be authorized to obtain conviction data with respect to its officers and employees or prospective officers and employees. For such purpose, the authority may submit to the Georgia Crime Information Center two complete sets of fingerprints of the officer or employee or the applicant for appointment or employment, the required records search fees, and such other information as may be required. Upon receipt thereof, the Georgia Crime Information Center shall promptly transmit one set of fingerprints to the Federal Bureau of Investigation for a search of bureau records and an appropriate report and shall retain the other set and promptly conduct a search of its own records and records to which it has access. The Georgia Crime Information Center shall notify the authority in writing of any derogatory finding, including, but not limited to, any conviction data regarding the fingerprint records check or if there is no such finding. All conviction data received by the authority shall be used by it for the exclusive purpose of making employment decisions, shall not be a public record, shall be privileged, and shall not be disclosed to any other person or agency except to any person or agency which otherwise has a legal right to inspect the employment file. All such records shall be maintained by the authority pursuant to laws regarding such records and the rules and regulations of the Federal Bureau of Investigation and the Georgia Crime Information Center, as applicable. As used in this subsection, "conviction data" means a record of a finding or verdict of guilty or plea of guilty or plea of nolo contendere with regard to any crime, regardless of whether an appeal of the conviction has been sought. (Code 1981, § 10-9-9, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1991, p. 1093, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, a comma was deleted following "qualified" in subsection

(b) and "bureau" was substituted for "Bureau" in the third sentence of subsection (e).

#### 10-9-10. Exemption of authority from taxation.

It is found, determined, and declared that the creation of the authority and the carrying out of its corporate purposes are in all respects for the benefit of the people of this state and are public purposes and that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this chapter. The authority shall

be required to pay no taxes or assessments upon any property acquired or under its jurisdiction, control, possession, or supervision or upon its activities in the development, construction, operation, or maintenance of any of the projects or facilities erected, maintained, or acquired by it or any fees, rentals, or other charges for the use of such facilities or other income received by the authority and shall not be subject to regulation of its activities in the acquisition, development, construction, operation, or maintenance of any of the projects or facilities acquired, developed, constructed, operated, or maintained by it by any county or municipal corporation of this state. The exemption from taxation provided for in this Code section shall include an exemption from sales and use tax on tangible personal property purchased by the authority for use exclusively by the authority. The revenue bonds or other evidence of indebtedness issued by the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within this state by the state or its municipalities or political subdivisions. (Ga. L. 1974, p. 174, § 6; Code 1981, § 10-9-6; Code 1981, § 10-9-10, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1989, p. 1195, § 4; Ga. L. 2007, p. 309, § 13/HB 219.)

The 2007 amendment, effective July 1, 2007, added the third sentence.

#### **10-9-11. Venue and jurisdiction of actions under chapter.**

Any action against the authority to protect or enforce any rights under the provisions of this chapter shall be brought in the Superior Court of Fulton County, Georgia, and such court shall have exclusive, original jurisdiction of such actions. (Ga. L. 1974, p. 174, § 8; Code 1981, § 10-9-13; Code 1981, § 10-9-11, enacted by Ga. L. 1982, p. 1122, § 1.)

#### **10-9-12. Acceptance of grants, contributions, and gifts of money, property, or services.**

The authority, in addition to the moneys received from the collection of revenues, rents, and earnings derived under the provisions of this chapter or from the Department of Economic Development, shall have authority to accept from any entity or agency of the United States, of this state, or of any county, municipality, political subdivision, or public authority and from any private individual or entity, grants, contributions, or gifts of either money or property, real or personal, tangible or intangible, or services or other things of value, in the furtherance of the purposes and powers of the authority. Incident to the acceptance of any such grant, contribution, or gift, the authority may accept and bind itself to express terms and conditions imposed incident to the grant, contribution, or gift governing the use and application of the money or property or the use or disposition of any property acquired therewith, provided that such term or condition is expressly accepted by the authority, is consistent with the purposes and



powers of the authority under this chapter, and is not inconsistent with the Constitution or laws of this state. Any such term or condition may require the authority to hold any money or property in trust separate from other money or property of the authority and any such money or property so held shall not be subject to any claims against or liability of the authority not arising from the use or application of the money or property so held or the operation of the property so held or acquired therewith. (Ga. L. 1974, p. 174, § 9; Code 1981, § 10-9-8; Code 1981, § 10-9-12, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1989, p. 1641, § 6; Ga. L. 1994, p. 421, § 2; Ga. L. 2004, p. 690, § 5.)

**10-9-13. Moneys received considered trust funds; exception.**

All moneys received pursuant to the authority of this chapter, whether as grants, contributions, or gifts or as revenues, rents, and earnings, shall be deemed to be trust funds to be held and applied solely as provided in this chapter, except that grants, contributions, or gifts, the terms or conditions of which require that the proceeds thereof be held separately in trust, shall be held in the manner and applied solely for the purposes specified. (Ga. L. 1974, p. 174, § 10; Code 1981, § 10-9-9; Code 1981, § 10-9-13, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1994, p. 421, § 3.)

**10-9-14. Authority to fix charges for use; use of earnings; terms and conditions for use of project; contract required; penalty for violation of commercial activity prohibition.**

(a) The board of governors of the authority is authorized to fix rentals, fees, prices, and other charges which any tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall pay to the authority for the use of the project or the facilities or part thereof or combination thereof, and for the goods and services provided by the authority in connection with such use, as the authority may deem necessary or appropriate to provide in connection with such use, and to charge and collect the same, and to establish and to perform and pay any obligations established under such other terms, conditions, and considerations as the authority and any such tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall determine necessary or appropriate. Such rentals, fees, prices, and other charges shall be so fixed and adjusted in respect to the aggregate thereof from the project or facilities or any part thereof so as to be reasonably expected to provide a fund sufficient with other revenues of such project and funds available to the authority, if any, to pay the cost of acquiring, constructing, equipping, maintaining, repairing, and operating the project or facilities, including the payment of debt service with respect to any revenue bonds issued under Article 3 of this chapter or other indebtedness and the payment or performance of contractual obligations incurred or undertaken by the authority and the establishment of reserves

for debt service for such revenue bonds or for extraordinary repairs and insurance, unless such cost shall be otherwise provided for, which costs shall be deemed to include the expenses incurred by the authority on account of the project for water, light, sewer, and other services furnished by other facilities at such project.

(b) The authority may establish the terms and conditions upon which any lessee, sublessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor shall be authorized to use the project as the authority may determine necessary or appropriate. The authority may by contract require any such person or entity to indemnify and hold harmless the authority and its officers, agents, or employees from the claims for personal injury or property damage or loss of such person or others employed by or admitted to the project or any of its facilities by such person arising out of or in connection with such use of the project from any cause, including negligence of the authority, its officers, agents, or employees, notwithstanding any other provision of law, including but not limited to subsection (b) of Code Section 13-8-2.

(c) A contract between the authority and any tenant, lessee, licensee, user, exhibitor, concessionaire, franchisee, or vendor and any consent otherwise granted by the authority for the use of or conduct of any activity within any project of or under the control and management of the authority shall not be exercisable or enforceable against the authority without the consent of the authority by any person except the person named in such contract. No such contract or consent shall be assignable or transferable to any other person without the consent of the authority.

(d) The authority shall have the power to adopt reasonable rules and regulations governing the use during an event period of sidewalks and public streets immediately adjacent to any project of or under the control and management of the authority so as to ensure the safe and orderly operation of the project and such areas, to prevent disruption of and interference with the conduct of such event, and to prevent public solicitation or public distribution of literature which is competitive with the activities of the person to whom the authority has granted the right to conduct such event.

(e) No person shall be authorized to engage publicly in any commercial activity or sale of goods or services, the public solicitation of commercial activity or the sale of goods or services, or begging, panhandling, or other public solicitation of funds for any purpose or the public distribution of literature within the boundaries of any project of or under the control and management of the authority without the prior express written consent of the authority and then only in accordance with the consent so given.

(f) No person shall be authorized to engage during any event period in any public commercial activity or the sale of goods or services, the public

solicitation of commercial activity or sale of goods or services, or begging, panhandling, or other public solicitation of funds for any purpose, or the public distribution of literature upon or within sidewalks or public streets adjacent to any project of or under the control and management of the authority without the prior written consent of the authority and then only in accordance with the consent so given.

(g) Any person who shall violate the provisions of subsection (e) or (f) of this Code section shall be guilty of a misdemeanor.

(h) As used in this Code section, “event period” means the period on any day on which an event has been scheduled by or under contract with the authority within any project of or under the management and control of the authority beginning two hours prior to the scheduled start of such event on that day and ending one hour after the closing of such event on that day.

(i) The provisions of this Code section are cumulative and shall not be in derogation of the rights and powers of the authority to control access to and use of any project of or under the control and management of the authority or applicable civil or criminal remedies or penalties otherwise provided by law. (Ga. L. 1974, p. 174, § 11; Code 1981, § 10-9-10; Code 1981, § 10-9-14, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1988, p. 556, § 3; Ga. L. 1989, p. 1195, § 5; Ga. L. 1991, p. 1093, § 2.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, the correct spelling of “concessionaire” was substituted in the first sentence of subsection (b).

Pursuant to Code Section 28-9-5, in 1991,

“transferable” was substituted for “transferrable” near the end of subsection (c) and “to” was inserted preceding “conduct” near the end of subsection (d).

### OPINIONS OF THE ATTORNEY GENERAL

**Constitutionality.** — O.C.G.A. § 10-9-14, and in particular subsections (d), (e) and (f), empowering the authority to regulate activities on the sidewalks and streets immediately adjacent to the World Congress Cen-

ter’s projects during an event period do not violate the City of Atlanta’s home rule power under Ga. Const. 1983, Art. IX, Sec. II, Para. III(c) and O.C.G.A. § 36-35-3(a). 1994 Op. Att’y Gen. No. U94-4.

### RESEARCH REFERENCES

**ALR.** — Laws regulating begging, panhandling, or similar activity by poor or homeless persons, 7 ALR5th 455.

#### 10-9-14.1. Bylaws, resolutions, regulations, or ordinances governing use of facilities; exclusion of persons; grants for particular uses.

(a) Notwithstanding any designation or name of a facility of the authority, the facilities of the authority owned by it or under its control and management, including without limitation facilities named as or used for plazas, parks, pavilions, and vehicular and pedestrian ways, shall not be



open or accessible to the public or be generally available for public or other use except (1) as may be determined or designated by the authority by bylaw, resolution, regulation, or ordinance as may be adopted by and amended from time to time by the authority either governing all facilities of the authority or governing a specific facility and then only for the purposes, at the times, and in the manner provided in such bylaw, resolution, regulation, or ordinance governing such facilities or facility and (2) as may be permitted by the authority to lessees, sublessees, licensees, sublicensees, exhibitors, concessionaires, franchisees, or vendors operating under a grant from the authority authorized by or entered into in accordance with bylaw, resolution, regulation, or ordinance of the authority and then only in accordance with the terms of that grant.

(b) The authority may exclude from the facilities of the authority any person whose access to or use of the facility is not authorized or permitted in accordance with such grant, bylaw, resolution, regulation, or ordinance and remove any person present on such facilities whose presence or activities during such presence are not in accordance with such grant, bylaw, resolution, regulation, or ordinance. In addition, the authority may exclude or remove any person from a facility of the authority or conditionally limit access of a person to a facility of the authority where the authority in good faith determines that the person's activities pose an actual or imminent threat of harm, that the person's activities do or are intended to disrupt or interfere with the activities or functions authorized or permitted within such facility, that the person's activities do or are likely to violate the security of persons authorized or permitted to use the facility, or that the person's activities constitute a hazard to the safe or orderly operation of the facilities of the authority or to the safety of the authority's facilities or the occupants thereof.

(c) Any bylaw, resolution, regulation, or ordinance adopted by the authority authorizing or permitting public or other use and access to any facility by the public or by persons other than the authority shall permit the authority from time to time directly to conduct activities within such facility or for other purposes which may be exclusive of access to and use of the facility by the public or by others otherwise authorized or permitted. Any bylaw, resolution, regulation, or ordinance adopted by the authority authorizing or permitting public or other use and access to any facility by persons other than the authority shall also permit the authority by lease, license, concession, franchise, or vending rights agreement, as the authority determines appropriate, to grant to others the right to use designated facilities of the authority to conduct activities thereon or for other purposes which shall be exclusive of the rights of others, including the public, to the extent set forth in the grant. During the period of such direct use or of the term of such grant and at such times preceding or following such period as the authority determines appropriate, notwithstanding any bylaw, resolution, regulation, or ordinance permitting public or other use and access to

a facility, the authority may close the facility for which direct use or grant is made to access by the public or others and exclude and remove from the facility of the authority for which such direct use or grant is made any person not authorized by the authority or by the authority's grantee to obtain access thereto. To the extent necessary to effectuate the purposes of such direct use or grant, the authority may temporarily close to vehicular and pedestrian access public streets and sidewalks within such facilities or limit vehicular and pedestrian traffic thereon and, after agreement with municipalities having jurisdiction, temporarily close to vehicular and pedestrian traffic public streets and sidewalks adjacent to such facilities or limit vehicular and pedestrian traffic thereon.

(d) The provisions of this Code section are in addition to and not in derogation of the other provisions of this chapter, including Code Section 10-9-14. (Code 1981, § 10-9-14.1, enacted by Ga. L. 1996, p. 916, § 2.)

**10-9-15. Power of authority with regard to ensuring maximum use of project; rules and regulations for operation and use; security guards.**

(a) The authority shall operate the project so as to ensure maximum use of the project. In connection with and incident to its operation of the project, the authority may engage in such activities as it deems appropriate to promote trade shows, conventions, and tourism within the state so as to promote the use of the project and the use of the industrial, agricultural, educational, historical, cultural, recreational, and natural resources of the State of Georgia by those using or visiting the project.

(b) The authority shall have the power to lease and make contracts with political subdivisions and agencies of this state with respect to the use of the project and the goods and services of the authority provided in connection with such use or the activities which the authority is otherwise authorized to undertake.

(c) It shall be the duty of the board of governors of the authority to prescribe rules and regulations for the operation and governing the use of the project constructed under the provisions of this chapter, including rules and regulations to ensure maximum use of the project.

(d)(1) The authority shall be authorized to establish the Georgia World Congress Center Police to keep watch over and protect the Geo. L. Smith II Georgia World Congress Center and such other properties or projects of the authority or as may be under the management and control of the authority. The police officers of the Georgia World Congress Center Police shall be subject to Chapter 8 of Title 35. Subject to rules and regulations of the authority, any person employed as a police officer of the Georgia World Congress Center Police who is accepted as a candidate for or who has obtained certification under Chapter 8 of Title 35 shall have powers to possess and carry firearms and to exercise such other

powers and duties as are possessed by a police officer or other peace officer employed by the county or the municipality in which the properties of or under the control and management of the authority are located, and without limitation of the foregoing, shall have the powers of protecting and preserving the properties or projects of or under the management and control of the authority and, within such properties and projects and within the boundaries of any public street or sidewalk adjacent to any such property or projects or which area is otherwise subject to regulation by the authority, have the powers of protecting persons, of enforcing law and order, of controlling pedestrian and vehicular traffic, and of prevention, detection, and investigation of offenses committed thereon.

(2) The authority shall be authorized to establish the Security Guard Division of the Georgia World Congress Center Police and to employ and assign security guards to the division. Security guards so assigned shall not be subject to Chapter 8 of Title 35. Subject to rules and regulations of the authority, security guards shall have the powers of protecting and preserving the properties in projects of or under the management and control of the authority and within such properties or projects and within the boundaries of any public street or sidewalk adjacent to any such property or projects, or which is otherwise subject to regulation by the authority, have the powers of protecting persons, enforcing law and order, controlling pedestrian and vehicular traffic, and of the prevention, detection, and investigation of offenses committed thereon and for those purposes shall be authorized to exercise such powers as are authorized by law for security guards employed by the Georgia Building Authority and subsection (f) of Code Section 50-9-9.

(3) The authority may contract for the provision of security services to the property or areas subject to control of the authority:

(A) With any state, county, or municipal government, agency, or authority police or security force;

(B) Subject to regulations of such police or security force, with the members of such force; and

(C) With any private person authorized and licensed to provide such services.

(4) Under such terms and conditions as may be established by agreement with such agencies, the Board of Public Safety through the Georgia Police Academy or the Georgia Peace Officer Standards and Training Council may provide such limited or specialized training to police officers or security guards employed by the authority as may be appropriate to the responsibilities and powers vested in such police officers or security guards. Nothing in this Code section shall limit the duty of the Georgia Peace Officer Standards and Training Council or the



Georgia Police Academy to provide training necessary for certification under Chapter 8 of Title 35.

(5) Law enforcement officers employed by the state or the county or municipality in which properties, projects, or facilities of or under the control or management of the authority are located may with respect to the police officers and security guards provided for under this subsection, exercise:

(A) Concurrent law enforcement jurisdiction over protecting and preserving such properties, projects, or facilities; and

(B) The power to enforce law and order and in the event of conflict shall have jurisdiction over such authority police officers and security guards on law enforcement matters and investigation of offenses committed on such properties, projects, or facilities. (Ga. L. 1972, p. 245, § 2; Ga. L. 1974, p. 174, §§ 4, 12; Ga. L. 1980, p. 1043, § 1; Code 1981, §§ 10-9-4, 10-9-11; Code 1981, § 10-9-15, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1983, p. 3, § 8; Ga. L. 1985, p. 149, § 10; Ga. L. 1991, p. 1093, § 3; Ga. L. 1993, p. 91, § 10.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1991, a comma was inserted following “detection” in paragraph (d)(2), “authority” was substituted for “Authority” in subparagraph (d)(5)(B) and a

comma was inserted following “projects” at the end of subparagraph (d)(5)(B).

Pursuant to Code Section 28-9-5, in 1992, “terms” was substituted for “term” in the first sentence of paragraph (d)(4).

## JUDICIAL DECISIONS

**Decision not to rent space to promoter’s competitor constitutional.** — The authority’s decision not to rent space to a promoter for a proposed fall home show but to rent instead to a competitor to hold its own fall

home show did not violate Ga. Const. 1983, Art. III, Sec. VI, Para. V. *Exposition Enters., Inc. v. George L. Smith II* Ga. World Congress Ctr. Auth., 177 Ga. App. 211, 338 S.E.2d 726 (1985).

## 10-9-16. Duties of Attorney General.

The Attorney General shall provide legal services for the authority and in connection therewith the provisions of Chapter 15 of Title 45, relating to the Attorney General, shall apply. (Ga. L. 1973, p. 666, § 3; Ga. L. 1974, p. 174, § 13; Code 1981, § 10-9-12; Code 1981, § 10-9-16, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1983, p. 3, § 8.)

### 10-9-16.1. Authority to contract with local entities to act on its behalf with regard to local trade and convention center; provision of goods and services; reimbursement for costs, liabilities, and expenses; liability.

(a) The authority is authorized to contract with any county, municipality, public corporation, or public authority, or combination of the foregoing

(any such county, municipality, corporation, authority, or combination being hereinafter referred to as the “local entity”), to exercise on behalf of the local entity such responsibility in connection with the planning, design, acquisition, construction, operation, management, and maintenance of a local trade and convention center of such local entity, as is now or may be hereafter vested in the local entity, and to provide to the local entity goods or services of the authority in connection with the planning, design, acquisition, construction, operation, management, and maintenance of any local trade and convention center of the local entity, all as the parties may by contract determine appropriate. Any such local entity is authorized by such contract to delegate to the authority all or any of its responsibilities and powers with respect to the planning, design, acquisition, construction, operation, management, and maintenance of a local trade and convention center and to obtain from the authority such goods or services of the authority in connection with the planning, design, acquisition, construction, operation, management, and maintenance of a local trade and convention center as the parties may by contract determine appropriate.

(b) Any such contract shall provide that the local entity shall reimburse the authority for all of the costs, liabilities, and expenses of the authority incurred by the authority in exercising such powers or providing such goods or services. The authority shall not directly or indirectly be liable for any liability, cost, or expense incurred by such local entity in the acquisition, construction, operation, management, or maintenance of a local trade and convention center. No funds derived by the authority from or in connection with the operation of the Geo. L. Smith II Georgia World Congress Center shall be used to pay any liability, cost, or expense incurred in connection with such contract, except pursuant to contract providing for reimbursement of the authority by the local entity therefor.

(c) As used in this Code section, “local trade and convention center” means a trade and convention center owned or operated by a local entity for the purpose of housing trade shows, conventions, cultural, political, musical, educational, entertainment, recreational, athletic, and other events, for displaying exhibits of counties, municipalities, industries, and attractions, or for promoting agricultural, historic, natural, and recreational resources of the state, which includes one or more facilities suitable for such purposes, including, but not limited to, exhibition halls, meeting halls, auditoriums, theaters, stadiums, facilities for purveying of foods, beverages, and other goods and services, parking facilities and parking areas in connection therewith, and related buildings or facilities usual and convenient to such purposes and activities. (Code 1981, § 10-9-16.1, enacted by Ga. L. 1988, p. 673, § 1; Ga. L. 1989, p. 14, § 10.)

**Code Commission notes.** — Pursuant to Smith, II” was inserted preceding “Georgia Code Section 28-9-5, in 1988, “Geo. L. World Congress Center” in subsection (b).

**10-9-16.2. Disposition of real property not required by authority; excepted property.**

(a) This Code section does not apply to any real property:

(1) Held by the authority for management under Code Section 10-9-5 or contract with the Department of Economic Development pursuant to such Code section;

(2) Held by the authority as lessee under lease from the Department of Economic Development;

(3) Acquired by the authority with the proceeds of revenue bonds issued under Article 3 of this chapter; or

(4) Acquired with the proceeds of appropriations or bonds issued by the state assigned to the authority for management.

(b) If the authority determines, in its sole discretion, that any real property held by it is no longer required for the purposes for which it was originally acquired or that the furtherance of the purposes of the authority would be served thereby, the authority may sell, lease, or otherwise convey, on such terms and conditions and with or without consideration as the authority determines appropriate, such real property to any county or municipality in which such property is located or to an authority created by such county or municipality, for the authorized public purposes of such entity, including, by way of illustration and not limitation, the public purposes set forth in Chapter 42, 44, 61, or 64 of Title 36, relating to local government. (Code 1981, § 10-9-16.2, enacted by Ga. L. 1994, p. 421, § 4; Ga. L. 2004, p. 690, § 6.)

**10-9-17. Powers declared supplemental and additional.**

The foregoing Code sections of this chapter shall be deemed to provide an additional and alternative method for the doing of things authorized thereby and shall be regarded as supplemental and additional to powers conferred by the Constitution and laws of the State of Georgia and shall not be regarded as in derogation of any powers now existing. (Ga. L. 1974, p. 174, § 14; Code 1981, § 10-9-15; Code 1981, § 10-9-17, enacted by Ga. L. 1982, p. 1122, § 1.)

**10-9-18. Liberal construction of chapter.**

This chapter, being for the welfare of the state and its inhabitants, shall be liberally construed to effect the purposes hereof. (Ga. L. 1974, p. 174, § 15; Code 1981, § 10-9-16; Code 1981, § 10-9-18, enacted by Ga. L. 1982, p. 1122, § 1.)



**10-9-19. Accounts and audits.**

The accounts of the authority created in this chapter shall be kept as separate and distinct accounts and shall be audited by the Department of Audits and Accounts of the state. (Ga. L. 1974, p. 174, § 16; Code 1981, § 10-9-14; Code 1981, § 10-9-19, enacted by Ga. L. 1982, p. 1122, § 1.)

**ARTICLE 2****OVERVIEW COMMITTEE****10-9-20. Geo. L. Smith II Georgia World Congress Center Authority Overview Committee created; composition; officers; duties.**

There is created as a joint committee of the General Assembly the Geo. L. Smith II Georgia World Congress Center Authority Overview Committee to be composed of five members of the House of Representatives appointed by the Speaker of the House, one of whom shall be a member of the minority party, five members of the Senate appointed by the Senate Committee on Assignments, one of whom shall be a member of the minority party, the chairperson of the House Committee on Economic Development and Tourism or his or her designee, and the chairperson of the Senate Economic Development Committee or his or her designee. The members of the committee shall serve two-year terms concurrent with their terms as members of the General Assembly. The chairperson of the committee shall be appointed by the Senate Committee on Assignments from the membership of the committee, and the vice chairperson of the committee shall be appointed by the Speaker of the House from the membership of the committee. The chairperson and vice chairperson shall serve terms of two years concurrent with their terms as members of the General Assembly. Vacancies in an appointed member's position or in the offices of chairperson or vice chairperson of the committee shall be filled for the unexpired term in the same manner as the original appointment. The committee shall periodically inquire into and review the operations of the Geo. L. Smith II Georgia World Congress Center Authority, as well as periodically review and evaluate the success with which the authority is accomplishing its statutory duties and functions as provided in this chapter. (Ga. L. 1978, p. 1929, § 1; Code 1981, § 10-9-30; Code 1981, § 10-9-20, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 2003, p. 386, § 1; Ga. L. 2009, p. 303, § 5/HB 117.)

**The 2009 amendment**, effective April 30, 2009, substituted "Senate Economic Development Committee" for "Senate Economic Development and Tourism Committee" in the first sentence. See the Editor's note for intent.

**Editor's notes.** — Ga. L. 2009, p. 303,

§ 20, not codified by the General Assembly, provides that: "This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009

General Assembly, such other Act shall control over this Act.”

**10-9-21. Cooperation of other state agencies; staff members and independent consultants.**

The state auditor, the Attorney General, and all other agencies of state government, upon request by the committee, shall assist the committee in the discharge of its duties set forth in this article. The committee may employ not more than two staff members and may secure the services of independent accountants, engineers, and consultants. (Ga. L. 1978, p. 1929, § 2; Code 1981, § 10-9-31; Code 1981, § 10-9-21, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 1985, p. 149, § 10.)

**10-9-22. Authority to cooperate with committee; enforcement actions; annual committee reports.**

The Geo. L. Smith II Georgia World Congress Center Authority shall cooperate with the committee, its authorized personnel, the Attorney General, the state auditor, the state accounting officer, and other state agencies in order that the charges of the committee, set forth in this article, may be timely and efficiently discharged. The authority shall submit to the committee such reports and data as the committee shall reasonably require of the authority in order that the committee may adequately perform its functions. The Attorney General is authorized to bring appropriate legal actions to enforce any laws specifically or generally relating to the Geo. L. Smith II Georgia World Congress Center Authority. The committee shall, on or before the first day of January of each year, and at such other times as it deems necessary, submit to the General Assembly a report of its findings and recommendations based upon the review of the Geo. L. Smith II Georgia World Congress Center Authority, as set forth in this chapter. (Ga. L. 1978, p. 1929, § 3; Code 1981, § 10-9-32; Code 1981, § 10-9-22, enacted by Ga. L. 1982, p. 1122, § 1; Ga. L. 2005, p. 694, § 20/HB 293.)

**10-9-23. Criteria for evaluating authority.**

In the discharge of its duties, the committee shall evaluate the performance of the Geo. L. Smith II Georgia World Congress Center Authority consistent with the following criteria:

- (1) Prudent, legal, and accountable expenditure of public funds;
- (2) Efficient operation; and
- (3) Performance of its statutory responsibilities. (Ga. L. 1978, p. 1929, § 4; Code 1981, § 10-9-33; Code 1981, § 10-9-23, enacted by Ga. L. 1982, p. 1122, § 1.)

10-9-24. Expenditure of funds; expenses of committee members.

(a) The committee is authorized to expend state funds available to the committee for the discharge of its duties. Said funds may be used for the purposes of compensating staff personnel, paying for services of independent accountants, engineers, and consultants, and paying all other necessary expenses incurred by the committee in performing its duties.

(b) The members of the committee shall receive the same compensation, per diem, expenses, and allowances for their service on the committee as is authorized by law for members of interim legislative study committees.

(c) The funds necessary for the purposes of the committee shall come from the funds appropriated to and available to the legislative branch of government. (Ga. L. 1978, p. 1929, § 5; Code 1981, § 10-9-34; Code 1981, § 10-9-24, enacted by Ga. L. 1982, p. 1122, § 1.)

10-9-30 through 10-9-35.

Repealed by Ga. L. 1982, p. 1122, § 1, effective November 1, 1982.

**Editor's notes.** — These Code sections were based on Ga. L. 1978, p. 1929, §§ 1-6. For current provisions, see Code Sections 10-9-20 through 10-9-24.

ARTICLE 3

REVENUE BONDS

10-9-40. Issuance of bonds authorized; purpose.

The authority shall have the power and is authorized at one time or from time to time to provide by one or more authorizing resolutions for the issuance of revenue bonds, but the authority shall not have the power to incur indebtedness under this article in excess of the cumulative principal sum of \$200 million but excluding from such limit bonds issued for the purpose of refunding bonds which have been previously issued. The authority shall have the power to issue such revenue bonds and to use the proceeds thereof for the purpose of paying all or part of the costs of the project to the extent but only to the extent the costs are incurred for the following facilities: multipurpose stadiums or coliseums and related athletic fields, courts, or surfaces, and clubhouses and gymnasiums; facilities for the purveying of goods and services within such stadiums or coliseums; parking facilities and parking areas in connection therewith; facilities deemed necessary or convenient within the structure of such stadiums or coliseums; and related lands, buildings, structures, fixtures, equipment, and personalty appurtenant or convenient to such facilities and the extension, addition, or improvement of such facilities, which facilities are to be operated as part of the project, as such facilities shall be designated in the resolution of the



board of governors of the authority authorizing the issuance of such bonds. (Code 1981, § 10-9-40, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-41. Terms and conditions of bonds; form.**

(a) The revenue bonds of each issue shall be dated, shall bear interest, shall be payable in such medium of payment as to both principal and interest as may be determined by the authority, and may be made redeemable before maturity, at the option of the authority, at such price or prices and under such terms and conditions as may be fixed by the authority in the resolution providing for the issuance of revenue bonds.

(b) The authority shall determine the form of the revenue bonds, including any interest coupons to be attached thereto, and shall fix the denomination or denominations of the revenue bonds and the place or places of payment of principal and interest thereof, which may be at any bank or trust company within or outside the state. (Code 1981, § 10-9-41, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-42. Signatures; seal.**

In case any officer whose signature or facsimile signature appears on any revenue bonds ceases to be an officer before the delivery of the revenue bonds, the signature or facsimile signature shall nevertheless be valid and sufficient for all purposes the same as if he had remained in office until the delivery. All such revenue bonds shall be signed by or bear the facsimile signature of the chairman or vice chairman of the board of governors of the authority, and the official seal of the authority shall be affixed thereto and attested by or bear the facsimile signature of the secretary or assistant secretary of the authority; and any bond may be signed, sealed, and attested on behalf of the authority by any such persons as at the actual time of the execution of the revenue bonds shall be duly authorized or hold the proper office, although at the date of the issuance of the revenue bonds such person may not have been so authorized or shall not have held such office. The facsimile signature of any officer of the authority may be imprinted in lieu of manual signature if the authority so directs. (Code 1981, § 10-9-42, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-43. Tax exemption.**

The revenue bonds and the interest payable thereon shall be exempt from all taxation within the state imposed by the state or any county, municipal corporation, or other political subdivision of the state. (Code 1981, § 10-9-43, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-44. Sale of bonds; interest rate.**

The authority may sell the revenue bonds in such manner at public or private sale and for such price, rate of interest, and other terms as it may

determine to be in the best interest of the authority. The rate of interest may be a fixed or variable rate, but if the rate is a variable rate, a maximum per annum rate of interest shall be specified in the authorizing resolution and in the validation proceeding. (Code 1981, § 10-9-44, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-45. Use of proceeds; issuance of additional bonds in case of deficit; use of surplus.**

The proceeds of the revenue bonds shall be used solely for the payment of the costs of the project incurred with respect to the facilities designated by the resolution authorizing the issuance of such revenue bonds. The resolution authorizing the issuance of revenue bonds may provide that the proceeds thereof shall be disbursed upon requisition or order of the chairman of the authority or other designated officer of the authority or by the Georgia State Financing and Investment Commission acting on behalf of the authority under contract with the authority under such restrictions, if any, as the resolution authorizing the issuance of the revenue bonds or the trust indenture may provide. If the proceeds of the revenue bonds, by error of calculation or otherwise, shall be less than the cost of the facility or combined facilities, unless otherwise provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, additional revenue bonds may in like manner be issued to provide the amount of the deficit which, unless otherwise provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, shall be deemed to be of the same issue and shall be entitled to payment from the same fund without preference or priority of the revenue bonds first issued for the same purpose. If the proceeds of the revenue bonds of any issue shall exceed the amount required for the purpose for which such revenue bonds are issued, the surplus shall be used for one or more of the following purposes:

(1) Payment into the fund provided in Code Section 10-9-51 for the payment of principal and interest of such revenue bonds; or

(2) For the purchase of such revenue bonds in the open market. (Code 1981, § 10-9-45, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 6.)

**10-9-46. Interim revenue receipts, certificates, or bonds.**

Prior to the preparation of definitive revenue bonds, the authority may, under like restrictions, issue interim revenue receipts, interim revenue certificates, or temporary revenue bonds exchangeable for definitive revenue bonds upon the issuance of the latter. (Code 1981, § 10-9-46, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-47. Replacement of mutilated, destroyed, or lost bonds.**

The authority may also provide for the replacement of any revenue bond which becomes mutilated or is destroyed or lost upon receipt of such indemnification as it may deem appropriate. (Code 1981, § 10-9-47, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-48. Proceedings and conditions for issuance; resolution.**

The revenue bonds may be issued without any other proceedings or the happening of any other conditions or things than those proceedings, conditions, and things which are specified or required by this article and Article 1 of this chapter. In the discretion of the authority, revenue bonds of a single issue may be issued for the purpose of paying the cost of any one or more, including a combination of, facilities described in Code Section 10-9-40 and in the resolution authorizing the issuance of such bonds. Any resolution providing for the issuance of revenue bonds under this article shall become effective immediately upon its passage and need not be published or posted, and any such resolution may be passed at any regular, special, or adjourned meeting of the board of governors of the authority. (Code 1981, § 10-9-48, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-49. Lease of facilities; terms and conditions; contracts with public entities.**

(a)(1) Subject to the requirements of paragraph (2) of this subsection, the authority shall operate and manage the facilities financed by the issuance of revenue bonds as authorized by this article. The authority may, incident to such operation and management, lease the facilities to persons, firms, private corporations, authorities, counties, municipal corporations, public corporations, public authorities, or other political subdivisions of this state under leases covering all or such separately identified portions of the facilities as the authority may determine appropriate and upon and for such terms, conditions, and considerations and for such rentals, fees, prices, and other charges as the authority shall determine appropriate. The authority shall fix the rentals, fees, prices, and other charges payable to the authority under such leases so that the aggregate amount of such rentals, fees, prices, or other charges derived by the authority thereunder, together with other revenues and earnings of the authority from the facilities designated by the resolution authorizing the issuance of the revenue bonds, and together with revenues, earnings, and funds otherwise available to the authority for such purposes, are at least sufficient to pay the principal, interest, premiums, discounts, fees, costs, or expenses payable by the authority on or with respect to all of the revenue bonds and other obligations issued by the authority for the purpose of financing such facilities as such principal,



interest, premiums, discounts, fees, costs, or expenses shall become due, together with the costs of the maintenance, repair, and operation of the facilities, including reserves established for such purposes, and the payment and performance of contractual obligations of the authority. The obligation of any lessee to the authority under any such lease may be secured in such manner as the authority shall determine appropriate. Any such lease may provide that the authority may be subrogated to and may at its election upon such terms as may be set forth in such lease enforce all contracts or rights of action of such lessee relating to or arising out of the operation of the facilities covered by such lease. Any such lease shall contain such other terms, conditions, and considerations as the authority may determine appropriate.

(2) Any lease provided for in paragraph (1) of this subsection which lease is for a term in excess of ten years must, as a condition precedent to its effectiveness, be approved by the Fiscal Affairs Subcommittees of the Senate and House of Representatives meeting jointly as one committee; and such approval shall require the affirmative votes of at least 11 members of such subcommittees sitting jointly.

(b) As used in this article, “lease” includes a lease or sublease and may, in the discretion of the authority, be in form and substance an estate for years, usufruct, license, concession, or any other right or privilege to use or occupy or conduct any activity within the facilities. The term “lessee” includes lessee or sublessee, tenant, licensee, concessionaire, or other person contracting for such estate, interest, right, or privilege.

(c) In the exercise of its powers under this chapter, including the powers under this article, the authority may contract with any public entity which shall include the state or with any other public agency, public corporation, or public authority, for joint services, for the provision of services, or for the joint or separate use of facilities which the contracting parties are authorized by law to undertake or provide.

(d) Pursuant to any such contract, in connection with any facility authorized under this article or any project authorized under this chapter, the authority may undertake such facility or provide such services or facilities or projects of the authority, in whole or in part, to or for the benefit of the public entity contracting with the authority with respect to those activities, services, or facilities or projects which the contracting public entity is authorized by the Constitution or laws of this state to provide, including, but not limited to, those set forth in Article IX, Section III, Paragraph I of the Constitution and Chapters 42, 44, 61, and 64 of Title 36 and Article 3 of Chapter 13 of Title 48, and any such contracting public entity is authorized to undertake to pay the authority for such activities, services, or facilities or projects such amounts and on such terms as the parties may determine.

(e) The state and each institution, department, or other agency thereof or each county, municipality, school district, or other political subdivision of

this state and each public agency, public corporation, or public authority is authorized to contract with the authority in connection with any activity, service, or facility which such public entity is otherwise authorized to provide to obtain the performance of such activity or provision of such services or facilities through the authority.

(f) In connection with its operations, the authority may similarly obtain from, and each public entity may provide, such activities, services, or facilities which the authority is authorized to provide.

(g) Except as provided by Article VII, Section IV, Paragraph IV of the Constitution, any such contract authorized by this Code section or the revenues derived therefrom may be designated as security for revenue bonds issued under this article. (Code 1981, § 10-9-49, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 7.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1988, the correct spelling of “concessionaire” was substituted in the second sentence of subsection (b) and commas were inserted following “activities” and “services” in subsection (d).

#### **10-9-50. Enforceability against authority; limitation on state liability.**

(a)(1) Revenue bonds issued under the authority of this article shall not be deemed to constitute a debt of the state or a pledge of the faith and credit of the state. The bonds shall be enforceable against the authority only to the extent of, and only against funds derived from, the rents, revenues, earnings, and funds derived from the facilities designated by the resolution authorizing the issuance of such revenue bonds or which are otherwise available to the authority for such purposes which are so designated, including but not limited to, rents, revenues, earnings, and funds which are:

(A) Payable to the authority by the lessee or lessees and received by the authority from the lessee or lessees under the lease or leases by the authority of the facilities acquired or improved by the proceeds of such revenue bonds described in the resolutions authorizing the issuance of such revenue bonds;

(B) Payable to the authority under such contracts as may be entered into in accordance with Code Section 10-9-49, relating to the facilities acquired or improved by the proceeds of the revenue bonds or the use thereof or services provided through such facilities, which are designated as security for the revenue bonds;

(C) Payable to the authority under such other contracts or agreements relating to the facilities acquired or improved by the proceeds of the revenue bonds as may be designated as security for such bonds; and

(D) As may otherwise be designated as security for such bonds either: (i) which are derived from or in connection with the facilities

acquired or improved by the proceeds of the revenue bonds or the use or operation thereof or the services provided through such facilities; or (ii) which are otherwise available to the authority for such purposes.

The bonds shall be payable solely from the rents, revenues, earnings, and funds described in this paragraph, except that the bonds may, in addition and in the discretion of the authority, be paid in part by the authority from any other source of funds lawfully available to the authority for that purpose. The authority shall not be obligated in any way, however, to make any payments from any such other source of funds.

(2) The issuance of the revenue bonds shall not directly or indirectly or contingently obligate the state to continue or to levy or pledge any form of taxation whatsoever therefor or to continue or make any appropriation for the payment thereof. Revenue bonds issued under the authority of this article shall not be payable from or a charge upon any funds other than those pledged to the payment thereof nor shall the authority be otherwise directly or indirectly subject to any pecuniary liability thereon. Except as provided in this article, a holder or holders of any such revenue bonds, directly or through any trustee or receiver, shall not have the right to enforce payment thereof against the authority or any property of or any right of action of or against the authority nor shall any such revenue bonds constitute a charge, lien, or encumbrance, legal or equitable, upon any property of or any right of action of or against the authority.

(b) Notice of the limitations of this Code section shall be set forth on the face of the revenue bonds which shall further provide that the obligations of the authority thereunder are limited by the provisions of this article. (Code 1981, § 10-9-50, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 8.)

**Editor's notes.** — Ga. L. 1989, p. 1195, § 12, repealed Ga. L. 1988, p. 556, § 6, relating to use of state funds in connection with acquisition of land for, construction of, and debt service incurred in connection with a domed stadium.

### **10-9-51. Security; provisions in resolution or trust indenture for protection of bondholder rights and remedies; sinking fund.**

(a) Subject to the limitations set forth in this chapter, the authority shall be authorized to provide, directly or through lessees of the project, such security for revenue bonds issued by it as it may determine appropriate.

(b)(1) Without limitation of the provisions of subsection (a) of this Code section, in the discretion of the authority, any issue of revenue bonds may be secured by a trust indenture by and between the authority and a corporate trustee, which may be any trust company or bank having the powers of a trust company within or outside the state. The trust indenture may pledge or assign rents, revenues, earnings, and funds derived from



the facilities designated by the resolution authorizing the issuance of such revenue bonds or which may be otherwise available to the authority for such purposes, including but not limited to rents, revenues, earnings, and funds which are:

(A) Payable to the authority by the lessee or lessees and received by the authority from the lessee or lessees under the lease or leases by the authority of the facilities acquired or improved by the proceeds of such revenue bonds described in the resolutions authorizing the issuance of such revenue bonds;

(B) Payable to the authority under such contracts as may be entered into in accordance with Code Section 10-9-49, relating to the facilities acquired or improved by the proceeds of the revenue bonds or the use thereof or services provided through such facilities, which are designated as security for the revenue bonds;

(C) Payable to the authority under such other contracts or agreements relating to the facilities acquired or improved by the proceeds of the revenue bonds as may be designated as security for such bonds; and

(D) As may otherwise be designated as security for such bonds either: (i) which are derived from or in connection with the facilities acquired or improved by the proceeds of the revenue bonds or the use or operation thereof or the services provided through such facilities; or (ii) which are otherwise available to the authority for such purposes.

(2) Either the resolution providing for the issuance of the revenue bonds or the trust indenture may contain such provisions for protecting and enforcing the rights and remedies of the bondholders as may be reasonable and proper and not in violation of law, including covenants setting forth the duties of the authority in relation to the acquisition of property; the construction of the project; the maintenance, operation, repair, and insurance of the project; and the custody, safeguarding, manner of disbursements, and application of all moneys and may also provide that any facility shall be constructed and paid for under the supervision and approval of consulting engineers or architects employed or designated by the authority. The resolution or the trust indenture may also require that the security given by contractors and by any depository of the proceeds of the bonds or revenues or other moneys be satisfactory to such purchasers and may also contain provisions concerning the conditions, if any, upon which additional revenue bonds may be issued. The indenture may set forth the rights and remedies of the bondholders and of the trustee and may restrict the individual right of action of bondholders as is customary in trust indentures securing revenue bonds and debentures of corporations.

(c) The resolution or trust indenture may provide that the rents, revenues, earnings, and funds which are designated as security for the

revenue bonds shall be set aside into a sinking fund, which sinking fund shall be pledged to and charged with the payment of:

- (1) The interest upon the revenue bonds as the interest falls due;
- (2) The principal of the bonds as the same falls due;
- (3) The necessary charges of paying agents for paying principal and interest;
- (4) Any premium upon bonds retired by call or purchase as provided in this article; and
- (5) Any fees, costs, or expenses payable under the revenue bonds or trust indentures.

(d) The use and disposition of the sinking fund shall be subject to such regulations as may be provided in the resolution authorizing the issuance of the revenue bonds or in the trust indenture, but, except as may otherwise be provided in the resolution or trust indenture, such sinking fund shall be a fund for the benefit of all revenue bonds without distinction or priority of one over another. Subject to the resolution authorizing the issuance of the revenue bonds or in the trust indenture, surplus moneys in the sinking fund may be applied to the purchase or redemption of such revenue bonds; and any such bonds so purchased or redeemed shall immediately be canceled and shall not again be issued. (Code 1981, § 10-9-51, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 9.)

#### **10-9-52. Enforcement of rights by bondholder, receiver, or indenture trustee.**

Any holder of revenue bonds or interest coupons thereon issued under this article, any receiver for such holders, or any indenture trustee, if there is any, except to the extent the rights given in this article may be restricted by resolution passed before the issuance of the revenue bonds or by the trust indenture, may either at law or in equity, by action, mandamus, or other proceedings, protect and enforce any and all rights under the laws of the state or granted under this article or under such resolution or trust indenture and may enforce and compel performance of all duties required by this article or by such resolution or trust indenture to be performed by the authority or any officer thereof. In the event of default upon the principal and interest or other obligations of any revenue bond issue, any such holder, receiver, or indenture trustee shall be subrogated to each and every right of collecting rentals, revenues, earnings, or funds by the authority which the authority may possess under contracts designated as security therefor, and, in the pursuit of its remedies as subrogee, may proceed either at law or in equity by action, mandamus, or other proceedings to collect any sums by such proceeding due and owing to the authority and pledged or partially pledged to the benefit of the revenue bond issue.

No individual, receiver, or indenture trustee thereof shall have the right to compel any exercise of the taxing power of the state to pay any such revenue bond or the interest thereon or otherwise to enforce the payment thereof against the state or the authority or any property of the state or authority, nor shall any such bond constitute a charge, lien, or encumbrance, legal or equitable, upon the property of the state or authority except the rents, revenues, earnings, and funds designated as security for the revenue bonds. In addition to the foregoing, the resolution or trust indenture may contain such other provisions as the authority may deem reasonable and proper for the security of the bondholders subject to the limitations otherwise stated in this article. All expenses incurred in carrying out the trust indenture may be treated as a part of the cost of the project affected by the indenture. (Code 1981, § 10-9-52, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-53. Payment of sale proceeds to trustee.**

The authority may, in the resolution providing for the issuance of revenue bonds or in the trust indenture, provide for the payment of the proceeds of the sale of the bonds to any officer or person who shall act as trustee or any agency, bank, or trust company or to the Georgia State Financing and Investment Commission acting under contract with the authority which officer, person, bank, trust company, or agency shall act as trustee of such funds and shall hold and apply the same to the purposes set forth in or through this article, subject to such regulations as this article and Article 1 of this chapter, or as the resolution or trust indenture, may provide. (Code 1981, § 10-9-53, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 1989, p. 1195, § 10.)

**10-9-54. Use of services of Georgia State Financing and Investment Commission; professional services for projects.**

The authority shall be authorized to utilize the financial advisory and construction related services of the Georgia State Financing and Investment Commission with respect to the issuance of revenue bonds and the investment and disposition of the proceeds thereof and the acquisition, design, planning, and construction of the facilities designated in the resolution authorizing the issuance of the revenue bonds. The reimbursement by the authority of the commission for services provided by the commission shall be considered as part of the costs of the project. Chapter 22 of Title 50 shall be applicable to the selection of persons to provide professional services for any project or any portion thereof constructed in whole or in part with any proceeds from the sale of revenue bonds authorized by this article. (Code 1981, § 10-9-54, enacted by Ga. L. 1988, p. 556, § 4.)



**10-9-55. Refunding bonds.**

The authority is authorized to provide by resolution for the issuance of revenue refunding bonds of the authority for the purpose of refunding any revenue bonds issued under this article and then outstanding, together with accrued interest thereon. The issuance of such revenue refunding bonds, and maturities and all other details thereof, the rights of the holders thereof, and the duties of the authority in respect to the same shall be governed by this article insofar as the same may be applicable. (Code 1981, § 10-9-55, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-56. Bonds made securities for investment and deposit purposes.**

The revenue bonds authorized by this article are made securities in which all public officers and bodies of this state and all municipalities and all political subdivisions of this state; all insurance companies and associations and other persons carrying on an insurance business; all banks, bankers, trust companies, savings banks, and savings associations, including savings and loan associations, building and loan associations, investment companies, financial institutions, and other persons carrying on a banking business; all administrators, guardians, executors, trustees, and other fiduciaries; and all other persons who are authorized to invest in bonds or other obligations of the state may properly and legally invest funds including capital in their control or belonging to them. The revenue bonds are also made securities which may be deposited with and shall be received by all public officers and bodies of this state and all municipalities and political subdivisions of this state for any purpose for which the deposit of the bonds or other obligations of this state may be authorized. (Code 1981, § 10-9-56, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-57. Validation of bonds; applicability of “Revenue Bond Law.”**

(a) Revenue bonds of the authority shall be confirmed and validated in accordance with the procedures of Article 3 of Chapter 82 of Title 36, the “Revenue Bond Law.” The revenue bonds and any security therefor when validated and the judgment of validation shall be final and conclusive with respect to such revenue bonds and any security therefor and against the authority issuing the same and any person, firm, corporation, county, municipality, authority, subdivision, instrumentality, or other agency contracting with the authority and any and all other persons who were or could have become parties to the proceedings.

(b) Revenue bonds issued by the authority shall not be subject to the limitations of term or interest set forth in the “Revenue Bond Law” or any other law.

(c) Notwithstanding the provisions of the “Revenue Bond Law,” in its resolution authorizing the issuance of revenue bonds, the authority, in its

discretion, in lieu of specifying the rate or rates of interest which the revenue bonds are to bear, may state that the bonds when issued will bear interest at a rate or rates which may be fixed or variable, not exceeding a maximum per annum rate of interest specified in the resolution. The petition, complaint, notice to the district attorney, and notice to the public required to be filed or published under the "Revenue Bond Law" shall conform to the resolution authorizing the issuance of the revenue bonds. (Code 1981, § 10-9-57, enacted by Ga. L. 1988, p. 556, § 4.)

#### **10-9-58. Legislative findings; state covenants.**

It is found, determined, and declared that the carrying out of the purposes of the authority as defined in this article is in all respects for the benefit of the people of this state and that the purposes are public purposes; that the authority will be performing an essential governmental function in the exercise of the powers conferred upon it by this article; and that the activities authorized in this article will develop and promote trade, commerce, industry, and employment opportunities to the public good and the general welfare and promote the general welfare of the state. The state covenants with the holders of the revenue bonds that the authority shall be required to pay no taxes or assessments of the state or its municipalities or political subdivisions upon any of the property acquired or leased by it, or under its jurisdiction, control, possession, or supervision or upon its activities in the acquisition, construction, operation, or maintenance of the facilities erected or acquired by it, including the purchase of tangible personal property for such purposes, or any fees, rentals, or other charges, for the use of such facilities, or any other income received by the authority. Further, the state covenants that the revenue bonds of the authority, their transfer, and the income therefrom shall at all times be exempt from taxation within this state by the state or its municipalities or political subdivisions. Any exemption from taxation provided by this Code section shall not include exemption from sales and use taxes on sales made by the authority in transactions or to persons not otherwise exempt therefrom. (Code 1981, § 10-9-58, enacted by Ga. L. 1988, p. 556, § 4.)

#### **10-9-59. Inapplicability of "Georgia Uniform Securities Act of 2008."**

Revenue bonds issued under the authority of this article shall not be a security within the meaning of, and shall not otherwise be subject to any of the provisions of, Chapter 5 of this title, the "Georgia Uniform Securities Act of 2008." (Code 1981, § 10-9-59, enacted by Ga. L. 1988, p. 556, § 4; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted "'Georgia Uniform Securities Act of 2008.'" for "'Georgia Securities Act of 1973.'" at the end of this Code section.

**10-9-60. Jurisdiction over actions.**

Any action to protect or enforce any rights under this article shall be brought in the Superior Court of Fulton County, Georgia, and any action pertaining to validation of any revenue bonds issued under this article shall likewise be brought in such court which shall have exclusive, original jurisdiction of such actions. (Code 1981, § 10-9-60, enacted by Ga. L. 1988, p. 556, § 4.)

**10-9-61. Cumulative nature of authority powers; power to pledge or assign rents, revenues, earnings, and funds as security for indebtedness.**

(a) The powers granted to the authority under this article are cumulative and not in derogation of the powers otherwise granted to the authority under this chapter.

(b) Without limitation of the foregoing, the authority shall have the power to pledge or assign as security for the payment of, and to apply in the payment of, any indebtedness incurred by the authority under paragraph (9) of subsection (b) of Code Section 10-9-4 any rents, revenues, earnings, and funds derived from or in connection with the facilities undertaken under this article or any project under this chapter or otherwise available to the authority for such purposes, as the authority may determine necessary or appropriate, subject to such limitations or priorities as may be established incident to the issuance of revenue bonds under this article. (Code 1981, § 10-9-61, enacted by Ga. L. 1989, p. 1195, § 11.)



## CHAPTER 10

## SEED-CAPITAL FUND

Sec.		Sec.	
10-10-1.	Definitions.	10-10-5.	Transfer of funds for making loans.
10-10-2.	Creation of Seed-Capital Fund.	10-10-6.	Distribution to be deposited in the fund.
10-10-3.	Moneys in the fund to be handled in accordance with policies authorized by the board.	10-10-7.	Publishing of annual report by center.
10-10-4.	Investing of funds with investment entities.		

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**Law reviews.** — For note on 1989 enactment of this chapter, see 6 Ga. St. U.L. Rev. 155 (1989).

**10-10-1. Definitions.**

As used in this chapter, the term:

(1) “Board” means the Board of Regents of the University System of Georgia.

(2) “Center” means the Advanced Technology Development Center created by the board and acknowledged and empowered to administer the fund by Article III, Section IX, Paragraph VI(g) of the Constitution of Georgia.

(3) “Enterprise” means a corporation, partnership, limited liability company, or other legal entity that has its principal place of business in this state and that is engaged in an entrepreneurial business, including, but not limited to, tenants of incubators. For the purposes of this chapter, an enterprise shall not be considered to be engaged in an entrepreneurial business unless it is engaged in innovative work in the areas of technology, bioscience, manufacturing, marketing, agriculture, or information related ventures that will increase the state’s share of domestic or international markets. An enterprise engaged primarily in business of a mercantile nature shall not be considered engaged in an entrepreneurial business. An enterprise shall be required to be young, as determined by the center.

(4) “Equity contribution” means:

(A) Moneys from the fund used to make direct investments by the state in qualified securities of enterprises; and

(B) The capital of an investment entity contributed by the fund, as created in Code Section 10-10-3, and contributed by other investors,

which capital shall be used by the investment entity to make investments in qualified securities of one or more enterprises as provided by this chapter and to pay the expenses of the investment entity but shall not include any current or accumulated income of the investment entity.

(5) “Fund” means the Seed-Capital Fund created in Code Section 10-10-3.

(6) “Incubator” means a facility that leases small units of space to tenants and which maintains or provides access to business development services for use by the tenants or member firms.

(7) “Investment entity” means a limited partnership, a limited liability company, or other legal entity, including without limitation any such entity as to which the state is the sole limited liability owner, providing limited liability to its owners that is formed to receive, in part, an investment by the fund or an equity return of investment from a fund loan and for which a general partner or manager manages the equity contributions by making investments in qualified securities of one or more enterprises or, in the case of an investment entity as to which the state is the sole limited liability owner, in another investment entity, as permitted by this chapter and by paying the expenses of the investment entity.

(8) “Loan” means an advance of money from the fund to an enterprise or an investment entity on such terms as the center shall set, including, but not limited to, an absolute promise to repay the principal amount of the loan made by the recipient enterprise, and any return on investment that the center may require as a term or condition of the loan, which may include, but not be limited to, simple or compound interest or any form of equity participation.

(9) “Qualified security” means any note, stock, treasury stock bond, debenture, evidence of indebtedness, certificate of interest or participation in any profit-sharing agreement, preorganization certificate or subscription, transferable share, investment contract, certificate of deposit for a security, certificate of interest or participation in a patent or application therefor or in royalty or other payments under such a patent or application, or, in general, any interest or instrument commonly known as a security or any certificate for, receipt for, guarantee of, or option, warrant, or right to subscribe to or purchase any of the foregoing of an enterprise.

(10) “State” means the State of Georgia. (Code 1981, § 10-10-1, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 1/HB 1305.)

**10-10-2. Creation of Seed-Capital Fund.**

There is created the Seed-Capital Fund to be managed by the center under the authority of the board. (Code 1981, § 10-10-2, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1.)

**Editor's notes.** — Ga. L. 2004, p. 431, § 1, effective May 13, 2004, reenacted this Code section without change.

**10-10-3. Moneys in the fund to be handled in accordance with policies authorized by the board.**

(a) The fund is created as a separate fund maintained by the board or a body designated by the board and shall be expended only as provided in this chapter. Pending their use as equity contributions or as loans, the moneys in the fund may be invested and reinvested in accordance with the investment policies authorized by the board or its designee. The entire cost of administration of the fund, including expenses of the center incurred in connection with the creation, operation, management, liquidation, and investment of fund moneys in enterprises, directly or through investment entities, may be paid from the assets of the fund. All moneys appropriated to or otherwise paid into the fund shall be presumptively concluded to have been committed to the purpose for which they have been appropriated or paid and shall not lapse.

(b) The fund shall consist of all moneys authorized by law for deposit in the fund, including, but not limited to, gifts, grants, private donations, and funds by government entities authorized to provide funding for the purposes authorized for use of the fund and any payments or returns on investments made by the center.

(c) In return for equity contributions by the fund, at the discretion of the center, the state will receive either direct ownership of qualified securities of an enterprise or a limited liability ownership in an investment entity either directly or indirectly through an investment entity as to which the state is the sole limited liability owner as permitted in subsection (c) of Code Section 10-10-4 with rights accruing from investments in qualified securities by the investment entity. With respect to loans made from the fund, the state shall receive repayment of the loan in accordance with its terms, with cash proceeds or other assets from such repayments being deposited in or held through the fund. Additional returns to the state will be secured through the establishment and growth of innovative enterprises that create new, value added products, processes, and services and encourage growth and diversification in the economy of the state.

(d) Disbursements from the fund shall be made upon the instruction of the center director in accordance with the policies of the board.



(e) The center, subject to the approval of the board or its designee, shall be authorized to contract and have contracts and other legal documents prepared to carry out the provisions of this chapter.

(f) The board shall have the authority to issue policies governing the management and operation of the fund as needed. (Code 1981, § 10-10-3, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 1993, p. 1402, § 18; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, § 2/HB 1305.)

#### **10-10-4. Investing of funds with investment entities.**

(a) The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make equity contributions through the direct purchase of qualified securities of enterprises, subject to the center assuring itself that the following conditions will be satisfied:

(1) At least \$3.00 of equity contributions has been committed in writing to the enterprise by persons other than the state for every \$1.00 of equity contributions committed by the state from the fund to the enterprise;

(2) The center shall manage the investments of equity contributions in the qualified securities of enterprises so that the state shall not hold voting control of an enterprise;

(3) The total amount of equity contributions by the state made to an enterprise that originate from the fund, either directly or indirectly through an investment entity as permitted by subsections (b) and (c) of this Code section, and that are invested in qualified securities of an enterprise should ordinarily be no more than \$1 million. Total equity contributions from the fund to an enterprise, directly or indirectly through an investment entity, may be greater than \$1 million if, in the judgment of the center, the enterprise is in severe financial difficulty and an investment of a greater amount is necessary to preserve the initial investment in qualified securities;

(4) The amount of investment, directly or indirectly through an investment entity, by the fund in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the enterprise's total qualified securities outstanding at the time such qualified securities are purchased by the fund, after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise. An investment of an equity contribution from the fund may exceed 49 percent of the enterprise's total qualified securities outstanding if:

(A) In the case of direct investment, in the center's judgment, such greater investment is prudent; or

(B) In the case of indirect investment in the investment entity's judgment exercised in accordance with paragraph (5) of subsection (b) of this Code section, such greater investment is prudent;

(5) The center shall invest equity contributions in qualified securities of enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and

(D) Such other information as the center shall request; and

(6) Approval of an equity contribution may be made after the center finds, based upon the application submitted by the enterprise and such additional investigation as the staff of the center shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The fund's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the fund will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the state by the enterprise for adequate reporting of financial data to the center, which shall include a requirement for an annual report or, if required by the center, an annual audit of the financial and operational records of the enterprise, and for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to

protect the investment or financial commitment of the investment entity, including in the discretion of the entity and without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise.

(b) The center, subject to the approval of the board or its designee, may authorize transfers directly from the fund or indirectly, as described in subsection (c) of this Code section, from an investment entity as to which the state is the sole limited liability owner, to make equity contributions to one or more investment entities whose structures, purposes, and operations are consistent with the criteria specified in this chapter. Investment entities to which the state, directly or indirectly, makes an equity contribution shall not expend any of the funds invested by the state unless and until the center has assured itself that the following conditions will be satisfied by such investment entity:

(1) Either:

(A) At least \$3.00 of equity contributions has been committed in writing to the investment entity by persons other than the state for every \$1.00 of equity contributions committed by the state from the fund or from an investment entity which the state is the sole limited liability owner of; or

(B) At least \$1.00 of equity contributions has been committed in writing to the investment entity by persons other than the state for every \$1.00 of equity contributions committed by the state from the fund or from an investment entity which the state is the sole limited liability owner of; provided, however, that no investment is to be made from such investment entity in qualified securities unless, in total, at least \$3.00 of investment from sources other than the state, which may include funds from sources other than the investment entity and funds invested by the investment entity in the enterprise that are other than from equity contributions made by the state from the fund or from an investment entity which the state is the sole limited liability owner of, has been committed to such enterprise for every \$1.00 of the state's portion of the amount invested in the qualified securities of such enterprise;

(2) The total amount of equity contributions by the state made to an investment entity that originate from the fund and that are ultimately invested by an investment entity in qualified securities of an enterprise, when added to any amounts invested by the fund directly in the enterprise's qualified securities, should ordinarily be no more than \$1 million. In addition, the amount of investment by an investment entity in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the total qualified securities at the time such



qualified securities are purchased by the investment entity, after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise; provided, however, that the investment in qualified securities of the enterprise by the investment entity can exceed 49 percent if, in the investment entity's judgment exercised in accordance with paragraph (5) of this subsection, such greater investment is prudent; and provided, further, that an amount greater than \$1 million of funds attributable to equity contributions by the state from the fund may be invested by the investment entity in qualified securities of an enterprise if the enterprise is in severe financial difficulty and, in the judgment of the investment entity, an investment of such greater amount is necessary to preserve the initial investment in qualified securities;

(3) The investment entity shall make authorized investments in enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and

(D) Such other information as the investment entity shall request;

(4) Approval of an investment may be made after the investment entity finds, based upon the application submitted by the enterprise and such additional investigation as the staff of the investment entity shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The investment entity's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the investment entity will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the investment entity by the enterprise for adequate reporting of financial data to the investment entity, which shall include a requirement for an annual report or, if required by the investment entity, an annual audit of the financial and operational records of the enterprise and, for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to protect the investment or financial commitment of the investment entity, including in the discretion of the entity and without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise;

(5) The governing agreement of the investment entity provides that the care and judgment that management of the investment entity must exercise in the performance of its obligations shall be the judgment and care under the circumstances then prevailing and that persons of ordinary prudence, discretion, and intelligence exercise in the management of risk capital intended for investment at the early stages of organization and growth of a business that is:

(A) Expected to create, retain, or extend employment opportunities and economic growth in Georgia; and

(B) All other material matters being equal, developing technological advances that could be expected to result in the greatest increase in employment opportunity and economic growth in Georgia; and

(6) The governing agreement of the investment entity provides for distributions made by the investment entity to its partners or members that are proportionate to the capital committed or otherwise reflective of the ownership interests purchased by the partners or members.

(c) The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make equity contributions to one or more investment entities as to which the state is the sole limited liability owner. Any such investment entities as to which the state is the sole limited liability owner shall be assigned for administrative purposes to the center within the meaning of Code Section 50-4-3. Such investment entities may make investments in other investment entities, which make equity contributions pursuant to subsection (b) of this Code section. Such investment entities may also make equity contributions through direct purchases of qualified securities of enterprises, subject to the center and the investment entity assuring themselves that the following conditions will be satisfied:

(1) At least \$3.00 of equity contributions has been committed in writing to the enterprise by persons other than the state for every \$1.00

of equity contributions committed by the state directly or indirectly from the fund to the enterprise;

(2) The center shall manage the investments of equity contributions in the qualified securities of enterprises so that the state shall not hold voting control of an enterprise;

(3) The total amount of equity contributions by the state made to an enterprise that originates from the fund, either directly or indirectly through an investment entity as permitted by subsection (b) of this Code section and this subsection, and that are invested in qualified securities of an enterprise should ordinarily be no more than \$1 million. Total equity contributions from the fund to an enterprise, directly or indirectly through an investment entity, may be greater than \$1 million if, in the judgment of the center, the enterprise is in severe financial difficulty and an investment of a greater amount is necessary to preserve the initial investment in qualified securities;

(4) The amount of investment, directly or indirectly through an investment entity, by the fund in qualified securities issued by an enterprise should ordinarily not represent more than 49 percent of the enterprise's total qualified securities outstanding at the time such qualified securities are purchased by the fund after giving effect to the conversion of all outstanding convertible qualified securities of the enterprise. An investment of an equity contribution from the fund may exceed 49 percent of the enterprise's total qualified securities outstanding if:

(A) In the case of direct investment, in the center's judgment, such greater investment is prudent; or

(B) In the case of indirect investment, in the investment entity's judgment exercised in accordance with paragraph (5) of subsection (b) of this Code section, such greater investment is prudent;

(5) The investment entity shall be authorized to make equity contributions in qualified securities of enterprises engaged in an entrepreneurial business only after receipt of an application from the enterprise that contains:

(A) A business plan including pro forma financial statements and a description of the enterprise and its management, product, and market;

(B) A statement of the amount, timing, and projected use of the capital required;

(C) A statement of the potential economic impact of the enterprise, including the number, location, and types of jobs expected to be created; and



(D) Such other information as the center shall request; and

(6) Approval of an equity contribution may be made after the investment entity finds, based upon the application submitted by the enterprise and such additional investigation as the staff of the center shall make and incorporate in its records, that:

(A) The proceeds of the investment or financial assistance will be used only to cover the seed-capital needs of the enterprise except as authorized by paragraph (2) of this subsection;

(B) The enterprise has a reasonable chance of success;

(C) The fund's participation is instrumental to the success of the enterprise and its retention within the state;

(D) The enterprise has the reasonable potential to enhance employment opportunities within the state;

(E) The entrepreneur and other founders of the enterprise have already made or are contractually committed to make a substantial financial or time commitment to the enterprise;

(F) Any securities to be purchased are qualified securities;

(G) There is a reasonable possibility that the fund will recoup at least its initial investment or financial commitment; and

(H) Binding commitments have been made to the state by the enterprise for adequate reporting of financial data to the center, which shall include a requirement for an annual report or, if required by the center, an annual audit of the financial and operational records of the enterprise, and for such control on the part of the investment entity as considered prudent, over the management of the enterprise so as to protect the investment or financial commitment of the investment entity, including in the discretion of the entity and, without limitation, right of access to financial and other records of the enterprise and membership or representation on the board of directors of the enterprise. (Code 1981, § 10-10-4, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Ga. L. 2004, p. 431, § 1; Ga. L. 2006, p. 880, §§ 3-6/HB 1305; Ga. L. 2008, p. 938, § 2/HB 1196.)

**The 2008 amendment**, effective May 14, 2008, in subparagraph (b)(1)(A), deleted "as to" preceding "which the state" and substituted "of; or" for "to the investment entity"; in subparagraph (b)(1)(B), deleted "as to" preceding "which the state", substituted "owner of" for "owner to an investment entity", substituted "securities unless" for "securities without an equal or greater

investment in the same enterprise from sources other than the investment entity, such that", substituted "which may include funds from sources other than the investment entity and funds" for "including funds", and inserted "of" after "limited liability owner".

**Editor's notes.** — Ga. L. 2008, p. 938, § 3, not codified by the General Assembly, pro-

vided that the amendment to this Code section shall be applicable to investments made on or after July 1, 2008.

#### **10-10-5. Transfer of funds for making loans.**

The center, subject to the approval of the board or its designee, may authorize transfers from the fund to make unsecured or secured loans. With respect to such loans, the center, acting on behalf of the state and the fund, shall have the authority to sell loans, mortgages, security interests, and other obligations held by the state through the fund at public or private sale; to negotiate modifications or alterations in loans, mortgages, security interests, and other obligations held by the fund; to foreclose on any security interest in default or commence any action to protect or enforce any right conferred upon it by any law, mortgage, security agreement, deed of trust, deed to secure debt, contract, or other agreement; to bid for and purchase property which was the subject of such loan, mortgage, security interest, or other obligation held by the fund at any foreclosure or at any other sale; to acquire or take possession of such property; and to exercise any and all rights as provided by law or contract for the benefit or protection of the fund. (Code 1981, § 10-10-5, enacted by Ga. L. 2004, p. 431, § 1.)

**Editor's notes.** — Ga. L. 2004, p. 431, § 1, Code Section 10-10-5 as present Code Section 10-10-6, effective May 13, 2004, redesignated former

#### **10-10-6. Distribution to be deposited in the fund.**

All distributions made by an investment entity allocable to the state's limited partner interest or membership interest therein; all cash proceeds with respect to any loan, whether interest, the repayment of principal, or other amounts; or proceeds of the sale or transfer of qualified securities held directly by the fund shall be deposited in the fund for future investment in other investment entities, in other qualified securities of enterprises, for making loans as provided in this chapter, or to pay the cost of administration of the fund as provided in this chapter. (Code 1981, § 10-10-5, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-6, as redesignated by Ga. L. 2004, p. 431, § 1.)

**Editor's notes.** — Ga. L. 2004, p. 431, § 1, Code Section 10-10-6 as present Code Section 10-10-7, effective May 13, 2004, redesignated former

#### **10-10-7. Publishing of annual report by center.**

The center, on behalf of the board, shall publish an annual report which shall be made available to the Governor, the General Assembly, the Department of Economic Development or any successor agency, the chairperson of the House Committee on Economic Development and Tourism, the chairperson of the Senate Economic Development Commit-

tee, and the board setting forth in detail the operations and transactions conducted by it pursuant to this chapter. The annual report shall specifically account for the ways in which the needs, mission, and programs of the center described in this chapter have been carried out. The center shall distribute its annual report by such means that will make it widely available to those innovative enterprises of special importance to the Georgia economy. The center shall not be required to distribute copies of the annual report to the members of the General Assembly but shall notify the members of the availability of the annual report in the manner which it deems to be most effective and efficient. (Code 1981, § 10-10-6, enacted by Ga. L. 1989, p. 1674, § 1; Ga. L. 2000, p. 473, § 1; Code 1981, § 10-10-7, as redesignated by Ga. L. 2004, p. 431, § 1; Ga. L. 2005, p. 1036, § 3/SB 49; Ga. L. 2009, p. 303, § 5/HB 117.)

**The 2009 amendment,** effective April 30, 2009, substituted “Senate Economic Development Committee” for “Senate Economic Development and Tourism Committee” in the first sentence. See the Editor’s note for intent.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2004, “Economic Development” was substituted for “Industry, Trade, and Tourism”.

**Editor’s notes.** — Ga. L. 2009, p. 303, § 20, not codified by the General Assembly, provides that: “This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act.”



**CHAPTER 11****BUSINESS RECORDS**

Sec.		Sec.	
10-11-1.	Definitions.	10-11-3.	Retention of reproductions of original business records.
10-11-2.	Time period for retention of business records.		

**10-11-1. Definitions.**

As used in this chapter, the term:

(1) "Business record" means letters, words, sounds, or numbers, or the equivalent of letters, words, sounds, or numbers, recorded in the operation of a business by handwriting, typewriting, printing, photostat, photograph, magnetic impulse, mechanical or electronic recording, or another form of data compilation.

(2) "Reproduction" means a counterpart of an original business record created by production from the same impression on the same matrix as the original; photograph, including an enlargement or miniature; mechanical or electronic rerecording; chemical reproduction; or another technique that accurately reproduces the original. (Code 1981, § 10-11-1, enacted by Ga. L. 1991, p. 1638, § 1.)

**10-11-2. Time period for retention of business records.**

Unless a specific period is designated by law for their preservation, business records which persons pursuant to the laws of this state are required to keep or preserve may be destroyed after the expiration of three years from the making of such records without constituting an offense under such laws. This Code section does not apply to minute books of corporations or to records of sales or other transactions involving weapons or poisons capable of use in the commission of crimes. (Code 1981, § 10-11-2, enacted by Ga. L. 1991, p. 1638, § 1.)

**10-11-3. Retention of reproductions of original business records.**

If, in the regular course of business, a person makes reproductions of original business records, the preservation of such reproductions constitutes compliance with any laws of this state requiring that business records be kept or preserved. (Code 1981, § 10-11-3, enacted by Ga. L. 1991, p. 1638, § 1.)

CHAPTER 12

ELECTRONIC TRANSACTIONS

Sec.		Sec.	
10-12-1.	Short title.	10-12-11.	Satisfaction of notarization, acknowledgement, verification or oath requirement.
10-12-2.	Definitions.	10-12-12.	Retention of electronic records.
10-12-3.	Applicability to electronic records and signatures relating to a transaction.	10-12-13.	Record or signature evidence not to be excluded solely on the basis of electronic format.
10-12-4.	Applicability to electronic records and signatures created on or after July 1, 2009.	10-12-14.	Rules for automated transactions.
10-12-5.	Chapter does not create requirement for electronic transactions; determination as to whether parties intend to conduct electronic transactions.	10-12-15.	Sending and receipt of electronic records.
10-12-6.	Construction and applicability.	10-12-16.	Transferable records.
10-12-7.	Legal effect of electronic records or signatures.	10-12-17.	Agency creation and retention of electronic records; conversion of written records to electronic records.
10-12-8.	Ability to retain, store, and print electronic records; requirements for posting and display of records; variation by agreement.	10-12-18.	Each government agency to determine extent of electronic record utilization; specifications for use.
10-12-9.	Attributing electronic record or signature to particular person; effect of attributing electronic record or signature to a person.	10-12-19.	Standards.
10-12-10.	Rules applicable when change or error in electronic record occurs.	10-12-20.	Chapter modifies, limits, and supersedes Electronic Signatures in Global and National Commerce Act.

**Effective date.** — This chapter became effective July 1, 2009.

**Cross references.** — Filing documents by electronic means, § 15-10-53. Electronic commerce study committee, § 50-29-12. Disclosure of information relating to electronic signature, § 50-18-72.

**Editor’s notes.** — Ga. L. 2009, p. 698, § 1, effective July 1, 2009, repealed the Code sections formerly codified at this chapter

and enacted the current chapter. The former chapter consisted of Code Sections 10-12-1 through 10-12-5, relating to electronic records and signatures, and was based on Code 1981, §§ 10-12-1—10-12-5, enacted by Ga. L. 1997, p. 1052, § 1; Ga. L. 1998, p. 232, §§ 1-3; Ga. L. 1999, p. 323, § 1; Ga. L. 2001, p. 983, §§ 1, 2; Ga. L. 2006, p. 72, § 10/SB 465; Ga. L. 2007, p. 133, § 4/HB 24.

10-12-1. Short title.

This chapter shall be known and may be cited as the “Uniform Electronic Transactions Act.” (Code 1981, § 10-12-1, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**Cross references.** — Electronic records and signatures, § 44-2-35 et seq. Filing documents by electronic means, § 44-2-35 et seq.

## 10-12-2. Definitions.

As used in this chapter, the term:

(1) “Agreement” means the bargain of the parties in fact, as found in their language or inferred from other circumstances and from rules, regulations, and procedures, given the effect of agreements under laws otherwise applicable to a particular transaction.

(2) “Automated transaction” means a transaction conducted or performed, in whole or in part, by electronic means or electronic records in which the acts or records of one or both parties are not reviewed by an individual in the ordinary course in forming a contract, performing under an existing contract, or fulfilling an obligation required by the transaction.

(3) “Computer program” means a set of statements or instructions to be used directly or indirectly in an information processing system in order to bring about a certain result.

(4) “Contract” means the total legal obligation resulting from the parties’ agreement as affected by this chapter and other applicable law.

(5) “Electronic” means relating to technology having electrical, digital, magnetic, wireless, optical, electromagnetic, or similar capabilities.

(6) “Electronic agent” means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances, in whole or in part, without review or action by an individual.

(7) “Electronic record” means a record created, generated, sent, communicated, received, or stored by electronic means.

(8) “Electronic signature” means an electronic sound, symbol, or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record.

(9) “Governmental agency” means an executive, legislative, or judicial agency, department, board, commission, authority, institution, or instrumentality of the federal government or of a state or of a county, municipality, or other political subdivision of a state.

(10) “Information” means data, text, images, sounds, codes, computer programs, software, data bases, or the like.

(11) “Information processing system” means an electronic system for creating, generating, sending, receiving, storing, displaying, or processing information.



(12) “Person” means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, governmental agency, public corporation, or any other legal or commercial entity.

(13) “Record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(14) “Security procedure” means a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures.

(15) “State” means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States. The term includes an Indian tribe or band, or Alaskan native village, which is recognized by federal law or formally acknowledged by a state.

(16) “Transaction” means an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or governmental affairs. (Code 1981, § 10-12-2, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

### **10-12-3. Applicability to electronic records and signatures relating to a transaction.**

(a) Except as otherwise provided in subsection (b) of this Code section, this chapter shall apply to electronic records and electronic signatures relating to a transaction.

(b) This chapter shall not apply to a transaction to the extent it is governed by:

(1) A law governing the creation and execution of wills, codicils, or testamentary trusts;

(2) Title 11 other than Code Sections 11-1-107 and 11-1-206, Article 2, and Article 2A; or

(3) The Uniform Computer Information Transactions Act.

(c) This chapter shall apply to an electronic record or electronic signature otherwise excluded from the application of this chapter under subsection (b) of this Code section to the extent it is governed by a law other than those specified in subsection (b) of this Code section.

(d) A transaction subject to this chapter shall also be subject to other applicable substantive law.

(e) A governmental agency which is a party to a transaction subject to this chapter shall also be further subject to the records retention requirements for state and local government records established by state law. (Code 1981, § 10-12-3, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-4. Applicability to electronic records and signatures created on or after July 1, 2009.**

This chapter shall apply to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after July 1, 2009. (Code 1981, § 10-12-4, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-5. Chapter does not create requirement for electronic transactions; determination as to whether parties intend to conduct electronic transactions.**

(a) This chapter shall not require a record or signature to be created, generated, sent, communicated, received, stored, or otherwise processed or used by electronic means or in electronic form.

(b) This chapter shall apply only to transactions between parties each of which has agreed to conduct transactions by electronic means. Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct.

(c) A party that agrees to conduct a transaction by electronic means may refuse to conduct other transactions by electronic means. The right granted by this subsection shall not be waived by agreement.

(d) Except as otherwise provided in this chapter, the effect of any of this chapter's provisions may be varied by agreement. The presence in certain provisions of this chapter of the words "unless otherwise agreed," or words of similar import, shall not imply that the effect of other provisions may not be varied by agreement.

(e) Whether an electronic record or electronic signature has legal consequences shall be determined by this chapter and other applicable laws. (Code 1981, § 10-12-5, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-6. Construction and applicability.**

This chapter shall be construed and applied:

(1) To facilitate electronic transactions consistent with other applicable laws;

(2) To be consistent with reasonable practices concerning electronic transactions and with the continued expansion of those practices; and

(3) To effectuate its general purpose to make uniform the law with respect to the subject of this chapter among states enacting it. (Code 1981, § 10-12-6, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-7. Legal effect of electronic records or signatures.**

(a) A record or signature shall not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract shall not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record shall satisfy the law.

(d) If a law requires a signature, an electronic signature shall satisfy the law. (Code 1981, § 10-12-7, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-8. Ability to retain, store, and print electronic records; requirements for posting and display of records; variation by agreement.**

(a) If parties have agreed to conduct a transaction by electronic means and a law requires a person to provide, send, or deliver information in writing to another person, the requirement shall be satisfied if the information is provided, sent, or delivered, as the case may be, in an electronic record capable of retention by the recipient at the time of receipt. An electronic record is not capable of retention by the recipient if the sender or its information processing system inhibits the ability of the recipient to print or store the electronic record.

(b) If a law other than this chapter requires a record to be posted or displayed in a certain manner; to be sent, communicated, or transmitted by a specified method; or to contain information that is formatted in a certain manner, the following rules shall apply:

(1) The record shall be posted or displayed in the manner specified in the other law;

(2) Except as otherwise provided in paragraph (2) of subsection (d) of this Code section, the record shall be sent, communicated, or transmitted by the method specified in the other law; and

(3) The record shall contain the information formatted in the manner specified in the other law.

(c) If a sender inhibits the ability of a recipient to store or print an electronic record, the electronic record shall not be enforceable against the recipient.

(d) The requirements of this Code section shall not be varied by agreement, but:



(1) To the extent a law other than this chapter requires information to be provided, sent, or delivered in writing but permits that requirement to be varied by agreement, the requirement under subsection (a) of this Code section that the information be in the form of an electronic record capable of retention may also be varied by agreement; and

(2) A requirement under a law other than this chapter to send, communicate, or transmit a record by first-class mail, postage prepaid, or by regular United States mail may be varied by agreement to the extent permitted by the other law. (Code 1981, § 10-12-8, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**10-12-9. Attributing electronic record or signature to particular person; effect of attributing electronic record or signature to a person.**

(a) An electronic record or electronic signature shall be attributable to a person if such record or signature was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to whom the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subsection (a) of this Code section shall be determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law. (Code 1981, § 10-12-9, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, "whom" was substituted for "which" in subsection (a).

**10-12-10. Rules applicable when change or error in electronic record occurs.**

If a change or error in an electronic record occurs in a transmission between parties to a transaction, the following rules shall apply:

(1) If the parties have agreed to use a security procedure to detect changes or errors and one party has conformed to the procedure but the other party has not, and the nonconforming party would have detected the change or error had that party also conformed, the conforming party may avoid the effect of the changed or erroneous electronic record;

(2) In an automated transaction involving an individual, the individual may avoid the effect of an electronic record that resulted from an error made by the individual in dealing with the electronic agent of another person if the electronic agent did not provide an opportunity for the

prevention or correction of the error and, at the time the individual learns of the error, the individual:

(A) Promptly notifies the other person of the error and that the individual did not intend to be bound by the electronic record received by the other person;

(B) Takes reasonable steps, including steps that conform to the other person's reasonable instructions, to return to the other person or, if instructed by the other person, to destroy the consideration received, if any, as a result of the erroneous electronic record; and

(C) Has not used or received any benefit or value from the consideration, if any, received from the other person;

(3) If neither paragraph (1) nor paragraph (2) of this Code section applies, the change or error shall have the effect provided by other law, including the law of mistake, and the parties' contract, if any; and

(4) Paragraphs (2) and (3) of this Code section shall not be varied by agreement. (Code 1981, § 10-12-10, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-11. Satisfaction of notarization, acknowledgement, verification or oath requirement.**

If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, such requirement shall be satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record. (Code 1981, § 10-12-11, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-12. Retention of electronic records.**

(a) If a law requires that a record be retained, such requirement shall be satisfied by retaining an electronic record of the information in the record which:

(1) Accurately reflects the information set forth in the record after it was first generated in its final form as an electronic record or otherwise; and

(2) Remains accessible for the retention period required by law.

(b) A requirement to retain a record in accordance with subsection (a) of this Code section shall not apply to any information the sole purpose of which is to enable the record to be sent, communicated, or received.

(c) A person may satisfy subsection (a) of this Code section by using the services of another person if the requirements of that subsection are satisfied.

(d) If a law requires a record to be presented or retained in its original form, or provides consequences if the record is not presented or retained in its original form, that law is satisfied by an electronic record retained in accordance with subsection (a) of this Code section.

(e) If a law requires retention of a check, that requirement is satisfied by retention of an electronic record of the information on the front and back of the check in accordance with subsection (a) of this Code section.

(f) A record retained as an electronic record in accordance with subsection (a) of this Code section shall satisfy a law requiring a person to retain a record for evidentiary, audit, or like purposes unless a law enacted after July 1, 2009, specifically prohibits the use of an electronic record for the specified purpose.

(g) This Code section shall not preclude a governmental agency of this state from specifying additional requirements for the retention of a record subject to the agency's jurisdiction.

(h) This Code section shall not preclude the Georgia Technology Authority from specifying additional technology requirements in accordance with Code Section 50-25-4. (Code 1981, § 10-12-12, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, “July 1, 2009,” was substituted for “the effective date of this chapter” in subsection (f).

### **10-12-13. Record or signature evidence not to be excluded solely on the basis of electronic format.**

In a proceeding, evidence of a record or signature shall not be excluded solely because it is in electronic form. (Code 1981, § 10-12-13, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

### **10-12-14. Rules for automated transactions.**

In an automated transaction, the following rules shall apply:

(1) A contract may be formed by the interaction of electronic agents of the parties, even if no individual was aware of or reviewed the electronic agents' actions or the resulting terms and agreements;

(2) A contract may be formed by the interaction of an electronic agent and an individual, acting on the individual's own behalf or for another person, including by an interaction in which the individual performs actions that the individual is free to refuse to perform and which the



individual knows or has reason to know will cause the electronic agent to complete the transaction or performance; and

(3) The terms of the contract are determined by the substantive law applicable to the contract. (Code 1981, § 10-12-14, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-15. Sending and receipt of electronic records.**

(a) Unless otherwise agreed between the sender and the recipient, an electronic record is sent when:

(1) It is addressed properly or otherwise directed properly to an information processing system that the recipient has designated or uses for receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record;

(2) It is in a form capable of being processed by that system; and

(3) It enters an information processing system outside the control of the sender or of a person that sent the electronic record on behalf of the sender or enters a region of the information processing system designated or used by the recipient which is under the control of the recipient.

(b) Unless otherwise agreed between a sender and the recipient, an electronic record is received when:

(1) It enters an information processing system that the recipient has designated or uses for receiving electronic records or information of the type sent and from which the recipient is able to retrieve the electronic record; and

(2) It is in a form capable of being processed by that system.

(c) Subsection (b) of this Code section shall apply even if the information processing system is located in a different place than the electronic record is deemed to be received under subsection (d) of this Code section.

(d) Unless otherwise expressly provided in the electronic record or agreed between the sender and the recipient, an electronic record is deemed to be sent from the sender's place of business and to be received at the recipient's place of business. For purposes of this subsection, the following rules shall apply:

(1) If the sender or recipient has more than one place of business, the place of business of that person is the place having the closest relationship to the underlying transaction; and

(2) If the sender or the recipient does not have a place of business, the place of business is the sender's or recipient's residence, as the case may be.

(e) An electronic record is received under subsection (b) of this Code section even if no individual is aware of its receipt.

(f) Receipt of an electronic acknowledgment from an information processing system described in subsection (b) of this Code section shall establish that a record was received but, by itself, does not establish that the content sent corresponds to the content received.

(g) If a person is aware that an electronic record purportedly sent under subsection (a) of this Code section, or purportedly received under subsection (b) of this Code section, was not actually sent or received, the legal effect of the sending or receipt shall be determined by other applicable law. Except to the extent permitted by the other law, the requirements of this subsection shall not be varied by agreement. (Code 1981, § 10-12-15, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-16. Transferable records.**

(a) As used in this Code section, “transferable record” means an electronic record that:

(1) Would be a note under Article 3 of Title 11 or a document under Article 7 of Title 11 if the electronic record were in writing; and

(2) The issuer of the electronic record expressly has agreed is a transferable record.

(b) A person has control of a transferable record if a system employed for evidencing the transfer of interests in the transferable record reliably establishes that person as the person to which the transferable record was issued or transferred.

(c) A system satisfies subsection (b) of this Code section, and a person is deemed to have control of a transferable record, if the transferable record is created, stored, and assigned in such a manner that:

(1) A single authoritative copy of the transferable record exists which is unique, identifiable, and, except as otherwise provided in paragraphs (4), (5), and (6) of this subsection, unalterable;

(2) The authoritative copy identifies the person asserting control as:

(A) The person to which the transferable record was issued; or

(B) If the authoritative copy indicates that the transferable record has been transferred, the person to which the transferable record was most recently transferred;

(3) The authoritative copy is communicated to and maintained by the person asserting control or its designated custodian;

(4) Copies or revisions that add or change an identified assignee of the authoritative copy can be made only with the consent of the person asserting control;

(5) Each copy of the authoritative copy and any copy of a copy is readily identifiable as a copy that is not the authoritative copy; and

(6) Any revision of the authoritative copy is readily identifiable as authorized or unauthorized.

(d) Except as otherwise agreed, a person having control of a transferable record is the holder, as defined in Code Section 11-1-201, of the transferable record and has the same rights and defenses as a holder of an equivalent record or writing under Title 11, including, if the applicable statutory requirements under subsection (a) of Code Section 11-3-302 or Code Section 11-7-501 or 11-9-308 are satisfied, the rights and defenses of a holder in due course, a holder to which a negotiable document of title has been duly negotiated, or a purchaser, respectively. Delivery, possession, and indorsement are not required to obtain or exercise any of the rights under this subsection.

(e) Except as otherwise agreed, an obligor under a transferable record shall have the same rights and defenses as an equivalent obligor under equivalent records or writings under Title 11.

(f) If requested by a person against which enforcement is sought, the person seeking to enforce the transferable record shall provide reasonable proof that the person is in control of the transferable record. Proof may include access to the authoritative copy of the transferable record and related business records sufficient to review the terms of the transferable record and to establish the identity of the person having control of the transferable record. (Code 1981, § 10-12-16, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-17. Agency creation and retention of electronic records; conversion of written records to electronic records.**

Each governmental agency of this state shall determine whether, and the extent to which, it will create and retain electronic records and convert written records to electronic records. (Code 1981, § 10-12-17, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-18. Each government agency to determine extent of electronic record utilization; specifications for use.**

(a) Except as otherwise provided in subsection (f) of Code Section 10-12-12, each governmental agency of this state shall determine whether, and the extent to which, it will send and accept electronic records and



electronic signatures to and from other persons and otherwise create, generate, communicate, store, process, use, and rely upon electronic records and electronic signatures.

(b) To the extent that a governmental agency uses electronic records and electronic signatures under subsection (a) of this Code section, the governmental agency, giving due consideration to security, may specify:

(1) The manner and format in which the electronic records shall be created, generated, sent, communicated, received, and stored and the systems established for those purposes;

(2) If electronic records must be signed by electronic means, the type of electronic signature required, the manner and format in which the electronic signature shall be affixed to the electronic record, and the identity of, or criteria that shall be met by, any third party used by a person filing a document to facilitate the process;

(3) Control processes and procedures as appropriate to ensure adequate preservation, disposition, integrity, security, confidentiality, and auditability of electronic records; and

(4) Any other required attributes for electronic records which are specified for corresponding nonelectronic records or reasonably necessary under the circumstances.

(c) Except as otherwise provided in subsection (f) of Code Section 10-12-12, this chapter shall not require a governmental agency of this state to use or permit the use of electronic records or electronic signatures. (Code 1981, § 10-12-18, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-19. Standards.**

Any governmental agency of this state which adopts standards pursuant to Code Section 10-12-18 may encourage and promote consistency and interoperability with similar requirements adopted by other governmental agencies of this and other states and the federal government and nongovernmental persons interacting with governmental agencies of this state. If appropriate, those standards may specify differing levels of standards from which governmental agencies of this state may choose in implementing the most appropriate standard for a particular application. (Code 1981, § 10-12-19, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

#### **10-12-20. Chapter modifies, limits, and supersedes Electronic Signatures in Global and National Commerce Act.**

This chapter modifies, limits, and supersedes the federal Electronic Signatures in Global and National Commerce Act, 15 U.S.C. Section 7001, et seq., but does not modify, limit, or supersede Section 101(c) of that act,

15 U.S.C. Section 7001(c), or authorize electronic delivery of any of the notices described in Section 103(b) of that act, 15 U.S.C. Section 7003(b). (Code 1981, § 10-12-20, enacted by Ga. L. 2009, p. 698, § 1/HB 126.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, a misspelling of “Commerce” was corrected and a minor punctuation change was made in this Code section.

## CHAPTER 13

### TOBACCO PRODUCT MANUFACTURERS

Sec.		Sec.	
10-13-1.	Legislative findings; Master Settlement Agreement.	10-13-4.	Copies of Master Settlement Agreement available to the public.
10-13-2.	Definitions.		
10-13-3.	Deposits into escrow accounts; violations.		

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**Administrative rules and regulations.** — Rules Governing Escrow Payments from Non-Participating Tobacco Product Manufacturers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Chapter 60-1-1.

#### 10-13-1. Legislative findings; Master Settlement Agreement.

(a) Cigarette smoking presents serious public health concerns to the state and to the citizens of the state. The Surgeon General has determined that smoking causes lung cancer, heart disease, and other serious diseases, and that there are hundreds of thousands of tobacco-related deaths in the United States each year. These diseases most often do not appear until many years after the person in question begins smoking.

(b) Cigarette smoking also presents serious financial concerns for the state. Under certain health-care programs, the state may have a legal obligation to provide medical assistance to eligible persons for health conditions associated with cigarette smoking, and those persons may have a legal entitlement to receive such medical assistance.

(c) Under these programs, the state pays millions of dollars each year to provide medical assistance for these persons for health conditions associated with cigarette smoking.

(d) It is the policy of the state that financial burdens imposed on the state by cigarette smoking be borne by tobacco product manufacturers rather than by the state to the extent that such manufacturers either determine to enter into a settlement with the state or are found culpable by the courts.

(e) On November 23, 1998, leading United States tobacco product manufacturers entered into a settlement agreement, entitled the "Master Settlement Agreement," with the state. The Master Settlement Agreement obligates these manufacturers, in return for a release of past, present, and certain future claims against them as described therein, to pay substantial sums to the state (tied in part to their volume of sales); to fund a national foundation devoted to the interests of public health; and to make substan-



tial changes in their advertising and marketing practices and corporate culture, with the intention of reducing underage smoking.

(f) It would be contrary to the policy of the state if tobacco product manufacturers who determine not to enter into such a settlement could use a resulting cost advantage to derive large, short-term profits in the years before liability may arise without ensuring that the state will have an eventual source of recovery from them if they are proven to have acted culpably. It is thus in the interest of the state to require that such manufacturers establish a reserve fund to guarantee a source of compensation and to prevent such manufacturers from deriving large, short-term profits and then becoming judgment-proof before liability may arise. (Code 1981, § 10-13-1, enacted by Ga. L. 1999, p. 725, § 1.)

JUDICIAL DECISIONS

**Misinterpretation of Attorney General’s power under O.C.G.A. § 10-13A-4(b).** — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could

not sell cigarettes under its brand name in Georgia since the AG’s decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG’s retention of the ability to have the manufacturer cure any certification deficiencies. *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

RESEARCH REFERENCES

**ALR.** — Validity, construction, application, and effect of master settlement agreement (MSA) between tobacco companies

and various states, and state statutes implementing agreement; use and distribution of MSA proceeds, 25 ALR6th 435.

10-13-2. Definitions.

As used in this chapter, the term:

- (1) “Adjusted for inflation” means increased in accordance with the formula for inflation adjustment set forth in Exhibit C to the Master Settlement Agreement.
- (2) “Affiliate” means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with, another person. Solely for purposes of this definition, the terms “owns,” “is owned,” and “ownership” mean ownership of an equity interest, or the equivalent thereof of 10 percent or more, and the term “person” means an individual, partnership, committee, association, corporation, or any other organization or group of persons.
- (3) “Allocable share” means Allocable Share as that term is defined in the Master Settlement Agreement.
- (4) “Cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of

or contains (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (B) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (C) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (A) of this definition. The term "cigarette" includes "roll-your-own" (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of "cigarette," 0.09 ounces of "roll-your-own" tobacco shall constitute one individual "cigarette."

(5) "Master Settlement Agreement" means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(6) "Qualified escrow fund" means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least \$1 billion where such arrangement requires that such financial institution hold the escrowed funds' principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds' principal except as consistent with subparagraph (B) of paragraph (2) of Code Section 10-13-3.

(7) "Released claims" means Released Claims as that term is defined in the Master Settlement Agreement.

(8) "Releasing parties" means Releasing Parties as that term is defined in the Master Settlement Agreement.

(9) "Tobacco product manufacturer" means an entity that after the date of enactment of this chapter directly (and not exclusively through any affiliate):

(A) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsections II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

The term “tobacco product manufacturer” shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within subparagraphs (A) through (C) of this paragraph.

(10) “Units sold” means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs (or “roll-your-own” tobacco containers) bearing the excise tax stamp of the state. The state revenue commissioner shall promulgate such regulations as are necessary to ascertain the amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. (Code 1981, § 10-13-2, enacted by Ga. L. 1999, p. 725, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1999, “\$1 billion” was substituted for “\$1,000,000,000.00” in paragraph (6).

### JUDICIAL DECISIONS

**Misinterpretation of Attorney’s General power under O.C.G.A. § 10-13A-4(b).** — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG’s decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG’s retention of the ability to have the manufacturer cure any certification deficiencies. *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

### 10-13-3. Deposits into escrow accounts; violations.

Any tobacco product manufacturer selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) after the date of enactment of this chapter shall do one of the following:

(1) Become a participating manufacturer (as that term is defined in section II(jj) of the Master Settlement Agreement) and generally perform its financial obligations under the Master Settlement Agreement; or

(2)(A) Place into a qualified escrow fund by April 15 of the year following the year in question the following amounts (as such amounts are adjusted for inflation):



- (i) 1999: \$.0094241 per unit sold after the date of enactment of this chapter;
- (ii) 2000: \$.0104712 per unit sold;
- (iii) For each of 2001 and 2002: \$.0136125 per unit sold;
- (iv) For each of 2003 through 2006: \$.0167539 per unit sold; and
- (v) For each of 2007 and each year thereafter: \$.0188482 per unit sold.

(B) A tobacco product manufacturer that places funds into escrow pursuant to subparagraph (A) of this paragraph shall receive the interest or other appreciation on such funds as earned. Such funds themselves shall be released from escrow only under the following circumstances:

(i) To pay a judgment or settlement on any released claim brought against such tobacco product manufacturer by the state or any releasing party located or residing in the state. Funds shall be released from escrow under this division: (I) in the order in which they were placed into escrow; and (II) only to the extent and at the time necessary to make payments required under such judgment or settlement;

(ii) To the extent that a tobacco product manufacturer establishes that the amount it was required to place into escrow on account of units sold in the state in a particular year was greater than the Master Settlement Agreement payments, as determined pursuant to section IX(i) of that Agreement including after final determination of all adjustments, that such manufacturer would have been required to make on account of such units sold had it been a participating manufacturer, the excess shall be released from escrow and revert back to such tobacco product manufacturer; or

(iii) To the extent not released from escrow under division (i) or (ii) of this subparagraph, funds shall be released from escrow and revert back to such tobacco product manufacturer 25 years after the date on which they were placed into escrow.

(C) Each tobacco product manufacturer that elects to place funds into escrow pursuant to this paragraph shall annually certify to the Attorney General that it is in compliance with this paragraph. The Attorney General may bring a civil action on behalf of the state against any tobacco product manufacturer that fails to place into escrow the funds required under this paragraph. Any tobacco product manufacturer that fails in any year to place into escrow the funds required under this paragraph shall:

(i) Be required within 15 days to place such funds into escrow as shall bring it into compliance with this paragraph. The court, upon

a finding of a violation of this paragraph, may impose a civil penalty (to be paid to the general fund of the state) in an amount not to exceed 5 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 100 percent of the original amount improperly withheld from escrow;

(ii) In the case of a knowing violation, be required within 15 days to place such funds into escrow as shall bring it into compliance with this Code section. The court, upon a finding of a knowing violation of this paragraph, may impose a civil penalty (to be paid to the general fund of the state) in an amount not to exceed 15 percent of the amount improperly withheld from escrow per day of the violation and in a total amount not to exceed 300 percent of the original amount improperly withheld from escrow; and

(iii) In the case of a second knowing violation, be prohibited from selling cigarettes to consumers within the state (whether directly or through a distributor, retailer, or similar intermediary) for a period not to exceed two years.

Each failure to make an annual deposit required under this Code section shall constitute a separate violation. (Code 1981, § 10-13-3, enacted by Ga. L. 1999, p. 725, § 1; Ga. L. 2000, p. 136, § 10; Ga. L. 2004, p. 340, § 1.)

**Editor's notes.** — Ga. L. 2004, p. 340, § 2, not codified by the General Assembly, provides that: "If this Act, or any portion of the amendment to division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 made by this Act, is held by a court of competent jurisdiction to be unconstitutional, then such division (ii) shall be deemed to be repealed in its entirety. If subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall thereafter be held by a court of competent jurisdiction to be unconstitutional, then this Act shall be deemed repealed, and division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall be restored as if no such

amendments had been made. Neither any holding of unconstitutionality nor the repeal of division (ii) of subparagraph (B) of paragraph (2) of Code Section 10-13-3 shall affect, impair, or invalidate any other portion of Code Section 10-13-3, or the application of such Code section to any other person or circumstance, and such remaining portions of Code Section 10-13-3 shall at all times continue in force and effect."

Ga. L. 2004, p. 340, § 3, not codified by the General Assembly, provides that the amendment to division (2)(B)(ii) shall govern all requests for the release of escrow moneys made on or after May 7, 2004.

## JUDICIAL DECISIONS

**Cited** in *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

### 10-13-4. Copies of Master Settlement Agreement available to the public.

The "Master Settlement Agreement" referred to in subsection (e) of Code Section 10-13-1 and other provisions of this chapter has been

transmitted by the Attorney General to the Secretary of State and shall be maintained as a permanent record in the office of the Secretary of State, together with the enrolled Act by which this chapter is enacted. The Master Settlement Agreement shall not be published with the Act, but the Secretary of State shall, upon request and payment of copying costs, make a copy or certified copy of such document available to any member of the public. (Code 1981, § 10-13-4, enacted by Ga. L. 1999, p. 725, § 1.)

#### JUDICIAL DECISIONS

**Cited** in *Carolina Tobacco Co. v. Baker*,  
295 Ga. App. 115, 670 S.E.2d 811 (2008).



CHAPTER 13A

MASTER SETTLEMENT AGREEMENT ENHANCEMENTS

Sec.	Sec.
10-13A-1. Legislative findings.	directory updating; refunds upon removal from directory.
10-13A-2. Definitions.	10-13A-7. Documentation to be supplied by distributor; cooperation between commissioner and Attorney General; promulgation of regulations.
10-13A-3. Certification of compliance with Master Settlement Agreement; requirements; retention of documentation of sales.	10-13A-8. Suspension of distributor's license; other available remedies.
10-13A-4. Directory available via internet; requirements for inclusion and maintenance; e-mail requirement for distributor.	10-13A-9. Review of Attorney General's decision on removal from directory; certification of full compliance required; recovery of costs; conflicts with the Master Settlement Agreement.
10-13A-5. Prohibition against affixing tax stamp to manufacturer or brand not included in directory.	
10-13A-6. Agents of nonresident or foreign nonparticipating manufacturers;	

**Cross references.** — Cigar and cigarette taxes, § 48-11-1 et seq.

**Administrative rules and regulations.** — Rules Governing Escrow Payments from Non-Participating Tobacco Product Manufacturers, Official Compilation of the Rules and Regulations of the State of Georgia, Department of Law, Chapter 60-1-1.

**Law reviews.** — For note on the 2003 enactment of this chapter, see 20 Ga. St. U.L. Rev. 51 (2003).

10-13A-1. Legislative findings.

The General Assembly finds that violations of Chapter 13 of this title threaten the integrity of the tobacco Master Settlement Agreement, the fiscal soundness of the state, and the public health. The General Assembly finds that enacting procedural enhancements will aid the enforcement of such chapter and thereby safeguard the Master Settlement Agreement, the fiscal soundness of the state, and the public health. (Code 1981, § 10-13A-1, enacted by Ga. L. 2003, p. 829, § 1.)

RESEARCH REFERENCES

**ALR.** — Validity, construction, application, and effect of master settlement agreement (MSA) between tobacco companies and various states, and state statutes implementing agreement; use and distribution of MSA proceeds, 25 ALR6th 435.

10-13A-2. Definitions.

As used in this chapter, the term:

(1) “Brand family” means all styles of cigarettes sold under the same trademark and differentiated from one another by means of additional

modifiers or descriptors, including, but not limited to, “menthol,” “lights,” “kings,” and “100s,” and includes any brand name, alone or in conjunction with any other word, trademark, logo, symbol, motto, selling message, recognizable pattern of colors, or any other indicia of product identification identical or similar to or identifiable with a previously known brand of cigarettes.

(2) “Cigarette” means any product that contains nicotine, is intended to be burned or heated under ordinary conditions of use, and consists of or contains (A) any roll of tobacco wrapped in paper or in any substance not containing tobacco; or (B) tobacco, in any form, that is functional in the product, which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette; or (C) any roll of tobacco wrapped in any substance containing tobacco which, because of its appearance, the type of tobacco used in the filler, or its packaging and labeling, is likely to be offered to, or purchased by, consumers as a cigarette described in clause (A) of this definition. The term “cigarette” includes “roll-your-own” (i.e., any tobacco which, because of its appearance, type, packaging, or labeling is suitable for use and likely to be offered to, or purchased by, consumers as tobacco for making cigarettes). For purposes of this definition of “cigarette,” 0.09 ounces of “roll-your-own” tobacco shall constitute one individual “cigarette.”

(3) “Commissioner” means the state revenue commissioner.

(4) “Directory” means the directory listing all tobacco product manufacturers that have provided current and accurate certifications conforming to the requirements of Code Section 10-13A-3 and all brand families that are listed in such certifications developed by the Attorney General pursuant to Code Section 10-13A-4.

(5) “Distributor” means any person who:

(A) Maintains a warehouse, warehouse personnel, and salespersons who regularly contact and call on dealers; and

(B) Is engaged in the business of:

(i) Manufacturing cigars or cigarettes in this state, importing cigars or cigarettes into this state, or purchasing cigars or cigarettes from other manufacturers or distributors; and

(ii) Selling the cigars or cigarettes to dealers in this state for resale but is not in the business of selling the cigars or cigarettes directly to the ultimate consumer of the cigars or cigarettes.

(6) “Master Settlement Agreement” means the settlement agreement (and related documents) entered into on November 23, 1998, by the state and leading United States tobacco product manufacturers.

(7) “Nonparticipating manufacturer” means any tobacco product manufacturer that is not a participating manufacturer.

(8) “Participating manufacturer” has the meaning given that term in subsection II(jj) of the Master Settlement Agreement and all amendments thereto.

(9) “Qualified escrow fund” means an escrow arrangement with a federally or state chartered financial institution having no affiliation with any tobacco product manufacturer and having assets of at least \$1 billion where such arrangement requires that such financial institution hold the escrowed funds’ principal for the benefit of releasing parties and prohibits the tobacco product manufacturer placing the funds into escrow from using, accessing, or directing the use of the funds’ principal except as consistent with subparagraph (B) of paragraph (2) of Code Section 10-13-3.

(10) “Tobacco product manufacturer” means an entity that after April 28, 1999:

(A) Manufactures cigarettes anywhere that such manufacturer intends to be sold in the United States, including cigarettes intended to be sold in the United States through an importer (except where such importer is an original participating manufacturer (as that term is defined in the Master Settlement Agreement) that will be responsible for the payments under the Master Settlement Agreement with respect to such cigarettes as a result of the provisions of subsection II(mm) of the Master Settlement Agreement and that pays the taxes specified in subsection II(z) of the Master Settlement Agreement, and provided that the manufacturer of such cigarettes does not market or advertise such cigarettes in the United States);

(B) Is the first purchaser anywhere for resale in the United States of cigarettes manufactured anywhere that the manufacturer does not intend to be sold in the United States; or

(C) Becomes a successor of an entity described in subparagraph (A) or (B) of this paragraph.

The term tobacco product manufacturer shall not include an affiliate of a tobacco product manufacturer unless such affiliate itself falls within subparagraphs (A) through (C) of this paragraph.

(11) “Units sold” means the number of individual cigarettes sold in the state by the applicable tobacco product manufacturer (whether directly or through a distributor, retailer, or similar intermediary or intermediaries) during the year in question, as measured by excise taxes collected by the state on packs (or “roll-your-own” tobacco containers) bearing the excise tax stamp of the state. The state revenue commissioner shall promulgate such regulations as are necessary to ascertain the



amount of state excise tax paid on the cigarettes of such tobacco product manufacturer for each year. (Code 1981, § 10-13A-2, enacted by Ga. L. 2003, p. 829, § 1; Ga. L. 2004, p. 631, § 10.)

**10-13A-3. Certification of compliance with Master Settlement Agreement; requirements; retention of documentation of sales.**

(a) Every tobacco product manufacturer whose cigarettes are sold in this state, whether directly or through a distributor, retailer, or similar intermediary or intermediaries, shall execute and deliver in the manner prescribed by the Attorney General a certification to the commissioner and Attorney General, no later than the thirtieth day of April each year, certifying that, as of the date of such certification, such tobacco product manufacturer either is a participating manufacturer or is in full compliance with Chapter 13 of this title including all annual deposits required by paragraph (2) of Code Section 10-13-3.

(b) A participating manufacturer shall include in its certification a list of its brand families. A participating manufacturer shall update such list 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and commissioner. A participating manufacturer may not include a brand family in its certification unless the participating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of calculating its payments under the Master Settlement Agreement for the relevant year, in the volume and shares determined pursuant to the Master Settlement Agreement.

(c) A nonparticipating manufacturer shall include in its certification a list of all of its brand families and the number of units sold for each brand family that were sold in this state during the preceding calendar year and a list of all of its brand families that have been sold in this state at any time during the current calendar year. Such lists must indicate by an asterisk any brand family sold in this state during the preceding calendar year that is no longer being sold in this state as of the date of such certification, and identification by name and address of any other manufacturer of such brand families in the preceding or current calendar year. The nonparticipating manufacturer shall update such list 30 calendar days prior to any addition to or modification of its brand families by executing and delivering a supplemental certification to the Attorney General and commissioner. A nonparticipating manufacturer may not include a brand family in its certification unless such nonparticipating manufacturer affirms that the brand family is to be deemed to be its cigarettes for purposes of Chapter 13 of this title. Such certification must also certify:

(1) That such nonparticipating manufacturer is registered to do business in this state and has appointed a resident agent for service of

process and provided notice thereof as required by Code Section 10-13A-6;

(2) That such nonparticipating manufacturer has established and continues to maintain a qualified escrow fund as required by Code Section 10-13-3 and has executed a qualified escrow agreement that has been reviewed and approved by the Attorney General and that governs the qualified escrow fund;

(3) That such nonparticipating manufacturer is in full compliance with Chapter 13 of this title and with this chapter and any regulations promulgated pursuant to either such chapter; and

(4) The name, address, and telephone number of the financial institution where the nonparticipating manufacturer has established such qualified escrow fund required pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such chapter; the account number of such qualified escrow fund and any subaccount number for this state; the amount such nonparticipating manufacturer placed in such fund for cigarettes sold in this state during the preceding calendar year, the date and amount of each such deposit, and such evidence or verification as may be deemed necessary by the Attorney General to confirm the foregoing; and the amount and date of any withdrawal or transfer of funds the nonparticipating manufacturer made at any time from such fund or from any other qualified escrow fund into which it ever made escrow payments pursuant to Chapter 13 of this title and all regulations promulgated pursuant to such chapter.

Certification in accordance with this subsection shall be deemed to be in compliance with subparagraph (C) of paragraph (2) of Code Section 10-13-3.

(d) Nothing in this Code section shall be construed as limiting or otherwise affecting the state's right to maintain that a brand family constitutes cigarettes of a different tobacco product manufacturer for purposes of calculating payments under the Master Settlement Agreement or for purposes of Chapter 13 of this title.

(e) Tobacco product manufacturers shall maintain all invoices and documentation of sales and other such information relied upon for such certification for a period of five years, unless otherwise required by law to maintain them for a greater period of time. (Code 1981, § 10-13A-3, enacted by Ga. L. 2003, p. 829, § 1.)

### JUDICIAL DECISIONS

**Misinterpretation of Attorney General's power under O.C.G.A. § 10-13A-4(b).** — Trial court committed an error of law by affirming a decision of the Georgia Attorney

General (AG) that a cigarette manufacturer was not a tobacco product manufacturer under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could

not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the

ability to have the manufacturer cure any certification deficiencies. *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

**10-13A-4. Directory available via internet; requirements for inclusion and maintenance; e-mail requirement for distributor.**

(a) Not later than August 1, 2004, the Attorney General shall develop and make available for public inspection on its website a directory, as defined in paragraph (4) of Code Section 10-13A-2.

(b) The Attorney General shall not include or retain in such directory the name or brand families of any nonparticipating manufacturer that has failed to provide the required certification or whose certification the Attorney General determines is not in compliance with subsection (c) of Code Section 10-13A-3, unless the Attorney General has determined that such violation has been cured to the satisfaction of the Attorney General.

(c) Neither a tobacco product manufacturer nor brand family shall be included or retained in the directory if the Attorney General concludes, in the case of a nonparticipating manufacturer, that:

(1) Any escrow payment required pursuant to Chapter 13 of this title for any period for any brand family, whether or not listed by such nonparticipating manufacturer, has not been fully paid into a qualified escrow fund governed by a qualified escrow agreement that has been approved by the Attorney General; or

(2) Any outstanding final judgment, including interest thereon, for a violation of Chapter 13 of this title has not been fully satisfied for such brand family or such manufacturer.

(d) The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove tobacco product manufacturers or brand families to keep the directory in conformity with the requirements of this chapter.

(e) Every distributor shall provide and update as necessary an e-mail address to the Attorney General for the purpose of receiving any notifications as may be required by this chapter. (Code 1981, § 10-13A-4, enacted by Ga. L. 2003, p. 829, § 1.)

**JUDICIAL DECISIONS**

**Misinterpretation of Attorney General's power under O.C.G.A. § 10-13A-4(b).** — Trial court committed an error of law by affirming a decision of the Georgia Attorney General (AG) that a cigarette manufacturer was not a tobacco product manufacturer

under the Georgia Qualifying Statute, O.C.G.A. § 10-13-2(9), and, therefore, could not sell cigarettes under its brand name in Georgia since the AG's decision was based in part on a misinterpretation of O.C.G.A. § 10-13A-4(b) and the AG's retention of the



ability to have the manufacturer cure any certification deficiencies. *Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

**10-13A-5. Prohibition against affixing tax stamp to manufacturer or brand not included in directory.**

It shall be unlawful for any person to affix a tax stamp to a package or other container of cigarettes of a tobacco product manufacturer or brand family not included in the directory or to sell, offer for sale, or possess with intent to sell, in this state, cigarettes of a tobacco product manufacturer or brand family not included in the directory. (Code 1981, § 10-13A-5, enacted by Ga. L. 2003, p. 829, § 1.)

**JUDICIAL DECISIONS**

**Cited** in *Carolina Tobacco Co. v. Baker*, 295 Ga. App. 115, 670 S.E.2d 811 (2008).

**10-13A-6. Agents of nonresident or foreign nonparticipating manufacturers; directory updating; refunds upon removal from directory.**

(a) Any nonresident or foreign nonparticipating manufacturer that has not registered to do business in this state as a foreign corporation or business entity shall, as a condition precedent to having its brand families included or retained in the directory, appoint and continually engage without interruption the services of an agent in this state as required by Code Section 48-11-5 to act as agent for the service of process on whom all process and any action or proceeding against it concerning or arising out of the enforcement of this chapter may be served in any manner authorized by law. Such service shall constitute legal and valid service of process on the nonparticipating manufacturer. The nonparticipating manufacturer shall provide the name, address, phone number, and proof of the appointment and availability of such agent to the satisfaction of the commissioner and Attorney General.

(b) The nonparticipating manufacturer shall provide notice to the commissioner and Attorney General 30 calendar days prior to termination of the authority of an agent and shall further provide proof to the satisfaction of the Attorney General of the appointment of a new agent no less than five calendar days prior to the termination of an existing agent appointment. In the event an agent terminates an agency appointment, the nonparticipating manufacturer shall notify the commissioner and Attorney General of said termination within five calendar days and shall include proof to the satisfaction of the Attorney General of the appointment of a new agent.

(c) Any nonparticipating manufacturer whose cigarettes are sold in this state who has not appointed and engaged an agent as required in this Code

section shall be deemed to have appointed the Secretary of State as such agent and may be proceeded against in courts of this state by service of process upon the Secretary of State; provided, however, that the appointment of the Secretary of State as such agent shall not satisfy the condition precedent for having the brand families of the nonparticipating manufacturer included or retained in the directory.

(d) The Attorney General shall update the directory as necessary in order to correct mistakes and to add or remove a tobacco product manufacturer or brand family to keep the directory in conformity with the requirements of this chapter. The Attorney General shall post in the directory and transmit by e-mail or other practicable means to each notice of any removal from the directory of a tobacco product manufacturer or brand family at least 30 days prior to removal from the directory of such tobacco product manufacturer or brand family. Unless otherwise provided by agreement between the wholesaler and a tobacco product manufacturer, the wholesaler shall be entitled to a refund from a tobacco product manufacturer for any money paid by the wholesaler to the tobacco product manufacturer for any cigarettes of the tobacco product manufacturer in the possession of the wholesaler on the effective date of removal from the directory, or as subsequently received from a retail dealer as provided in this chapter, of products of that tobacco product manufacturer or brand family of cigarettes. Unless otherwise provided by agreement between a retail dealer and the wholesaler or a tobacco product manufacturer, a retail dealer shall be entitled to a refund from the wholesaler or a tobacco product manufacturer for any money paid by the retail dealer to the wholesaler or such tobacco product manufacturer for any cigarettes of the tobacco product manufacturer still in the possession of the retail dealer on the effective date of removal from the directory of that tobacco product manufacturer or brand family. (Code 1981, § 10-13A-6, enacted by Ga. L. 2003, p. 829, § 1.)

**10-13A-7. Documentation to be supplied by distributor; cooperation between commissioner and Attorney General; promulgation of regulations.**

(a) Not later than 20 calendar days after the end of each calendar quarter, and more frequently if so directed by the Attorney General, each distributor shall submit such information as the Attorney General requires to facilitate compliance with this chapter, including, but not limited to, a list by brand family of the total number of cigarettes, or, in the case of "roll-your-own," the equivalent count, for which the distributor affixed tax stamps during the previous calendar quarter or otherwise paid the tax due for such cigarettes. The distributor shall maintain and make available to the Attorney General all invoices and documentation of sales of all nonparticipating manufacturer cigarettes and any other information relied upon in reporting to the Attorney General for a period of five years.

(b) The commissioner is authorized to disclose to the Attorney General any information received under this chapter and requested by the Attorney General for purposes of determining compliance with and enforcing the provisions of this chapter. The commissioner and Attorney General shall share with each other the information received under this chapter and may share such information with other federal, state, or local agencies only for purposes of enforcement of this chapter or the corresponding laws of other states.

(c) The Attorney General may require at any time from the nonparticipating manufacturer proof from the financial institution in which such manufacturer has established a qualified escrow fund for the purpose of compliance with Chapter 13 of this title of the amount of money in such fund, exclusive of interest, the amount and date of each deposit to such fund, and the amount and date of each withdrawal from such fund.

(d) In addition to the information required to be submitted pursuant to this chapter, the Attorney General may require a distributor or tobacco product manufacturer to submit any additional information including, but not limited to, samples of the packaging or labeling of each brand family, as is necessary to enable the Attorney General to determine whether a tobacco product manufacturer is in compliance with this chapter.

(e) To promote compliance with this chapter, the Attorney General may promulgate regulations requiring a tobacco product manufacturer subject to the requirements of subsection (c) of Code Section 10-13A-3 to make the annual escrow deposits required during the year in which the sales covered by such deposits are made. The Attorney General may require production of information sufficient to enable the Attorney General to determine the adequacy of the amount of the installment deposit. (Code 1981, § 10-13A-7, enacted by Ga. L. 2003, p. 829, § 1.)

#### **10-13A-8. Suspension of distributor's license; other available remedies.**

(a) In addition to or in lieu of any other civil or criminal remedy provided by law, upon a determination that a distributor has violated Code Section 10-13A-5 or any regulation adopted pursuant to this chapter, the commissioner may revoke or suspend the license of the distributor in the manner provided by Code Section 48-11-6. Each tax stamp affixed and each sale or offer to sell cigarettes in violation of Code Section 10-13A-5 shall constitute a separate violation. For each violation, the commissioner may also impose a civil penalty in an amount not to exceed the greater of 500 percent of the retail value of the cigarettes or \$5,000.00 upon a determination of a violation of Code Section 10-13A-5 or any regulations adopted pursuant thereto. Such penalty shall be imposed in the manner provided in subsection (c) of Code Section 48-11-24.

(b) Any cigarettes that have been sold, offered for sale, or possessed for sale in this state in violation of Code Section 10-13A-5 shall be deemed



contraband under Code Section 48-11-9 and such cigarettes shall be subject to seizure and forfeiture as provided in such Code section.

(c) The Attorney General, on behalf of the commissioner, may seek an injunction to restrain a threatened or actual violation of Code Section 10-13A-5 or of subsection (a) or (d) of Code Section 10-13A-7 by a distributor and to compel the distributor to comply with said Code section or either such subsection. In any action brought pursuant to this Code section, the state shall be entitled to recover the costs of investigation, costs of the action, and reasonable attorney fees.

(d) It shall be unlawful for a person to sell or distribute cigarettes or to acquire, hold, own, possess, transport, import, or cause to be imported cigarettes that the person knows or should know are intended for distribution or sale in this state in violation of Code Section 10-13A-5. Any person who violates this subsection shall be guilty of a misdemeanor.

(e) A violation of Code Section 10-13A-5 shall constitute an unfair and deceptive act or practice under Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975." (Code 1981, § 10-13A-8, enacted by Ga. L. 2003, p. 829, § 1.)

**10-13A-9. Review of Attorney General's decision on removal from directory; certification of full compliance required; recovery of costs; conflicts with the Master Settlement Agreement.**

(a) A determination of the Attorney General to not include or to remove from the directory a brand family or tobacco product manufacturer shall be subject to review in the manner prescribed by Article 1 of Chapter 13 of Title 50, known as the "Georgia Administrative Procedure Act."

(b) No person shall be issued a license or granted a renewal of a license under Chapter 11 of Title 48 to act as a distributor unless such person has certified in writing that such person will comply fully with this chapter.

(c) The first report of distributors required by subsection (a) of Code Section 10-13A-7 shall be due 30 calendar days after July 1, 2003, the certifications by a tobacco product manufacturer described in subsection (a) of Code Section 10-13A-3 shall be due 45 calendar days after such date, and the directory described in Code Section 10-13A-4 shall be published or made available within 90 calendar days after such date.

(d) The Attorney General may promulgate rules and regulations necessary to effect the purposes of this chapter.

(e) In any action brought by the state to enforce this chapter, the state shall be entitled to recover the costs of investigation, expert witness fees, costs of the action, and reasonable attorney fees.

(f) If a court of competent jurisdiction finds that the provisions of this chapter and of Chapter 13 of this title conflict and cannot be harmonized,

then such provisions of Chapter 13 of this title shall control. If any section, subsection, subdivision, paragraph, sentence, clause, or phrase of this chapter causes Chapter 13 of this title to no longer constitute a qualifying or model statute, as those terms are defined in the Master Settlement Agreement, then that portion of this chapter shall not be valid. If any section, subsection, subdivision, paragraph, sentence, clause or phrase of this chapter is for any reason held to be invalid, unlawful, or unconstitutional, such decision shall not affect the validity of the remaining portions of this chapter or any part thereof. (Code 1981, § 10-13A-9, enacted by Ga. L. 2003, p. 829, § 1.)

JUDICIAL DECISIONS

**Cited** in *Carolina Tobacco Co. v. Baker*,  
295 Ga. App. 115, 670 S.E.2d 811 (2008).

## CHAPTER 14

## CEMETERY AND FUNERAL SERVICES

Sec.		Sec.	
10-14-1.	Short title.	10-14-14.	Administration of chapter; rules and regulations.
10-14-2.	Regulation of preneed dealers, registrants, and cemetery companies; licenses.	10-14-15.	Investigations by Secretary of State; subpoenas; hearings.
10-14-3.	Definitions.	10-14-16.	Cemetery rules and regulations; service charges.
10-14-3.1.	Authority of board.	10-14-17.	Enumeration of prohibited acts; fees.
10-14-4.	Registration of dealers and cemeteries; perpetual care cemeteries trust funds; nonperpetual care cemeteries; preneed escrow accounts.	10-14-18.	Duties of registrant; written contract.
10-14-5.	Preneed sales agents; contracts; retention of employee data.	10-14-19.	Enforcement of article; civil penalties.
10-14-6.	Irrevocable trust fund.	10-14-20.	Criminal penalties.
10-14-7.	Preneed escrow accounts.	10-14-21.	Purchaser's remedy for violations.
10-14-8.	Prohibition of certain persons from employment; notice and hearing; emergency orders.	10-14-22.	Judicial appeal of order of Secretary of State.
10-14-9.	Amendment of registration application; state audit of records; change of ownership.	10-14-23.	Administrative appeal of order of Secretary of State.
10-14-10.	Minimum acreage for cemeteries; exceptions.	10-14-24.	Effect of consent to service of process.
10-14-11.	Stop order suspending or revoking a registration; denial or refusal of application for registration; penalties.	10-14-25.	Waiver of rights or defenses in cemetery purchase agreements void.
10-14-12.	Separate accounts and records; agreement form approval; owner acting as trustee; bond; removal of trustee or escrow agent; allocation of funds; financial reports.	10-14-26.	Secretary of State immune from liability.
10-14-13.	Venue for civil or criminal actions.	10-14-27.	Evidence in civil or criminal actions under article.
		10-14-28.	Actions pending under prior law.
		10-14-29.	Construction regulations; preconstruction trust funds.
		10-14-30.	Adoption of minimum standards by Secretary of State.

**Cross references.** — Disposition of dead bodies, Ch. 21, T. 31. Regulation of funeral directors, embalmers, and funeral establishments, and contracts for preneed funeral services, Ch. 18, T. 43. Authority of administrator to issue cease and desist orders or impose civil penalty, judicial relief, and receivers, § 10-1-397.3. Protection of American Indian human remains and burial objects, Art. 7, Ch. 12, T. 44. Limitations upon right to choose funeral services for insured, entry into contracts by life insurers, and

receiving of compensation from undertakers, § 33-1-10 et seq.

**Administrative rules and regulations.** — Rules of General Applicability, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Cemeteries, Preneed Dealers, and Merchandise Dealers, Chapter 590-3-1.

Preneed Sales Agents, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Chapter 590-3-2.



Preneed Dealers, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Chapter 590-3-4.

Merchandise Dealers, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Chapter 590-3-5.

Mausoleum Preconstruction, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Chapter 590-3-6.

Administrative Hearings, Official Compilation of the Rules and Regulations of the State of Georgia, Office of Secretary of State, Chapter 590-3-7.

RESEARCH REFERENCES

**ALR.** — Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lots, 32 ALR 1406; 47 ALR 70.

Cemetery property and cemetery lots as subject to assessment for public improvement, in absence of express exemption, 71 ALR 322.

Rights and remedies of holder of lien on cemetery property, 90 ALR 444.

Right to take property under eminent domain as affected by fact that property is already devoted to cemetery purposes, 109 ALR 1502.

Right to exclude from privilege of burial in cemetery, 110 ALR 388.

Validity of public prohibition or regulation of location of cemetery, 50 ALR2d 905.

Cemetery or burial ground as nuisance, 50 ALR2d 1324.

To whom does title to burial lot pass on testator's death, in absence of specific provision in his will, 26 ALR3d 1425.

Liability of cemetery in connection with conducting or supervising burial services, 42 ALR4th 1059.

Dead bodies: liability for improper manner of reinterment, 53 ALR4th 394.

Construction and effect of contracts or insurance policies providing preneed coverage of burial expense or services, 67 ALR4th 36.

Validity, construction, and application of statutes or ordinances regulating perpetual-care trust funds of cemeteries and mausoleums, 54 ALR5th 681.

10-14-1. Short title.

This chapter shall be known as and may be cited as the “Georgia Cemetery and Funeral Services Act of 2000.” (Code 1981, § 44-3-130, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-1, as redesignated by Ga. L. 2000, p. 882, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, “chapter” was substituted for “article”.

JUDICIAL DECISIONS

**Insurance coverage for breach of perpetual care.** — When an insurer sought a declaratory judgment defining the insurer's rights and responsibilities under an insurance policy issued to an insured cemetery that was sued for desecrating a grave, the insurer was not obligated to indemnify the insured for any damages awarded on a breach of contract claim alleging a breach of

a perpetual care contract regarding the grave because the insured had no duty to care for the grave absent the contract, and the policy excluded coverage for any personal injury for which the insured had assumed liability in a contract. *Nationwide Mut. Fire Ins. Co. v. Somers*, 264 Ga. App. 421, 591 S.E.2d 430 (2003).

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Cemeteries, § 1.  
**C.J.S.** — 14 C.J.S., Cemeteries, § 1.

**10-14-2. Regulation of preneed dealers, registrants, and cemetery companies; licenses.**

(a) The legislature recognizes that purchasers of preneed burial rights, funeral or burial merchandise, or funeral services or burial services may suffer serious economic harm if purchase money is not set aside for future use as intended by the purchaser and that the failure to maintain cemetery grounds properly may cause significant emotional distress. Therefore, it is necessary in the interest of the public welfare to regulate preneed dealers, licensees, registrants, and cemetery companies in this state. However, restrictions shall be imposed only to the extent necessary to protect the public from significant or discernible harm or damage and not in a manner which will unreasonably affect the competitive market.

(b) Subject to certain interests of society, the legislature finds that every competent adult has the right to control the decisions relating to his or her own funeral arrangements. Accordingly, unless otherwise stated in this chapter, it is the legislature's express intent that nothing contained in this chapter should be construed or interpreted in any manner as to subject preneed contract purchasers to federal income taxation under the grantor trust rules contained in Sections 671 et seq. of the Internal Revenue Code of 1986, as amended.

(c) Nothing herein is intended to prohibit or restrict the sale or purchase of life insurance as a funding vehicle for preneed contracts under this chapter, nor to change the state of the law prior to July 1, 2000, with respect to prohibiting or restricting the sale or purchase of life insurance as a funding vehicle for preneed contracts under this chapter. (Code 1981, § 10-14-2, enacted by Ga. L. 2000, p. 882, § 1.)

**Cross references.** — Solicitation during final illness, § 10-1-393.7.

## JUDICIAL DECISIONS

**Constitutional challenges.** — Nonprofit cemetery association was unable to sustain an equal protection challenge to the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., on the basis that the Act regulated only private cemeteries; the association, which conceded that the Act's purpose was to protect consumers and the public welfare, health, and safety, did not

argue that the regulation of the private cemeteries alone would not meet the purposes intended in the Act, but rather argued that it would have been better and more efficient if the Georgia Legislature had regulated all cemeteries rather than only those privately owned, which was not a decision for the court to make. *Ga. Cemetery Ass'n v. Cox*, 403 F. Supp. 2d 1206 (N.D. Ga. 2003).

**10-14-3. Definitions.**

As used in this chapter, the term:

(1) “Affiliate” means a person who directly or indirectly owns or controls, is owned or controlled by, or is under common ownership or control with another person. Solely for purposes of this definition, the terms “owns,” “is owned,” and “ownership” mean ownership of an equity interest, or the equivalent thereof, of 10 percent or more, and the term “person” means an individual, partnership, committee, association, corporation, or any other organization or group of persons.

(2) “Board” means the State Board of Cemeterians as described and authorized in Chapter 8B of Title 43.

(3) “Burial merchandise,” “funeral merchandise,” or “merchandise” means any personal property offered or sold by any person for use in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(4) “Burial right” means the right to use a grave space, mausoleum, or columbarium for the interment, entombment, or inurnment of human remains.

(5) “Burial service” means any service other than a funeral service offered or provided by any person in connection with the final disposition, memorialization, interment, entombment, or inurnment of human remains.

(6) “Care and maintenance” means the perpetual process of keeping a cemetery and its lots, graves, grounds, landscaping, roads, paths, parking lots, fences, mausoleums, columbaria, vaults, crypts, utilities, and other improvements, structures, and embellishments in a well cared for and dignified condition, so that the cemetery does not become a nuisance or place of reproach and desolation in the community. As specified in the rules of the Secretary of State, care and maintenance may include, but is not limited to, any or all of the following activities: mowing the grass at reasonable intervals; raking and cleaning the grave spaces and adjacent areas; pruning of shrubs and trees; suppression of weeds and exotic flora; and maintenance, upkeep, and repair of drains, water lines, roads, buildings, and other improvements. Care and maintenance may include, but is not limited to, reasonable overhead expenses necessary for such purposes, including maintenance of machinery, tools, and equipment used for such purposes. Care and maintenance may also include repair or restoration of improvements necessary or desirable as a result of wear, deterioration, accident, damage, or destruction. Care and maintenance does not include expenses for the construction and development of new grave spaces or interment structures to be sold to the public.



(7) "Casket" means a container which is designed for the encasement and viewing of a dead human body.

(8) "Cemetery" means a place dedicated to and used, or intended to be used, for permanent interment of human remains. A cemetery may contain land or earth interments; mausoleum, a vault, crypt interments; a columbarium or other structure or place used or intended to be used for the inurnment of cremated human remains; or any combination of one or more of such structures or places. Such term shall not include governmentally owned cemeteries, fraternal cemeteries, cemeteries owned and operated by churches, synagogues, or communities or family burial plots.

(9) "Cemetery company" means any entity that owns or controls cemetery lands or property.

(10) "Columbarium" means a structure or building which is substantially exposed above the ground and which is intended to be used for the inurnment of cremated human remains.

(11) "Common business enterprise" means a group of two or more business entities that share common ownership in excess of 50 percent.

(12) "Cremation" includes any mechanical or thermal process whereby a deceased human being is reduced to ashes. Cremation also includes any other mechanical or thermal process whereby human remains are pulverized, burned, recreated, or otherwise further reduced in size or quantity.

(13) "Crypt" means a chamber of sufficient size to inter the remains of a deceased human being.

(14) "Entombment" means the disposition of a dead human body in a mausoleum, including without limitation a crypt, private mausoleum, or any other permanent above-ground structure not used for inurnment, but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(15) "Final disposition" means the final disposal of a deceased human being whether by interment, entombment, inurnment, burial at sea, cremation, or any other means and includes, but is not limited to, any other disposition of remains for which a segregated charge is imposed.

(16) "Funeral director" means any person licensed in this state to practice funeral directing pursuant to the provisions of Chapter 18 of Title 43.

(17) "Funeral service" means any service relating to the transportation, embalming, and interment of a deceased human being, as further described in paragraphs (10), (18), and (19) of Code Section 43-18-1.

(18) "Grave space" or "lot" means a space of ground in a cemetery intended to be used for the interment in the ground of human remains.

(19) "Human remains" means the bodies of deceased human beings and includes the bodies in any stage of decomposition and the cremated remains.

(20) "Interment" means the burial of human remains but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(21) "Inurnment" means the disposition of the cremated remains of a deceased human being in any fashion, including without limitation in a columbarium niche, cremorial, cremation bench, cremation rock, urn, or other container but shall not include the opening and closing of a grave space, crypt, or niche or the installation of a vault.

(22) "Mausoleum" means a structure or building which is substantially exposed above the ground and which is used, or intended to be used, for the entombment of human remains.

(23) "Mausoleum section" means any construction unit of a mausoleum which is acceptable to the Secretary of State and which a cemetery uses to initiate its mausoleum program or to add to its existing mausoleum structures.

(24) "Monument" means any product used for identifying or permanently decorating a grave site, including, without limitation, monuments, markers, benches, and vases and any base or foundation on which they rest or are mounted.

(25) "Niche" means a space used, or intended to be used, for the interment of the cremated remains of one or more deceased human beings.

(26) "Nonperpetual care" means any cemetery which does not offer perpetual care as defined in this Code section.

(27) "Outer burial container" or "vault" means an enclosure into which a casket is placed and includes, but is not limited to, containers made of concrete, steel, fiberglass, copper or other metals, polypropylene, sectional concrete enclosures, and crypts.

(28) "Perpetual care" means the care and maintenance and the reasonable administration of the cemetery grounds and buildings at the present time and in the future.

(29) "Person" or "entity" means an individual, a corporation, a limited liability company, a general or limited partnership, an association, a joint-stock company, a trust, or any type of incorporated or unincorporated organization.

(30) "Preneed contract" means any arrangement or method, of which the provider of burial or funeral merchandise or services has actual knowledge, whereby any person agrees to furnish burial or funeral merchandise or services in the future.

(31) "Preneed dealer" means every person, other than a salesperson registered under this chapter, who engages, either for all or part of his or her time, directly or indirectly, as agent, broker, or principal in the retail business of offering, selling, or otherwise dealing in funeral services or burial services or funeral or burial merchandise which is not attached to realty or delivered to the purchaser at the time of sale.

(32) "Preneed interment service" or "preneed service" means any service which is not performed at the time of sale and which is offered or provided by any person in connection with the interment of human remains, except those services offered regarding mausoleums and the normal and customary installation charges on burial or funeral merchandise.

(32.1) "Principal" means a sum set aside or escrowed exclusive of income or interest or other return thereon.

(33) "Sale" or "sell" means and shall include every contract of sale or disposition of burial rights, grave spaces, burial services, funeral services, or burial or funeral merchandise for value. The term "offer to sell," "offer for sale," or "offer" shall include any attempt or offer to dispose of, or solicitation of an offer to buy, grave spaces, burial rights, burial or funeral services, or burial or funeral merchandise for value. This definition shall not include wholesalers of burial or funeral merchandise.

(34) "Salesperson" or "sales agent" means an individual employed or appointed or authorized by a cemetery, cemetery company, or preneed dealer to sell grave spaces, burial rights, burial or funeral merchandise, burial or funeral services, or any other right or thing of value in connection with the final disposition of human remains. The owner of a cemetery, the executive officers, and general partners of a cemetery company shall not be deemed to be salespersons within the meaning of this definition unless they are paid a commission for the sale of said property, lots, rights, burial or funeral merchandise, or burial or funeral services.

(35) "Secretary of State" means the Secretary of State of the State of Georgia.

(36) "Solicitation" means any communication in the context of an offer or sale of grave spaces, burial or funeral merchandise, or burial or funeral services which directly or implicitly requests a response from the recipient. (Code 1981, § 44-3-131, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, § 1;



Code 1981, § 10-14-3, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, §§ 1, 2/HB 910; Ga. L. 2007, p. 47, § 10/SB 103; Ga. L. 2007, p. 398, § 1/HB 391; Ga. L. 2008, p. 324, § 10/SB 455.)

**The 2007 amendments.** — The first 2007 amendment, effective May 11, 2007, part of an Act to revise, modernize, and correct the Code, revised language in paragraph (27). The second 2007 amendment, effective May 24, 2007, at the end of paragraph (3), deleted “, including without limitation a mausoleum, cremation urn, cremation bench, cremation marker, or cremorial”; in paragraph (14), substituted “means” for “mean” near the beginning and inserted “, including without limitation a crypt, private

mausoleum, or any other permanent above-ground structure not used for inurnment,” in the middle of the paragraph; and, in the middle of paragraph (21), substituted “any fashion, including without limitation in a columbarium niche, cremorial, cremation bench, cremation rock, urn,” for “an urn”.

**The 2008 amendment,** effective May 12, 2008, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (3).

### JUDICIAL DECISIONS

**Constitutional challenges.** — O.C.G.A. § 10-14-3(8) of the Georgia Cemetery and Funeral Services Act of 2000, O.C.G.A. § 10-14-1 et seq., did not violate the Establishment Clause because the Act’s purpose to protect consumer and public welfare,

health, and safety was clearly secular; the principal effect of the Act did not advance or inhibit religion, and the statute did not foster an excessive government entanglement with religion. *Ga. Cemetery Ass’n v. Cox*, 403 F. Supp. 2d 1206 (N.D. Ga. 2003).

#### 10-14-3.1. Authority of board.

The board shall have all administrative powers and other powers necessary to carry out the provisions of this chapter, including the authority to promulgate rules and regulations, and the Secretary of State shall delegate to the board all such duties otherwise entrusted to the Secretary of State; provided, however, that the Secretary of State shall have sole authority over matters relating to the regulation of funds, trust funds, and escrow accounts and accounting and investigations concerning such matters. (Code 1981, § 10-14-3.1, enacted by Ga. L. 2006, p. 1087, § 2A/HB 910.)

#### 10-14-4. Registration of dealers and cemeteries; perpetual care cemeteries trust funds; nonperpetual care cemeteries; preneed escrow accounts.

(a)(1) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any cemetery burial rights, mausoleum interment rights, columbarium inurnment rights, grave spaces, or other physical locations for the final disposition of human remains in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner pursuant to this Code section.

(2) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or sell burial or funeral merchandise or burial

services in this state unless such person is registered as or employed by and acting on behalf of and under the direction of a person registered as a cemetery owner under this Code section, a funeral director under Chapter 18 of Title 43, or a burial or funeral merchandise dealer under this Code section.

(3) Unless exempt under this chapter, it shall be unlawful for any person to offer for sale or to sell any preneed burial or funeral merchandise or preneed burial services in this state unless such person is registered as a preneed dealer or preneed sales agent pursuant to this Code section.

(4) It shall be unlawful for any person to offer for sale or to sell any funeral services in this state unless such person is licensed as a funeral director under the provisions of Chapter 18 of Title 43.

(b)(1) Every person desiring to be a registered cemetery owner shall file with the Secretary of State a separate registration application for each cemetery owned in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name, mailing address, and telephone number of the applicant, which for the purposes of this Code section shall be the legal owner of the land upon which the cemetery is located;

(B) The location and, if different from the information submitted for subparagraph (A) of this paragraph, the mailing address and telephone number of the cemetery;

(C) The location of all records of the applicant which relate to the cemetery;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A copy of cemetery rules and regulations, a certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation, and any amendments to such documents or any substantially equivalent docu-

ments. Any such document once filed with the Secretary of State pursuant to this chapter shall be deemed to be on file and incorporated into any subsequent renewal or filing of such cemetery registration; provided, however, that each applicant and registrant is under a continuing duty to update such filing and to notify the Secretary of State regarding any changes or amendments to the articles of incorporation, bylaws, cemetery rules and regulations, or substantially equivalent documents, and provided, further, that any applicant or registrant shall furnish to the Secretary of State additional copies of any such document upon request;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the cemetery or could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the cemetery;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Evidence satisfactory to the Secretary of State that the applicant owns for the cemetery unencumbered fee simple title to contiguous land in the minimum acreage required by this chapter or by rules issued by the Secretary of State in accordance with this chapter, properly zoned for use as a cemetery, and dedicated for such use, and a copy of a plat of survey thereto, provided that nothing herein shall prohibit the encumbrance of the undeveloped portion of cemetery property for the purpose of securing debt incurred for the purpose of developing or improving such property;

(L) Evidence satisfactory to the Secretary of State that the applicant has recorded, in the public land records of the county in which the land described in subparagraph (K) of this paragraph is located, a notice that contains the following language:



## NOTICE

The property described herein shall not be sold, conveyed, leased, mortgaged, or encumbered except as provided by the prior written approval of the Secretary of State, as provided in the Georgia Cemetery and Funeral Services Act of 2000.

Such notice shall have been clearly printed in boldface type of not less than ten points and may be included on the face of the deed of conveyance to the applicant or may be contained in a separate recorded instrument that contains a legal description of the property.

(M) The name, address, location, and telephone number of the perpetual care trust account depository or depositories, the names of the accounts, and the account numbers;

(N) The name, address, and telephone number of each trustee;

(O) A copy of a perpetual care trust fund agreement executed by the applicant and accepted by the trustee, and evidence satisfactory to the Secretary of State of the deposit into such account of the amount of the initial required deposit, the trust agreement being conditioned only upon issuance of a certificate of registration;

(P) Such other information and documents as the Secretary of State may require by rule; and

(Q) A filing fee of \$100.00.

(2) Every person desiring to be a registered preneed dealer shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if the applicant is an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to preneed sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority, if the applicant is some other entity and their respective addresses and telephone numbers; the name and

address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's preneed business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) A list of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any grave lots, burial rights, burial or funeral merchandise, or burial services on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) The name, address, location, and telephone number of the preneed escrow account depository or depositories, the names of the accounts, and the account numbers;

(L) An executed copy of the escrow agreement required by Code Section 10-14-7;

(M) The name, address, and telephone number of the escrow agent;

(N) Such other information and documents as the Secretary of State may require by rule; and

(O) A filing fee of \$250.00.

(3) Every person desiring to be a registered burial or funeral merchandise dealer shall file with the Secretary of State a registration application in a form prescribed by the Secretary of State, executed and duly verified under oath by the applicant, if an individual, or by an executive officer or general partner, if the applicant is a corporation or partnership, or by an

individual of similar authority, if the applicant is some other entity, and containing the following information:

(A) The name of the applicant;

(B) The location, mailing address, and telephone number of the applicant's principal business location in Georgia and the same information for other locations where business is conducted, together with any trade names associated with each location;

(C) All locations of the records of the applicant which relate to funeral or burial merchandise sales in Georgia;

(D) If the applicant is not a natural person, the names of the president, secretary, and registered agent if the applicant is a corporation, of each general partner if the applicant is a partnership, or of individuals of similar authority if the applicant is some other entity and their respective addresses and telephone numbers; the name and address of each person who owns 10 percent or more of any class of ownership interest in the applicant and the percentage of such interest; and the date of formation and the jurisdiction of organization of the applicant;

(E) A certified copy of a certificate of existence or certificate of authority issued in accordance with Code Section 14-2-128 if the applicant is a corporation;

(F) A description of any judgment or pending litigation to which the applicant or any affiliate of the applicant is a party and which involves the operation of the applicant's funeral or burial merchandise business in Georgia or which could materially affect the business or assets of the applicant;

(G) Whether the applicant or any affiliate of the applicant owns any other entities in Georgia regulated by this chapter and, if so, the location, mailing address, telephone number, and type of registration of such other entities;

(H) A consent to service of process meeting the requirements of Code Section 10-14-24 for actions brought by the State of Georgia;

(I) The name and business address of each individual employed, appointed, or authorized by the applicant to offer for sale or to sell any burial or funeral merchandise on behalf of the applicant;

(J) A balance sheet of the applicant dated as of the end of the most recent fiscal year and in no event dated more than 15 months prior to the date of filing, which the Secretary of State shall treat as confidential and not open to public inspection;

(K) Such other information and documents as the Secretary of State may require by rule;



(L) A filing fee of \$100.00; and

(M) A bond, if required by the rules and regulations of the Secretary of State.

(c) The Secretary of State may approve an application only after he or she has conducted an investigation of the applicant and determined that such applicant is qualified by character, experience, and financial responsibility to conduct the business for which the applicant is seeking registration in a legal and proper manner. A registration application filed under this Code section shall become effective upon the issuing of a certificate of registration by the Secretary of State or at such earlier time as the Secretary of State determines.

(d) Every registration under this subsection shall expire on the first day of August of each year. The registration must be renewed with the Secretary of State each year by the submission of a renewal application containing the information required in an application for initial registration to the extent that such information had not been included in an application or renewal application previously filed together with a sworn statement that all information not provided remains accurate. The filing fee for renewal of registration shall be \$50.00 for each cemetery of cemetery owners, \$100.00 for preneed dealers, and \$50.00 for burial or funeral merchandise dealers.

(e) The Secretary of State, by rule, may provide for exceptions from registration for cemeteries when the Secretary of State determines that the public interest does not require registration, provided that such cemeteries are in existence on or before July 1, 2000, consist of less than 25 acres, and are operated by nonprofit entities.

(f) Notwithstanding any provision to the contrary contained in this Code section, the following shall be exempt from registration as a burial or funeral merchandise dealer:

(1) Any registered cemetery owner;

(2) The owner of any cemetery exempt from registration with respect to sales of burial or funeral merchandise sold for use at such cemetery;

(3) Any licensed funeral director;

(4) Any person providing interment and disinterment services exclusively at cemeteries exempt from registration;

(5) Any monument manufacturer or dealer which does not install monuments in cemeteries required to be registered by this Code section;

(6) Any person who does not offer for sale or sell burial or funeral services or merchandise to the general public; and

(7) Any registered preneed dealer.

In addition, the Secretary of State, by rule, may provide for other exceptions from registration.

(g)(1) Any cemetery in operation on August 1, 1986 which offers perpetual care for some designated sections of its property but does not offer perpetual care to other designated sections shall be considered a perpetual care cemetery for purposes of this chapter. No cemetery formed or created on or after July 1, 2000, may fail to offer perpetual care for any part of such cemetery.

(2) Any nonperpetual care cemetery which was registered with the Secretary of State prior to August 1, 1986, may continue to be operated as such after that date and a renewal of such registration shall not be required.

(3) Any nonperpetual care cemetery which is shown to be of historical significance and is operated solely for historical nonprofit purposes shall be exempt from registration.

(4) Except as specifically authorized under paragraphs (2) and (3) of this subsection, from and after August 1, 1986, it shall be unlawful for any person to operate or establish a nonperpetual care cemetery. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-4, as redesignated by Ga. L. 2000, p. 882, § 1.)

**Cross references.** — Abandoned cemetery lots, § 44-5-211. Forfeiture of abandoned cemetery lots, § 44-5-211.

#### OPINIONS OF THE ATTORNEY GENERAL

**Insurance Code restrictions apply.** — The restrictions imposed by former Code 1933, § 56-1005 upon domestic insurers in making investments applied to the investment of the assets of perpetual care trust funds. 1974 Op. Att'y Gen. No. 74-51.

**Initial deposit is capital.** — For the purpose of determining what investments are permissible, the initial trust deposit required of a cemetery offering perpetual care should be considered minimum capital, and the balance of the corpus of the trust fund should be considered a reserve. 1974 Op. Att'y Gen. No. 74-51.

**Corpus of a perpetual care trust fund is generally a reserve** to provide for the payment of future liabilities. 1974 Op. Att'y Gen. No. 74-51.

**Family burial plot.** — Absent some local regulation to the contrary, a citizen could start a family burial plot on the citizen's own property; in the event of any death, however, all public health formalities would have to be complied with. 1975 Op. Att'y Gen. No. U75-9.

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Cemeteries, § 24. 76 Am. Jur. 2d, Trusts, § 90.

**C.J.S.** — 14 C.J.S., Cemeteries, §§ 1, 11, 29.

**ALR.** — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot, 32 ALR 1406; 47 ALR 70.

Duty as regards use of proceeds of sales of

cemetery lots for care, maintenance, or improvement of cemetery, 124 ALR 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 ALR2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

#### **10-14-5. Preneed sales agents; contracts; retention of employee data.**

(a) All individuals who offer preneed contracts to the public, or who execute preneed contracts on behalf of any entity required to be registered as a preneed dealer, and all individuals who offer, sell, or sign contracts for the preneed sale of burial rights shall be registered with the Secretary of State as preneed sales agents, pursuant to this Code section, unless such individuals are exempted under this chapter or individually own a controlling interest in a preneed dealer registered under this chapter.

(b) All preneed sales agents must be employed by a registered preneed dealer.

(c) A preneed dealer shall be liable for the activities of all preneed sales agents who are employed by the preneed dealer or who perform any type of preneed related activity on behalf of the preneed dealer. If a preneed sales agent violates any provision of this chapter, such preneed sales agent and each preneed dealer who employs such preneed sales agent shall be subject to the penalties and remedies set out in Code Sections 10-14-11, 10-14-19, 10-14-20, and 10-14-21.

(d) A preneed sales agent may be authorized to sell, offer, and execute preneed contracts on behalf of all entities owned or operated by the agent's sponsoring preneed dealer.

(e) If the application for his or her registration is sent by certified mail, return receipt requested, an individual may begin functioning as a preneed sales agent as soon as a completed application for registration, as set forth in subsection (g) of this Code section, is mailed to the Secretary of State, provided that, if any such sales agent fails to meet the qualifications set forth in this chapter, the preneed dealer shall immediately upon notification by the Secretary of State cause such agent to cease any sales activity on its behalf.

(f) The qualifications for a preneed sales agent are as follows:

(1) The applicant must be at least 18 years of age;

(2) The applicant must not be subject to any order of the Secretary of State that restricts his or her ability to be registered as a preneed sales agent; and



(3) The applicant must not have been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, have been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or have been convicted of a felony.

(g) An application for registration as a preneed sales agent shall be submitted to the Secretary of State with an application fee of \$100.00 by the preneed dealer on a form that has been designated by the Secretary of State and shall contain, at a minimum, the following:

(1) The name, address, social security number, and date of birth of the applicant and such other information as the Secretary of State may reasonably require of the applicant;

(2) The name, address, and license number of the sponsoring preneed dealer;

(3) A representation, signed by the applicant, that the applicant meets the requirements set forth in subsection (f) of this Code section;

(4) A representation, signed by the preneed dealer, that the applicant is authorized to offer, sell, and sign preneed contracts on behalf of the preneed dealer and that the preneed dealer has informed the applicant of the requirements and prohibitions of this chapter relating to preneed sales, the provisions of the preneed dealer's preneed contract, and the nature of the merchandise, services, or burial rights sold by the preneed dealer;

(5) A statement indicating whether the applicant has any type of working relationship with any other preneed dealer or insurance company; and

(6) A signed agreement by the applicant consenting to an investigation of his or her background with regard to the matters set forth in this Code section, including, without limitation, his or her criminal history.

(h) An individual may be registered as a preneed sales agent on behalf of more than one preneed dealer, provided that the individual has received the written consent of all such preneed dealers.

(i) A preneed dealer who has registered a preneed sales agent shall notify the Secretary of State within three business days of a change in such individual's status as a preneed sales agent with such preneed dealer or upon the occurrence of any other event which would disqualify the individual as a preneed sales agent.

(j) Upon receipt and review of an application that complies with all of the requirements of this Code section, the Secretary of State shall register the applicant. The department shall by rule provide for annual renewal of registration and a renewal fee of \$50.00.

(k) Each cemetery registered under this chapter shall maintain in its files for a period of five years a properly completed and executed application for employment in a form prescribed by the Secretary of State for each employee, officer, independent contractor, or other agent directly or indirectly involved in cemetery or preneed sales or any person occupying a similar status or performing similar functions. If a request is made, said forms shall be made available for inspection by authorized representatives of the Secretary of State. (Code 1981, § 44-3-132, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, § 2; Code 1981, § 10-14-5, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### **10-14-6. Irrevocable trust fund.**

(a)(1) Each cemetery or cemetery company required to be registered by this chapter shall establish and maintain an irrevocable trust fund for each cemetery owned.

(2) For trust funds established on or after July 1, 2000, the initial deposit to said irrevocable trust fund shall be the sum of \$10,000.00 and the deposit of said sum shall be made before selling or contracting to sell any burial right. No such initial deposit shall be required with respect to any cemetery for which there is an existing perpetual care account on July 1, 2000. The trust fund shall apply to sales or contracts for sale of lots, grave spaces, niches, mausoleums, columbaria, urns, or crypts in which perpetual care has been promised or guaranteed.

(3) The initial corpus of the trust fund and all subsequent required deposits shall be deposited in a state bank, state savings and loan institution, savings bank, national bank, or federal savings and loan institution, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other depository or trustee which is approved by the Secretary of State or which meets the standards contained in the rules and regulations promulgated by the Secretary of State.

(4) Each perpetual care trust fund established on or after July 1, 2000, shall be named "The \_\_\_\_\_ Cemetery \_\_\_\_\_ Perpetual Care Trust Fund" with the first blank being filled by the name of the cemetery and the second blank being filled by the month and year of the establishment of such trust fund. If a cemetery has a perpetual care trust fund existing on July 1, 2000, and the perpetual care trust fund agreement permits, the cemetery may make additional deposits to such a trust fund on the condition that the entire corpus of the trust fund, any income earned by the trust fund, and any subsequent deposits to the trust fund are thereafter governed by the provisions of this chapter, the

“Georgia Cemetery and Funeral Services Act of 2000,” as it existed on July 1, 2000, except for the amount of the initial deposit to the trust fund. If a cemetery owner or company elects to establish a new perpetual care trust fund subject to the provisions of this chapter, the “Georgia Cemetery and Funeral Services Act of 2000,” as it existed on July 1, 2000, any perpetual care trust fund which existed on July 1, 2000, is subject to the provisions of law in effect on the date of its establishment, and deposits for sales transacted on or after July 1, 2000, shall be deposited in the trust fund established on or after July 1, 2000. If a cemetery existing on July 1, 2000, has an existing perpetual care trust fund which complies with provisions of law in effect on the date of its establishment, a new trust fund created in compliance with this chapter shall not require an initial deposit.

(b) Whenever any burial right, cemetery lot, grave space, niche, mausoleum, columbarium, urn, or crypt wherein perpetual care or endowment care is promised or contracted for or guaranteed is sold by any cemetery, the cemetery shall make deposits to the trust fund that equal 15 percent of the sales price of the burial right or 7.5 percent of the total sales price of any mausoleums, niches, columbaria, urns, or crypts, provided that the minimum deposit for each burial right shall be \$50.00; provided, further, that on July 1, 2003, and every three years thereafter, the amount of said minimum deposit shall be adjusted by the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustment to the amount of said minimum deposit by rule. Deposits to the trust fund shall be made not later than 30 days following the last day of the month in which payment therefor is made, or, in the case of a free space, the month in which the space is given. In the event any sale is made on an installment basis, not less than a pro rata share of the principal portion of each payment made and allocated to the lot, grave, space, niche, mausoleum, columbarium, urn, or crypt shall be allocated to the required trust fund deposit, provided that all deposits to the trust fund shall be completed within six years from the date of the signing of the perpetual care contract. The manner of any such allocation shall be clearly reflected on the books of the registrant.

(c) The initial \$10,000.00 corpus of the perpetual care trust fund shall not be counted as part of the required periodic deposits and shall be considered to be corpus or principal.

(d) The income earned by the trust fund shall be retained by the trust fund. At such time as either:

(1) The cemetery owner is not licensed and has not been licensed for 90 or more consecutive days to sell burial rights;

(2) The cemetery is under the management of a receiver; or



(3) Less than 50 percent of available lots are unsold,

95 percent of the income from the trust fund shall be paid to the owner or receiver exclusively for covering the costs of care and maintenance of the cemetery, including reasonable administrative expenses incurred in connection therewith. The income of the trust fund shall be paid to the owner or receiver at intervals agreed upon by the recipient and the trustee, but in no case shall the income be paid more often than monthly.

(e) There shall be no withdrawals from the trust fund except pursuant to the provisions of this chapter or by court order.

(f)(1) The assets of a trust fund shall be invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees regarding the making and depositing of investments with trust moneys pursuant to Code Sections 53-8-1 through 53-8-4 of the "Pre-1998 Probate Code," if applicable, or Code Section 53-8-1 and Code Section 53-12-287 of the "Revised Probate Code of 1998." Subject to said terms, conditions, limitations, and restrictions, the trustee of the perpetual care trust fund shall have full power to hold, purchase, sell, assign, transfer, reinvest, and dispose of any of the securities and investments in which any of the assets of said fund are invested, including proceeds of investments.

(2) Any state bank, national bank, or other financial institution authorized to act in a fiduciary capacity in this state, which presently or in the future serves as a fiduciary or cofiduciary of the trust fund of a perpetual care cemetery, may invest part or all of such trust fund held by it for investment in interests or participation in one or more common trust funds established by that state bank, national bank, or other financial institution for collective investment, if such investment is not expressly prohibited by the instrument, judgment, decree, or order creating the fiduciary relationship and if, in the case of cofiduciaries the trust institution procures the consent of its cofiduciary or cofiduciaries to such investment, and notwithstanding the fact that such common trust funds are not invested and reinvested subject to all the terms, conditions, limitations, and restrictions imposed by the laws of the State of Georgia upon executors and trustees in the making and disposing of their investments.

(3) Notwithstanding any other provision of this subsection, the Secretary of State shall establish rules and regulations for investments of a trust fund established on or after July 1, 2000, or otherwise governed by this chapter, the "Georgia Cemetery and Funeral Services Act of 2000," as it existed on July 1, 2000, as necessary to preserve the corpus and income of such a fund and for determining what restrictions are necessary for such purpose.

(4) At any time, in the event that the perpetual care trust fund contains an amount less than the amount required by this Code section,

the cemetery owner shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the perpetual care trust fund an amount equal to such shortfall. In the event that the Secretary of State and the cemetery owner disagree regarding the amount of such shortfall, no penalty shall be imposed upon the cemetery owner for any failure to comply with this paragraph unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(g) Moneys of the perpetual care trust fund shall not be invested in or loaned to any business venture controlled by the cemetery owner, a person who owns a controlling interest of a cemetery owner that is not a natural person, or an affiliate of any of these persons or entities.

(h) The trustee shall furnish yearly to the Secretary of State a financial report in a form designated by the Secretary of State with respect to the perpetual care trust fund.

(i) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the trust account as required by this chapter or of fraud, theft, or misconduct by the owners of the cemetery or the officers or directors of a cemetery company which has wasted or depleted such funds, the cemetery owners or the officers or directors of a cemetery company may be held jointly and severally liable for any deficiencies in the trust account as required in this chapter. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-6, as redesignated by Ga. L. 2000, p. 882, § 1.)

**Cross references.** — Abandoned cemetery lots, § 44-5-211. Forfeiture of abandoned cemetery lots, § 44-5-211.

#### OPINIONS OF THE ATTORNEY GENERAL

**Insurance Code restrictions apply.** — The restrictions imposed by former Code 1933, § 56-1005 upon domestic insurers in making investments apply to the investment of the assets of perpetual care trust funds. 1974 Op. Att'y Gen. No. 74-51.

**Initial deposit is capital.** — For the purpose of determining what investments are permissible, the initial trust deposit required of a cemetery offering perpetual care should be considered minimum capital, and the balance of the corpus of the trust fund should be considered a reserve. 1974 Op. Att'y Gen. No. 74-51.

**Corpus of a perpetual care trust fund is generally a reserve** to provide for the payment of future liabilities. 1974 Op. Att'y Gen. No. 74-51.

**Family burial plot.** — Absent some local regulation to the contrary a citizen could start a family burial plot on the citizen's own property; in the event of any death, however, all public health formalities would have to be complied with. 1975 Op. Att'y Gen. No. U75-9.

## RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Cemeteries, § 24. 76 Am. Jur. 2d, Trusts, § 90.

**C.J.S.** — 14 C.J.S., Cemeteries, §§ 1, 11, 29.

**ALR.** — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot, 32 ALR 1406; 47 ALR 70.

Duty as regards use of proceeds of sales of cemetery lots, for care, maintenance, or improvement of cemetery, 124 ALR 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 ALR2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

**10-14-7. Preneed escrow accounts.**

(a)(1) Each preneed dealer which sells burial or funeral merchandise on a preneed basis or preneed burial or funeral services shall establish and maintain a preneed escrow account.

(2) With respect to each monument and outer burial container, and except as otherwise provided in paragraph (3) of this subsection, the amount to be deposited to said escrow account shall be not less than 35 percent of the sales price of such monument or outer burial container; in no event shall the amount deposited be less than 110 percent of the wholesale price of such monument or outer burial container. For any other burial or funeral merchandise, the amount to be deposited to said escrow account shall be not less than 100 percent of the sales price of such merchandise; in no event shall the amount deposited be less than 110 percent of the wholesale price of such merchandise. If the contract of sale shall include grave spaces or items not deemed to be burial or funeral merchandise, the portion of the sales price attributable to the sale of the burial or funeral merchandise shall be determined, and it shall only be as to such portion of the total contract as constitutes burial or funeral merchandise that the deposit described in this paragraph shall be required. In the event that the sale of burial or funeral merchandise is under an installment contract, the required trust deposit shall be a pro rata part of the principal portion of each installment payment, such deposit only being required as payments are made by the purchaser for such burial or funeral merchandise. In the event the installment contract is discounted or sold to a third party, the seller shall be required to deposit an amount equal to the undeposited portion of the required deposit of the sales price of such burial or funeral merchandise at such time as if the contract were paid in full.

(3) With respect to a monument or outer burial container the itemized sales price of which does not include the installation of such item, 100 percent of the installation cost shall be deposited in the escrow account.



(4) With respect to cash advance items and the sale of preneed funeral or burial services, the amount to be deposited to said escrow account shall be 100 percent of the sales price of such funeral or burial services or the full amount of a cash advance item. The time and manner of deposit shall be the same as that specified for deposit of burial or funeral merchandise sale funds to the escrow account.

(b) The deposit specified in paragraphs (2) and (3) of subsection (a) of this Code section shall be made not later than 30 days following the last day of the month in which any payment is received.

(c) The preneed escrow account shall be established and maintained in a state bank, state savings and loan institution, savings bank, national bank, federal savings and loan association, whose deposits are insured by the Federal Deposit Insurance Corporation or other governmental agency, or a state or federally chartered credit union insured under 12 U.S.C. Section 1781 of the Federal Credit Union Act, or other organization approved by the Secretary of State which is located and doing business in this state.

(d)(1) Funds shall be released from the escrow account when the burial or funeral merchandise is delivered at the time of need or to the purchaser at the purchaser's request or, in the case of a monument, attached to realty, or at such times as described in the rules and regulations promulgated by the Secretary of State, not exceeding the lesser of 30 days from receipt of application for release or the time within which a preneed dealer is required by law to provide a refund to a purchaser. A preneed dealer is prohibited from requiring preneed delivery to the consumer as a condition of the sale. Outer burial containers may not be delivered prior to need. Deposits made from funds received in payment of preneed services shall remain in the escrow account until such services are performed, at which time said funds may be released to the preneed dealer. The trustee may require certification by the preneed dealer of delivery of merchandise or performance of services before release of funds.

(2) The funds on deposit under the terms of this subsection shall be deemed and regarded as escrow funds pending delivery of the burial or funeral merchandise concerned and said funds may not be pledged, hypothecated, transferred, or in any manner encumbered by the escrow agent nor may said funds be offset or taken for the debts of the preneed dealer until such time as the merchandise has been delivered or the services performed; but after delivery of the burial or funeral merchandise concerned.

(e) At any time, in the event that the preneed escrow account contains an amount less than the amount required by this Code section, the preneed dealer shall, within 15 days after the earlier of becoming aware of such fact or having been so notified by the Secretary of State, deposit into the

preneed account an amount equal to such shortfall. In the event that the Secretary of State and the preneed dealer disagree regarding the amount of such shortfall, no penalty shall be imposed upon the preneed dealer for any failure to comply with this provision unless such failure occurs after notice and opportunity for a hearing as provided in Code Section 10-14-23.

(e.1) In the case of release of escrowed funds to a purchaser at the purchaser's request pursuant to paragraph (1) of subsection (d) of this Code section, a sum not less than the lesser of 10 percent of the escrowed amount or one-half of the interest earned upon such funds as of the date of release, as provided by the Secretary of State by rule or regulation, may be retained by the preneed dealer as administrative costs.

(f) Upon a finding by a court of competent jurisdiction of failure to deposit or maintain funds in the preneed escrow account as required by this chapter or of fraud, theft, or other misconduct by the preneed dealer or the officers or directors of the preneed dealer which has wasted or depleted such funds, the preneed dealer or the officers or directors of the preneed dealer may be held jointly and severally liable for any deficiencies in the preneed escrow account. (Code 1981, § 44-3-134, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Ga. L. 1986, p. 1468, §§ 4-6; Ga. L. 1994, p. 329, § 1; Ga. L. 1998, p. 128, § 44; Code 1981, § 10-14-7, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 3/HB 910.)

**Cross references.** — Forfeiture of abandoned cemetery lots, § 44-5-211.

**Code Commission notes.** — Pursuant to

Code Section 28-9-5, in 1985, "of this subsection" was substituted for "hereof" in paragraph (d)(2).

#### RESEARCH REFERENCES

**Am. Jur. 2d.** — 14 Am. Jur. 2d, Cemeteries, § 24. 76 Am. Jur. 2d, Trusts, § 90.

**C.J.S.** — 14 C.J.S., Cemeteries, §§ 1, 11, 29.

**ALR.** — Failure to procure occupational or business license or permit as affecting validity or enforceability of contract, 30 ALR 834; 42 ALR 1226; 118 ALR 646.

Validity and reasonableness of rules and regulations of cemetery company or association as to improvement or care of lot; 32 ALR 1406; 47 ALR 70.

Duty as regards use of proceeds of sales of cemetery lots, for care, maintenance, or improvement of cemetery, 124 ALR 279.

Single or isolated transactions as falling within provisions of commercial or occupational licensing requirements, 93 ALR2d 90.

Recovery back of money paid to unlicensed person required by law to have occupational or business license or permit to make contract, 74 ALR3d 637.

#### 10-14-8. Prohibition of certain persons from employment; notice and hearing; emergency orders.

(a) The Secretary of State, by order, may prohibit a person who is an employee, officer, independent contractor, or other agent directly involved in the sale of burial rights, burial or funeral merchandise, or burial or

funeral services from employment or other association with a registrant under this chapter if the Secretary of State finds that such is in the public interest and that said person:

(1) Has willfully made or caused to be made, in any documents filed with the Secretary of State under this chapter, or in any hearings conducted by the Secretary of State, any statement which, at the time and in the light of the circumstances under which it was made, was false or misleading with respect to any material fact, or has willfully omitted to state in any application any material fact which is required to be stated therein or necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading;

(2) Has willfully violated or willfully failed to comply with any provision of this chapter or a predecessor law or any regulation or order promulgated or issued under this chapter or any predecessor law;

(3) Has been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, has been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or has been convicted of a felony;

(4) Has engaged in any unethical or dishonest practices in the funeral or cemetery business; or

(5) Is permanently or temporarily enjoined, suspended, or barred by any court of competent jurisdiction or by any state or other jurisdiction from engaging in or continuing any conduct or practice involving any aspect of the funeral or cemetery business.

(b) Where the Secretary of State finds that there are grounds for the prohibition from employment provided in this Code section, he or she may issue an order prohibiting an employee, officer, independent contractor, or other agent directly or indirectly involved in cemetery or preneed sales or any person occupying a similar status or performing similar functions from employment with a registered cemetery or preneed dealer. Such an order shall not be effective until notice and opportunity for hearing are provided in accordance with Code Section 10-14-23 and until the Secretary of State shall issue a written order in accordance with Code Section 10-14-23; but the Secretary of State may, if he or she finds that the public safety or welfare requires emergency action, immediately issue an order prohibiting such person from such employment. Such an order of immediate prohibition will expire automatically if the Secretary of State fails to afford notice and opportunity for hearing pursuant to Code Section 10-14-23. (Code 1981, § 44-3-133, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, § 3; Code 1981, § 10-14-8, as redesignated by Ga. L. 2000, p. 882, § 1.)



**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1985, in the first sentence of subsection (b) “provided in this Code section” was substituted for “herein provided”.

Pursuant to Code Section 28-9-5, in 1986 “of State” was inserted following “Secretary” throughout subsection (b).

### **10-14-9. Amendment of registration application; state audit of records; change of ownership.**

(a) A registration application may be amended by filing with the Secretary of State an amended application signed by the persons required to sign the original application under Code Section 10-14-4 or 10-14-5.

(b) Every applicant registered pursuant to Code Section 10-14-4 or 10-14-5 shall agree to deliver in Georgia, on demand of the Secretary of State, all records and documents concerning funds, accounts, transactions, and activities of said applicant or said applicant shall agree to pay the expenses incurred in sending an auditor approved by the Secretary of State to wherever such records and documents are located for the purpose of conducting an audit pursuant to the provisions of this chapter.

(c) When any cemetery or preneed dealer registered under Code Section 10-14-4 is sold or the ownership is otherwise transferred, or a controlling interest is sold or transferred, the vendor or the transferor of such cemetery, preneed dealer, or interest shall remain liable for any funds that should have been deposited prior to the date of such sale or transfer in the perpetual care trust fund or the preneed escrow account, or both.

(1) Prior to such sale or transfer, the vendor or transferor shall notify the Secretary of State of the proposed transfer and submit to the Secretary of State any document or record the Secretary of State may require in order to demonstrate that said vendor or transferor is not indebted to the perpetual care trust fund or the preneed escrow account, or both. After the transfer of ownership or control and the presentation of proof of currency of the perpetual care trust fund or the preneed escrow account, or both, by the vendor or transferor, the Secretary of State may require the presentation of proof of the continued current status of the perpetual care trust fund or the preneed escrow account, or both, by the vendee or transferee. The Secretary of State is authorized to recover from such vendor, transferor, vendee, or transferee, for the benefit of the perpetual care trust fund or the preneed escrow account, or both, all sums which the vendor, transferor, vendee, or transferee has not properly accounted for and paid into the trust fund.

(2) When the vendee or transferee has complied with the provisions of this subsection, he or she shall submit to the Secretary of State an application for registration and appropriate fees pursuant to Code Section 10-14-4. The Secretary of State shall then issue a certificate of registration to said vendee or transferee. (Code 1981, § 44-3-135, enacted

by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, §§ 7, 8; Ga. L. 1987, p. 3, § 44; Ga. L. 1992, p. 2397, § 1; Code 1981, § 10-14-9, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Cemeteries, § 11.

#### **10-14-10. Minimum acreage for cemeteries; exceptions.**

(a) Except as otherwise provided in subsections (b) and (c) of this Code section, every cemetery initially registered according to the provisions of this chapter on or after July 1, 1998, shall consist of not less than ten acres of land.

(b) The following cemeteries shall not be subject to the requirement of subsection (a) of this Code section:

(1) All cemeteries registered according to this chapter prior to August 1, 1986; or

(2) Cemeteries initially registered on or after August 1, 1986, but before July 1, 1998, which shall consist of not less than 25 acres of land, except for cemeteries subject to a provision of previous law, which allowed cemeteries consisting of not less than ten acres of land dedicated solely for burial purposes and located in counties having a population of less than 10,000 according to the United States decennial census of 1990 or any future such census.

(c) The Secretary of State may provide by rule or regulation for a smaller minimum size for a cemetery which consists solely of one or more columbaria. (Code 1981, § 44-3-135, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 1468, §§ 7, 8; Ga. L. 1987, p. 3, § 44; Ga. L. 1992, p. 2397, § 1; Code 1981, § 10-14-10, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 4/HB 910.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, “chapter” was substituted for “article” in paragraph (b)(1).

#### RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Cemeteries, § 11.

#### **10-14-11. Stop order suspending or revoking a registration; denial or refusal of application for registration; penalties.**

(a) The Secretary of State may issue a stop order denying effectiveness to, or suspending or revoking the effectiveness of, any registration and shall

give notice of such issuance pursuant to Code Section 10-14-23 if he or she finds that the order is in the public interest and that:

(1) The registration as of its effective date, or as of any earlier date in the case of an order denying effectiveness, contains an untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements therein not misleading;

(2) The applicant has failed to file financial reports required by subsection (h) of Code Section 10-14-12;

(3) The applicant has failed to pay the filing fees required by Code Section 10-4-4;

(4) The person or entity registered or sought to be registered or the individual owner, corporate owner, or person who owns a controlling interest of the corporate owner has been adjudicated, civilly or criminally, to have committed fraud or to have violated any law of any state involving fair trade or business practices, has been convicted of a misdemeanor of which fraud is an essential element or which involves any aspect of the funeral or cemetery business, or has been convicted of a felony;

(5) The trustee for the perpetual care trust fund or the escrow agent for the preneed escrow account has failed to file financial reports required by subsection (h) of Code Section 10-14-6 or subsection (g) of Code Section 10-14-29;

(6) The person or entity registered or seeking to be registered has become insolvent or has filed a voluntary petition for protection from creditors; or

(7) Any provision of this chapter or any rule, order, or condition lawfully imposed under this chapter has been willfully violated by:

(A) The person filing the registration application;

(B) The registrant's individual owner, corporate owner, or person who owns a controlling interest of the corporate owner; or

(C) The trustee or escrow agent of a trust fund or escrow account established and maintained pursuant to the provisions of this chapter.

(b) The Secretary of State may deny registration or refuse to grant renewal of registration if he or she finds that such refusal or denial is in the public interest and that:

(1) The registration application does not contain a current list of preneed sales agents and accompanying information as required by Code Section 10-14-4;

(2) The applicant has not paid filing fees or renewal fees as required by Code Section 10-14-4; or



(3) The applicant has not filed the financial reports required by Code Section 10-14-4 or subsection (h) of Code Section 10-14-12.

(c) In addition to the actions authorized in subsections (a) and (b) of this Code section, the Secretary of State shall be authorized to impose a penalty fee not to exceed \$500.00 for the late filing of an application for a renewal registration or late filing of financial reports required by this chapter, or both. However, the penalty fee or fees imposed for the late filing of an application for renewal of registration or financial reports may be waived by the Secretary of State upon a showing to the Secretary of the State that such late filing was due to circumstances beyond the control of the applicant or registrant despite the exercise by the applicant or registrant of due diligence in the timely filing of the application or report.

(d) The Secretary of State may by order summarily postpone or suspend the effectiveness of the registration or refuse to register any applicant pending final determination of any proceeding under this Code section. Upon the entry of the order, the Secretary of State shall promptly notify the applicant or registrant of the order and the reasons for the order and that, within 15 days after the receipt of a written request, the matter will be heard. If no hearing is requested and none is ordered by the Secretary of State, the order will remain in effect until it is modified or vacated by the Secretary of State. If a hearing is requested or ordered, the Secretary of State, after notice of an opportunity for hearing to the persons affected, may modify or vacate the order or extend it until final determination.

(e) The Secretary of State may vacate or modify a stop order if he or she finds that the conditions which prompted its entry have changed or that it is otherwise in the public interest to do so.

(f) No stop order issued under any part of this Code section, except the first sentence of subsection (d) of this Code section, shall become effective until and unless the Secretary of State has complied with the provisions of Code Section 10-14-23. (Code 1981, § 44-3-136, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1986, p. 10, § 44; Code 1981, § 10-14-11, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### RESEARCH REFERENCES

C.J.S. — 14 C.J.S., Cemeteries, §§ 11.

#### **10-14-12. Separate accounts and records; agreement form approval; owner acting as trustee; bond; removal of trustee or escrow agent; allocation of funds; financial reports.**

(a) Each registrant under paragraph (1) or (2) of subsection (b), or both, of Code Section 10-14-4 shall establish and maintain a separate and distinct account for the perpetual care trust fund for each cemetery and for the preneed escrow account. There shall be no commingling, codeposits, or

transfers of funds between the accounts, except pursuant to court order and with the knowledge and consent of the Secretary of State.

(b) Each registrant shall keep and maintain separate books, records, accounts, and documents regarding the transaction of its business. The books, records, accounts, and documents related to the keeping of funds pursuant to the provisions of this chapter and the rules and regulations promulgated under this chapter shall be kept and maintained by the registrant separately from the other books, records, accounts, and documents related to the transaction of business.

(c) A cemetery owner or an officer or director of a cemetery company may be a trustee of the perpetual care trust fund of a cemetery which the individual or cemetery company owns upon approval of the Secretary of State.

(d) The Secretary of State shall have the authority to prescribe or approve the form of the perpetual care trust agreement and shall have the authority to approve or disapprove any amendments to said trust agreement as of July 1, 1983.

(e) The Secretary of State shall have the authority to prescribe or approve the form of the preneed escrow account agreement and shall have the authority to approve or disapprove any amendments to said escrow account agreement as of July 1, 1983.

(f) A trustee or escrow agent of a registrant may be removed pursuant to the provisions of Code Section 10-14-19 or by other means provided by the laws of this state.

(g) Each perpetual care cemetery and preneed dealer shall file a report concerning the perpetual care trust and the preneed escrow account annually with the Secretary of State, provided that, after notice and a hearing, the Secretary of State may order more frequent reports in the event any such report is not filed in a timely manner or if the report filed contains errors and deficiencies. The report shall be on a form prescribed by the Secretary of State. (Code 1981, § 44-3-137, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1992, p. 6, § 44; Code 1981, § 10-14-12, as redesignated by Ga. L. 2000, p. 882, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000, the word “at” was deleted preceding “annually with the Secretary of State” in subsection (g).

### **10-14-13. Venue for civil or criminal actions.**

For the purposes of venue for any civil or criminal action under this chapter, any violation of this chapter or of any rule, regulation, or order promulgated under this chapter shall be considered to have been committed in any county in which any act was performed in furtherance of the transaction which violated this chapter, in the county of any violator’s

principal place of business in this state, in the county of the cemetery's or preneed dealer's or burial or funeral merchandise dealer's location or residence in this state, and in any county in which any violator had control or possession of any proceeds of said violation or of any books, records, documents, or other material or objects which were used in furtherance of said violation. (Code 1981, § 44-3-138, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-13, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### **10-14-14. Administration of chapter; rules and regulations.**

(a) The administration of the provisions of this chapter shall be vested in the Secretary of State.

(b) The Secretary of State shall keep a record of all proceedings related to his or her duties under this chapter and shall keep records in which shall be entered the names of all cemeteries, preneed dealers, preneed sales agents, and burial or funeral merchandise dealers to whom certificates of registration are issued, which records shall be open at all times for public inspection.

(c) The Secretary of State shall have the authority to administer oaths in, and to prescribe forms for, all matters arising under this chapter.

(d) The Secretary of State shall have authority to employ examiners, clerks and stenographers, and other employees as the administration of this law may require. The Secretary of State shall also have authority to appoint and employ investigators who shall have, in any case in which there is a reason to believe a violation of this chapter has occurred or is about to occur, the right and power to serve subpoenas and to swear out and execute search warrants and arrest warrants.

(e) The Secretary of State shall have the power to make such rules and regulations from time to time as he or she may deem necessary and proper for the enforcement of this chapter including, without limitation, rules regarding the solicitation of burial or funeral rights, merchandise, or services. The Secretary of State shall regulate such solicitation to protect the public from solicitation which is intimidating, overreaching, vexatious, fraudulent, or misleading; which utilizes undue influence; or which takes undue advantage of a person's ignorance or emotional vulnerability. Such rules and regulations shall be adopted, promulgated, and contested as provided in Chapter 13 of Title 50. (Code 1981, § 44-3-139, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981, § 10-14-14, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 5/HB 910.)

#### **10-14-15. Investigations by Secretary of State; subpoenas; hearings.**

(a) The Secretary of State, at his or her discretion:

(1) May make such public or private investigations or examinations inside or outside this state as he or she deems necessary to determine



whether any person has violated or is about to violate any provision of this chapter or any rule, regulation, or order under this chapter or to aid in the enforcement of this chapter or in the prescribing of rules and regulations under this chapter; and

(2) May require or permit any person to file a statement in writing, under oath or otherwise as the Secretary of State determines, as to all the facts and circumstances concerning the matter to be investigated.

(b) For the purpose of conducting any investigation as provided in this Code section, the Secretary of State shall have the power to administer oaths, to call any party to testify under oath at such investigations, to require the attendance of witnesses and the production of books, records, and papers, and to take the depositions of witnesses; and, for such purposes, the Secretary of State is authorized to issue a subpoena for any witness or a subpoena for the production of documentary evidence to compel the production of any books, records, or papers. Said subpoenas may be served by certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Secretary of State or shall be directed for service to the sheriff of the county where such witness resides or is found or where such person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid from the funds in the state treasury for the use of the Secretary of State in the same manner that other expenses of the Secretary of State are paid.

(c) In case of refusal to obey a subpoena issued under any Code section of this chapter to any person, a superior court of appropriate jurisdiction, upon application by the Secretary of State, may issue to the person an order requiring him or her to appear before the court to show cause why he or she should not be held in contempt for refusal to obey the subpoena. Failure to obey a subpoena may be punished by the court as contempt of court.

(d) The Secretary of State is authorized to hold investigative hearings with respect to any matter under this chapter. A hearing as provided for in this Code section may be conducted by any person designated by the Secretary of State for that purpose. A transcript of the testimony and evidence resulting from such hearing may, but need not, be transcribed by the Secretary of State. A report of the investigative hearing shall be included in the investigative report prepared for the Secretary of State. Any recommendations of the designated representative of the Secretary of State shall be advisory only and shall not have the effect of an order of the Secretary of State.

(e) The Secretary of State shall have the authority to inspect and review or cause to be reviewed the books of each registrant under this chapter. Said inspection or review may be conducted by the Secretary of State as frequently as the Secretary of State may deem appropriate. (Code 1981,

§ 44-3-140, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Ga. L. 1986, p. 1468, § 9; Ga. L. 1987, p. 3, § 44; Code 1981, § 10-14-15, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, section is applicable with respect to notices § 16, not codified by the General Assembly, delivered on or after July 1, 2000. provides that the amendment to this Code

#### **10-14-16. Cemetery rules and regulations; service charges.**

(a) The owner of every cemetery may make, adopt, and enforce rules and regulations for the use, care, control, management, restriction, and protection of such cemetery and of all parts and subdivisions thereof; for restricting, limiting, and regulating the use of all property within such cemetery; for regulating and preventing the introduction and care of plants or shrubs within such grounds; for regulating the conduct of persons and preventing improper assemblages therein; and for all other purposes deemed necessary by the owner of the cemetery for the proper conduct of the business of the cemetery and the protection of safeguarding the premises and the principles, plans, and ideas on which the cemetery was organized. From time to time, the owner may amend, add to, revise, change, modify, or abolish such rules and regulations. Such rules and regulations shall be plainly printed or typewritten, posted conspicuously, and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery; provided, however, that no cemetery to which the provisions of this chapter are applicable shall have the power to adopt any rule or regulation in conflict with any of the provisions of this chapter or in derogation of the contract rights of lot owners or owners of burial rights. Upon request, the registrant shall provide a copy of said rules and regulations to any person who requests it.

(b) The owner of every cemetery shall have the further right to establish reasonable rules and regulations regarding the type material, design, composition, finish, and specifications of any and all merchandise to be used or installed in the cemetery. Subject to the provisions of this Code section and rules of the Secretary of State, reasonable rules may further be adopted regarding the installing by the cemetery or others of all merchandise to be installed in the cemetery. Such rules and regulations shall be posted conspicuously and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery. Upon request, the registrant shall provide a copy of said rules and regulations to any person requesting it. No cemetery owner shall have the right to prevent the use of any merchandise purchased by a lot owner or owner of a burial right, his or her representative, his or her agent, or his or her heirs or assigns from any source, provided the merchandise meets all rules and regulations.

(c) All registrants shall have a full and complete schedule of all charges for grave lots, burial rights, burial or funeral merchandise, and burial or funeral services provided by the registrant plainly printed or typewritten, posted conspicuously, and maintained, subject to inspection and copy, at the usual place for transacting the regular business of the cemetery. Upon request, the registrant shall provide a copy of said schedule of charges to any person requesting it. (Code 1981, § 44-3-141, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981, § 10-14-16, as redesignated by Ga. L. 2000, p. 882, § 1.)

**Cross references.** — Abandoned cemetery lots, § 44-5-211.

### JUDICIAL DECISIONS

**Statute of limitations.** — Violations of former O.C.G.A. § 44-3-141 (see O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. *Reeves v. Edge*, 225 Ga. App. 615, 484 S.E.2d 498 (1997) (decided under former O.C.G.A. § 44-3-141).

### 10-14-17. Enumeration of prohibited acts; fees.

(a) It shall be unlawful for any person:

(1) To sell or offer to sell any burial rights, burial or funeral services, or burial or funeral merchandise by means of any oral or written untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading, the buyer not knowing of the untruth or omission, if such person shall not sustain the burden of proof that he did not know, and in the exercise of reasonable care could not have known, of the untruth or omission;

(2) To sell or offer to sell any, burial rights, burial or funeral services, or burial or funeral merchandise in violation of any provision of this chapter or rule, regulation, or order promulgated or issued by the Secretary of State under any provision of this chapter;

(3) Except as otherwise provided in paragraph (4) of this subsection, in connection with the sale of preneed merchandise or services requiring funds to be deposited into a preneed escrow account, to fail to refund, within three business days of the request of the purchaser or the purchaser's heirs or assigns, the sales prices plus applicable interest as determined according to rules promulgated by the Secretary of State, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the merchandise or services are intended to be used.



Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(4) In connection with the sale of monuments or vaults, to fail to refund within three business days of the request of the purchaser or the purchaser's heirs or assigns the full sales price, without interest, provided that such request is made prior to the earlier of:

(A) The delivery of the merchandise or services; or

(B) The death of the person for whose interment or inurnment the monument or vault is intended to be used.

Certain solicitations during a person's last illness relating to refunds shall be a violation of Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975," as set out in Code Section 10-1-393.7;

(5) To misappropriate, convert, illegally withhold, or fail to account for any trust funds, escrow funds, or other funds established or maintained pursuant to this chapter;

(6) Knowingly to cause to be made, in any document filed with the Secretary of State or in any proceeding under this chapter, any statement which is, at the time it is made and in the light of the circumstances under which it is made, false or misleading in any material respect;

(7) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of funeral services if such person is not a licensed funeral director;

(7.1) To sell, offer to sell, solicit offers to buy, or otherwise engage in the sale of burial rights or burial merchandise if such person is not registered pursuant to the provisions of this chapter; or

(8) To sell any grave space which has not been platted and pinned.

(b) It shall be unlawful for any person in connection with the ownership, offer, sale, or purchase of any burial rights, burial or funeral services, or burial or funeral merchandise, directly or indirectly:

(1) To employ any device, scheme, or artifice to defraud; or

(2) To engage in any transaction, act, practice, or course of business which operates or would operate as a fraud or deceit upon the purchaser or seller.

(c) In connection with the sale or installation of merchandise, it shall be unlawful for a cemetery company to:

(1) Impose any condition upon the installation of merchandise obtained from a third party, other than to require installation by a registrant under this chapter or as may be otherwise permitted by the rules and regulations of the Secretary of State;

(2) Charge a fee for the installation of merchandise purchased or obtained from and to be installed by a person or firm other than the cemetery company or its agents, provided that the cemetery owner may charge a fee not to exceed \$125.00 to reimburse the cemetery owner for its reasonable costs incurred in assisting in the siting of a monument on the lot on which it is to be installed, supervision and inspection of the installation to ensure compliance with the rules and regulations of the cemetery, and any administrative functions associated with the installation; provided, further, any such fee is properly disclosed and published as required by this chapter and charged regardless of whether the installer is or is not the cemetery owner or affiliated therewith;

(3) Refuse to mark the place on the grave where the merchandise is to be installed and inspect the installation when completed to ensure compliance with cemetery rules and regulations;

(4) Require any person or firm that installs, places, or sets merchandise to pay any fee other than any fee charged pursuant to paragraph (2) of this subsection;

(5) Tie the purchase of any grave space or burial right to the purchase of merchandise from or through the seller or any other designated person or corporation;

(6) Refuse to provide care or maintenance for any portion of a grave site on which a monument has been placed, provided that installation has been in accordance with lawful rules and regulations of the cemetery;

(7) Attempt to waive liability with respect to damage caused by cemetery employees or agents to merchandise after installation, where merchandise or installation service is not purchased from the cemetery company providing grave space or from or through any other person or corporation designated by the person authorized to sell grave space or the cemetery company providing grave space; provided, however, that no cemetery company may be held liable for the improper installation of merchandise where merchandise is not installed by the cemetery company or its agents;

(8) After the promulgation of rules and regulations relating to the subject matter of this subsection by the Secretary of State, to require any person who installs, places, or sets merchandise to obtain any form of insurance, bond, or surety or make any form of pledge, deposit, or monetary guarantee as a condition of entry or access to cemetery property or the installation of merchandise thereon, other than as may be in accordance with said rules and regulations.

(d) Other than the fees for the sale of burial rights, burial or funeral merchandise, and burial or funeral services, no other fee may be directly or indirectly charged, contracted for, or received by a cemetery company as a

condition for a customer to use any burial right, burial or funeral merchandise, or burial or funeral service, except for:

(1) Charges paid for opening and closing a grave and vault installation;

(2) Charges paid for transferring burial rights from one purchaser to another; however, no such fee may exceed \$75.00 and such fee must have been disclosed in writing to the owner at the time of the initial purchase of the burial right from the cemetery;

(3) Charges for sales, documentary, excise, and other taxes actually and necessarily paid to a public official, which charges must be supported in fact;

(4) Charges for credit life and credit disability insurance, but only as requested by the purchaser, and the premiums for which do not exceed the applicable premium chargeable in accordance with the rates filed with the Insurance Commissioner; or

(5) Charges for interest on unpaid balances in accordance with applicable law.

Nothing herein shall prohibit a cemetery company from charging a reasonable fee for services it provides in connection with a lawful disinterment, provided such charges do not exceed the greater of the cemetery company's normal and customary charges for interment or the actual costs incurred by the cemetery directly attributable to such disinterment. Nothing herein shall prohibit a cemetery from charging a reasonable fee for actual costs it incurs due to the commencement of a funeral service at a time other than previously agreed by the cemetery company, the funeral establishment, and the owner of the burial rights, or his or her heirs and assigns, provided such charges are calculated in a manner which is disclosed and published as required by this chapter and that such charges are directly attributable to extra costs incurred by the cemetery company due to such late commencement.

(e) In connection with the sale of burial rights, burial or funeral merchandise, or burial or funeral services, it shall be unlawful for any person to fail to comply with the provisions of Article 1 of Chapter 1 of this title, "The Georgia Retail Installment and Home Solicitation Sales Act" or Part 2 of Article 15 of Chapter 1 of this title, the "Fair Business Practices Act of 1975." For the purposes of this subsection, burial rights, burial or funeral services, and burial or funeral merchandise shall constitute goods as that term is used in said article and said part.

(f) In connection with the installation of a monument:

(1) It shall be unlawful for any person installing said monument to fail to comply with the lawful rules and regulations of the cemetery regarding



monument installation, provided that said rules and regulations are provided in writing to the installer prior to the installation. In the event such installation is not in conformity with said rules and regulations, the installer shall be liable to the cemetery for the actual cost of correcting such installation so it will be in conformity, provided that:

(A) The cemetery has notified the installer by certified mail, return receipt requested, of the reasons for the nonconformity not later than one year after the date of the installation; and

(B) The installer, provided it is registered under this chapter, shall have had not less than 30 days from its receipt of such notice to correct such nonconformity; and

(2) An installer of a monument shall be liable to the cemetery, to its customers, and to third persons for damages to their respective property and for other damages arising due to the negligence or intentional act of such installer, which liability may not be waived by contract.

(g) No program offering free burial rights may be conditioned on any requirement to purchase additional burial rights, burial or funeral merchandise, or burial or funeral services.

(h) The contract rights of any purchaser of preneed merchandise shall be freely transferable without fee except as provided in this chapter.

(i) It shall be unlawful for any owner or operator of a perpetual care cemetery to fail to provide care and maintenance for the cemetery.

(j) The fees set forth in this Code section shall be annually adjusted to the rate of change in the Consumer Price Index as reported by the Bureau of Labor Statistics of the United States Department of Labor. The Secretary of State shall adopt such adjustments to the amount of said fees by rule. (Code 1981, § 44-3-142, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-17, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2006, p. 1087, § 6/HB 910.)

## JUDICIAL DECISIONS

**Statute of limitations.** — Violations of former O.C.G.A. § 44-3-141 (see O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. *Reeves v. Edge*, 225 Ga. App. 615, 484 S.E.2d 498 (1997) (decided under former § 44-3-142).

**Constitutional challenges.** — Refund pro-

visions of the Georgia Cemetery and Funeral Services Act of 2000, specifically O.C.G.A. § 10-14-17(a)(3) and (4), did not violate the equal protection rights of a nonprofit cemetery association because the purpose of the provisions, to protect consumers from fraud in preneed purchasing, has a legitimate governmental purpose. *Ga. Cemetery Ass'n v. Cox*, 403 F. Supp. 2d 1206 (N.D. Ga. 2003).

**10-14-18. Duties of registrant; written contract.**

(a) A registrant offering to provide burial rights, burial or funeral merchandise, or burial or funeral services to the public shall:

(1) Provide by telephone, upon request, accurate information regarding the retail prices of burial or funeral merchandise and services offered for sale by the registrant;

(2) Fully disclose all regularly offered services and merchandise prior to the selection of burial rights, burial or funeral services, or burial or funeral merchandise. The full disclosure required shall identify the prices of all burial or rights, burial or funeral services, and burial or funeral merchandise provided by the registrant;

(3) Not make any false or misleading statements of the legal requirement as to the necessity of a casket or outer burial container;

(4) Provide a good faith estimate of all fees and costs the customer will incur to use any burial rights, merchandise, or services purchased;

(5) Provide to the customer a current copy of the rules and regulations of the registrant;

(6) Provide the registrant's policy on cancellation and refunds to each customer;

(7) Provide refunds if burial or funeral merchandise is not delivered as represented; and

(8) Provide the customer, upon the purchase of any burial right or burial or funeral merchandise or service, a written contract, the form of which has been filed with the Secretary of State.

(b) In a manner established by rule of the Secretary of State, the written contract shall provide on the signature page of the contract, clearly and conspicuously in boldface ten-point type or larger, the following:

(1) The words "purchase price" together with the sum of all items set out in the contract in accordance with subsection (d) of this Code section;

(2) The amount to be placed in trust;

(3) Either:

(A) A statement that no further expenses will be incurred at the time of need; or

(B) A statement that additional expenses will be incurred at the time of need, the registrant's current price for each such expense, and a statement that such prices may be expected to increase in the future; and

(4) The telephone number designated by the Secretary of State for questions and complaints.

(c) The written contract shall be completed prior to the signing of the contract by the customer and a copy of the contract shall be provided to the customer.

(d) The written contract shall provide an itemization of the amounts charged for all burial rights, burial or funeral services, burial or funeral merchandise, cash advances, and fees and other charges, which itemization shall be clearly and conspicuously segregated from everything else on the written contract.

(e) The written contract shall contain a description of the burial or funeral merchandise covered by the contract to include, when applicable, size, materials from which the burial or funeral merchandise is made, and other relevant specifications as may be required by the Secretary of State.

(f) The written contract shall disclose the location at which funeral services are to be provided and the space number of each lot or grave space. (Code 1981, § 10-14-18, enacted by Ga. L. 2000, p. 882, § 1.)

#### **10-14-19. Enforcement of article; civil penalties.**

(a) Whenever it may appear to the Secretary of State that any person has engaged in, or is engaging in, or is about to engage in any act or practice or transaction which is prohibited by this chapter or by any rule, regulation, or order of the Secretary of State promulgated or issued pursuant to any Code section of this chapter or which is declared to be unlawful under this chapter, the Secretary of State may, at his or her discretion, act under any or all of the following paragraphs:

(1) Issue an order, if he or she deems it to be appropriate in the public interest or for the protection of consumers, prohibiting such person from continuing such act, practice, or transaction, subject to the right of such person to a hearing as provided in Code Section 10-14-23;

(2) Apply to any superior court of competent jurisdiction in this state for an injunction restraining such person and such person's agents, employees, partners, officers, and directors from continuing such act, practice, or transaction or engaging therein or doing any acts in furtherance thereof, and for appointment of a receiver or an auditor and such other and further relief as the facts may warrant; or

(3) Transmit such evidence as may be available concerning such act, practice, or transaction to any district attorney or to the Attorney General, who may, at his or her individual discretion, institute the necessary criminal proceedings.

(b) In any proceedings for an injunction, the Secretary of State may apply for and be entitled to have issued the court's subpoena requiring the



appearance forthwith of any defendant and its agents, employees, partners, officers, or directors, and the production of such documents, books, and records as may appear necessary for the hearing upon the petition for an injunction. Upon proof of any of the offenses described in this Code section, the court may grant such injunction and appoint a receiver or an auditor and issue such other orders for the protection of the public as the facts may warrant.

(c) In any criminal proceeding, either the district attorney or the Attorney General, or both, may apply for and be entitled to have issued the court's subpoena requiring the appearance forthwith of any defendant or its agents, employees, partners, officers, or directors and the production of such documents, books, and records as may appear necessary for the prosecution of such criminal proceedings.

(d) In any civil proceeding brought under this Code section, if the Secretary of State shall establish that a perpetual care trust fund or preneed escrow account has not been established and maintained as required, the assets of the cemetery, cemetery company, or preneed dealer may be seized and sold by the state under orders of the court to the extent necessary to provide said perpetual care trust fund or preneed escrow account and set up the same. In addition, where the registration has been revoked, the whole company property may be ordered sold after the perpetual care trust fund and preneed escrow account have been established so that the purchaser of the cemetery may continue to operate the same and maintain it under the terms of this chapter.

(e) The Secretary of State shall have the authority to petition a court of competent jurisdiction to remove a trustee or escrow agent for violation of the provisions of this chapter, the rules and regulations promulgated under this chapter, or for other unlawful acts and practices.

(f) In addition to any other penalties that may be imposed, any person willfully violating any provisions of Code Section 10-14-17 or 10-14-18 or of Code Section 10-14-11 or any rule, regulation, or order of the Secretary of State made pursuant to Code Section 10-14-17, 10-14-18, or 10-14-11 shall be subject to a civil penalty not to exceed \$10,000.00 for a single violation and not exceeding \$100,000.00 for multiple violations in a single proceeding or a series of related proceedings. The Secretary of State shall be authorized in his or her discretion to decline to impose a penalty or to impose any lesser penalty that he or she may deem to be sufficient and appropriate in any particular case. The amount of such penalty may be collected by the Secretary of State in the same manner that money judgments are now enforced in the superior courts of this state, except that the order or finding of the Secretary of State as to such penalty may be appealed according to the provisions of Code Section 10-14-22. (Code 1981, § 44-3-143, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-19, as redesignated by Ga. L. 2000, p. 882, § 1.)

**JUDICIAL DECISIONS**

**Priority of liens.** — Purchase-money security deed executed prior to the effective date of former O.C.G.A. § 44-3-143 (see O.C.G.A. § 10-14-19) had priority over the statutory lien pertaining to the preneed escrow account but not as to the lien on the perpetual care trust fund. *Connolly v. State*, 199 Ga. App. 887, 406 S.E.2d 222 (1991) (decided under former § 44-3-143).

**10-14-20. Criminal penalties.**

(a) Except as otherwise provided in subsection (b) of this Code section, any person who shall willfully violate any provision of this chapter shall be guilty of a misdemeanor and, upon conviction thereof, shall be subject to a fine of not more than \$1,000.00 or imprisonment not to exceed 12 months, or both.

(b) Any person who shall willfully violate Code Section 10-14-17, Code Section 10-14-18, or any provision of this chapter regarding the establishment, maintenance, or reporting of any trust, reserve, or escrow funds mandated by this chapter shall be guilty of a felony and, upon conviction thereof, shall be punished by a fine of not more than \$10,000.00 or imprisonment for not less than one and not more than five years, or both.

(c) Nothing in this chapter shall limit any statutory or common-law right of the state to punish any person for violation of any provision of any law. (Code 1981, § 44-3-144, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-20, as redesignated by Ga. L. 2000, p. 882, § 1.)

**10-14-21. Purchaser's remedy for violations.**

(a) Any person who violates any provision of subsection (a) of Code Section 10-14-17 shall be liable to the person buying such burial lot, burial right, burial merchandise, or burial service; and such buyer may bring action in any court of competent jurisdiction to recover the consideration paid in cash for the burial lot, burial right, burial merchandise, or burial service together with interest at the legal rate from the date of such payment, and reasonable attorney's fees and costs.

(b) In addition to the remedy set forth in subsection (a) of this Code section, a purchaser may apply to a court of competent jurisdiction in this state for an order authorizing the recovery of the preneed escrow deposit if a registrant fails to deliver burial merchandise or perform preneed burial services in accordance with the terms of the preneed sales contract.

(c) No person may bring action under this Code section more than two years from the date of the scheduled completion of the contract for sale or from the date of the sale if there is no contract for sale.

(d) Every cause of action under this chapter survives the death of any person who might have been a plaintiff or defendant.

(e) Nothing in this chapter shall limit any statutory or common-law right of any person in any court for any act involving the sale of a burial lot, burial right, burial merchandise, or burial services. (Code 1981, § 44-3-145, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-21, as redesignated by Ga. L. 2000, p. 882, § 1.)

### JUDICIAL DECISIONS

**Statute of limitations.** — Violations of former O.C.G.A. § 44-3-141 (see O.C.G.A. § 10-14-16) alleged in a complaint were treated as violations of former O.C.G.A. § 44-3-142 (see O.C.G.A. § 10-14-17) and were subject to the two-year statute of limitation. *Reeves v. Edge*, 225 Ga. App. 615, 484 S.E.2d 498 (1997) (decide under former § 44-3-145).

#### 10-14-22. Judicial appeal of order of Secretary of State.

(a) An appeal may be taken from any order of the Secretary of State resulting from a hearing held in accordance with the provisions of Code Section 10-14-23 by any person adversely affected thereby to the Superior Court of Fulton County, Georgia, by serving on the Secretary of State, within 20 days after the date of entry of such order, a written notice of appeal, signed by the appellant, stating:

(1) The order from which the appeal is taken;

(2) The ground upon which a reversal or modification of such order is sought; and

(3) A demand for a certified transcript of the record of such order.

(b) Upon receipt of such notice of appeal, the Secretary of State shall, within ten days thereafter, make, certify, and deliver to the appellant a transcript of the record of the order from which the appeal is taken, provided that the appellant shall pay the reasonable costs of such transcript. The appellant shall, within five days after receipt of such transcript, file such transcript and a copy of the notice of appeal with the clerk of the court. Said notice of appeal and transcript of the record shall constitute appellant's complaint. Said complaint shall thereupon be entered on the trial calendar of the court in accordance with the court's normal procedures.

(c) If the order of the Secretary of State shall be reversed, the court shall by its mandate specifically direct the Secretary of State as to his or her further action in the matter, including the making and entering of any order or orders in connection therewith and the conditions, limitations, or restrictions to be contained therein. (Code 1981, § 44-3-146, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-22, as redesignated by Ga. L. 2000, p. 882, § 1.)



**10-14-23. Administrative appeal of order of Secretary of State.**

(a) Where the Secretary of State has issued any order forbidding the sale of burial lots, burial rights, burial merchandise, or burial services under any provision of this chapter, he or she shall promptly send to the cemetery owner, cemetery company, burial or funeral merchandise dealer, or preneed dealer and to the persons who have filed such application for registration a notice of opportunity for hearing. Before entering an order refusing to register any person or entity and after the entering of any order for revocation or suspension, the Secretary of State shall promptly send to such person or entity a notice of opportunity for hearing. Hearings shall be conducted by the Secretary of State pursuant to this Code section.

(b) Notices of opportunity for hearing shall be served by investigators appointed by the Secretary of State or sent by certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address, and such notice shall state:

(1) The order which has issued or which is proposed to be issued;

(2) The ground for issuing such order or proposed order; and

(3) That the person to whom such notice is sent will be afforded a hearing upon request if such request is made within ten days after receipt of the notice.

(c) Whenever a person requests a hearing in accordance with the provisions of this Code section, there shall immediately be set a date, time, and place for such hearing, and the person requesting such hearing shall forthwith be notified thereof. The date set for such hearing shall be within 15 days, but not earlier than five days after the request for hearing has been made, unless otherwise agreed to by the issuer of the notice and the person requesting such hearing.

(d) For the purpose of conducting any hearing as provided in this Code section, the Secretary of State shall have the power to administer oaths, to call any party to testify under oath at such hearings, to require the attendance of witnesses and the production of books, records, and papers, and to take the depositions of witnesses; and for such purposes the Secretary of State is authorized, at the request of the person requesting such hearing or upon the official's own initiative, to issue a subpoena for any witnesses or a subpoena for the production of documentary evidence to compel the production of any books, records, or papers. Said subpoenas may be served by certified mail or statutory overnight delivery, return receipt requested, to the addressee's business mailing address or by investigators appointed by the Secretary of State or shall be directed for service to the sheriff of the county where such witness resides or is found or where such person in custody of any books, records, or papers resides or is found. The fees and mileage of the sheriff, witness, or person shall be paid

from the funds in the state treasury for the use of the Secretary of State in the same manner that other expenses of the Secretary of State are paid.

(e) At any hearing conducted under this Code section, a party or an affected person may appear in his or her own behalf or may be represented by an attorney. A stenographic record of the testimony and other evidence submitted shall be taken unless the Secretary of State and the person requesting such hearing shall agree that such a stenographic record of the testimony shall not be taken. A transcript of the proceeding shall be made available to a party upon the payment of reasonable costs. The Secretary of State shall pass upon the admissibility of such evidence, but a party may at any time make objections to such rulings thereon; and, if the Secretary of State refuses to admit evidence, the party offering the same shall make a proffer thereof and such proffer shall be made a part of the record of such hearing.

(f) If the Secretary of State does not receive a request for a hearing within the prescribed time, he or she may permit an order previously entered to remain in effect or he or she may enter a proposed order. If a hearing is requested and conducted as provided in this Code section, the Secretary of State shall issue a written order which shall set forth his or her findings with respect to the matters involved and enter an order in accordance with the Secretary's findings. (Code 1981, § 44-3-147, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1992, p. 6, § 44; Code 1981, § 10-14-23, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that the amendment to this Code section is applicable with respect to notices delivered on or after July 1, 2000.

#### **10-14-24. Effect of consent to service of process.**

When consent to service of process is required under this chapter, such consent to service of process shall be in the form prescribed by the Secretary of State, shall be irrevocable, and shall provide that actions brought by the State of Georgia arising out of or founded upon the sale of burial lots, burial rights, burial services, or burial merchandise in violation of this chapter may be commenced in any court of competent jurisdiction with proper venue within this state by the service of process or pleadings upon the Secretary of State against the person executing such consent. Notwithstanding any provision in any other law to the contrary, service of any such process or pleadings in any such action against a person who has filed a consent to service with the Secretary of State shall, if made on the Secretary of State, be by duplicate copies, one of which shall be filed in the office of the Secretary of State and the other shall immediately be forwarded by the Secretary of State by certified mail or statutory overnight delivery to the person against whom such process or pleadings are directed

at such person's latest address on file in the office of the Secretary of State. (Code 1981, § 44-3-148, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-24, as redesignated by Ga. L. 2000, p. 882, § 1; Ga. L. 2000, p. 1589, § 3.)

**Editor's notes.** — Ga. L. 2000, p. 1589, section is applicable with respect to notices § 16, not codified by the General Assembly, delivered on or after July 1, 2000. provides that the amendment to this Code

#### **10-14-25. Waiver of rights or defenses in cemetery purchase agreements void.**

Any condition, stipulation, or provision binding any person acquiring any burial lot, burial right, burial merchandise, or burial services to waive:

(1) Compliance with any provision of this chapter or of the rules and regulations promulgated under this chapter;

(2) Any rights provided by this chapter or by the rules and regulations promulgated under this chapter; or

(3) Any defenses arising under this chapter or under the rules and regulations promulgated under this chapter

shall be void. (Code 1981, § 44-3-149, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Ga. L. 1985, p. 149, § 44; Code 1981, § 10-14-25, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### **10-14-26. Secretary of State immune from liability.**

For any action taken or any proceeding had under the provisions of this chapter or under color of the law, the Secretary of State shall be immune from liability and action to the same extent that any judge of any court of general jurisdiction in this state would be immune. (Code 1981, § 44-3-150, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-26, as redesignated by Ga. L. 2000, p. 882, § 1.)

#### **10-14-27. Evidence in civil or criminal actions under article.**

(a) In any action, civil or criminal, a certificate signed and sealed by the Secretary of State, stating compliance or noncompliance with the provisions of this chapter, shall constitute prima-facie evidence of such compliance or noncompliance with the provisions of this chapter and shall be admissible in any such action.

(b) In any action, civil or criminal, copies, photostatic or otherwise, certified by the Secretary of State of any documents filed in his or her office and of any of his or her records shall be admissible with the same effect as the original of such documents or records would have if actually produced.



(Code 1981, § 44-3-151, enacted by Ga. L. 1983, p. 1508, § 1; Code 1981, § 10-14-27, as redesignated by Ga. L. 2000, p. 882, § 1.)

**10-14-28. Actions pending under prior law.**

(a) Prior law exclusively governs all actions, prosecutions, or proceedings which are pending or may be initiated on the basis of facts or circumstances occurring before July 1, 2000, except that no civil action may be maintained to enforce any liability under prior law unless brought within any period of limitation which applied when the cause of action accrued and, in any event, no later than July 1, 2000.

(b) All effective registrations under prior law, all administrative orders relating to such registrations, and all conditions imposed upon such registrations remain in effect. They shall be deemed to have been filed, entered, or imposed under this chapter but are governed by prior law.

(c) Judicial review of all administrative orders as to which review proceedings have not been instituted by July 1, 2000, are governed by Code Section 10-14-22, except that no review proceeding may be instituted unless the petition is filed within any period of limitation which applied to a review proceeding when the order was entered and, in any event, no later than August 1, 2000. (Code 1981, § 44-3-152, enacted by Ga. L. 1983, p. 1508, § 1; Ga. L. 1984, p. 22, § 44; Code 1981, § 10-14-28, as redesignated by Ga. L. 2000, p. 882, § 1.)

**10-14-29. Construction regulations; preconstruction trust funds.**

(a) A cemetery company shall start construction of that section of a mausoleum or columbarium in which sales, contracts for sales, reservations for sales, or agreements for sales are being made within four years after the date of the first such sale or 50 percent of the mausoleum or columbarium has been sold and the purchase price has been received, whichever occurs first. The construction shall be completed within five years after the date of the first sale made. If the units have not been completely constructed at the earlier of time of need or the time specified in this subsection, all moneys paid shall be refunded upon request, plus interest earned thereon for that portion of the moneys deposited in the preneed escrow account and an amount equal to the interest that would have been earned on that portion of the moneys that were not so deposited.

(b) A cemetery company that plans to offer for sale space in a section of a mausoleum or columbarium prior to construction shall establish a preconstruction trust fund by written instrument. The preconstruction trust fund shall be administered by a corporate trustee approved by the Secretary of State and not affiliated with the cemetery company and operated in conformity with applicable provisions of Code Section 10-14-7.

The preconstruction trust fund shall be separate from any other trust funds that may be required by this chapter.

(c) Before a sale, contract for sale, reservation for sale, or agreement for sale in a mausoleum section or columbarium may be made, the cemetery company shall compute the amount to be deposited to the preconstruction trust fund. The total amount to be deposited in the fund for each unit of the project shall be computed by dividing the cost of the project plus 10 percent of the cost, as computed by a licensed contractor, engineer, or architect, by the number of crypts or niches in the mausoleum or columbarium. When payments are received in installments, the percentage of the installment payment placed in trust must be identical to the percentage which the payment received bears to the total cost of the contract, including other burial or funeral merchandise and services purchased. Preconstruction trust fund payments shall be made within 30 days after the end of the month in which payment is received.

(d) When the cemetery company delivers a completed crypt, mausoleum, columbarium, or niche acceptable to the purchaser in lieu of the crypt or niche purchased prior to construction, all sums deposited to the preconstruction trust fund for that purchaser shall be paid to the cemetery company.

(e) Upon completion of the mausoleum section or columbarium, the cemetery company shall certify completion to the trustee and shall be entitled to withdraw all funds deposited to the account of such mausoleum section or columbarium.

(f) If the mausoleum section or columbarium is not completed within the time limits set out in this Code section, the trustee shall contract for and cause the project to be completed and pay therefor from the trust funds deposited to the project's account, paying any balance, less cost and expenses, to the cemetery company. The cemetery company shall be liable for any difference between the amount necessary to complete construction and the amount of trust funds.

(g) On or before January 31 of each year, the trustee shall file with the Secretary of State in the form prescribed by the Secretary of State, a full and true statement as to the activities of any trust established pursuant to this Code section for the preceding calendar year. (Code 1981, § 10-14-29, enacted by Ga. L. 2000, p. 882, § 1.)

#### **10-14-30. Adoption of minimum standards by Secretary of State.**

The Secretary of State, by rule, may adopt minimum standards for interment of human remains, including, without limitation, standards for depth of burial, composition of vaults, caskets, and other containers, siting and marking of burial lots, and minimum standards for construction of

mausoleums and columbaria. In addition, the Secretary of State may, by rule, provide for the minimum standards for or prohibition of aboveground burial containers. (Code 1981, § 10-14-30, enacted by Ga. L. 2000, p. 882, § 1.)



CHAPTER 15

BUSINESS ADMINISTRATION

Sec.		Sec.	
10-15-1.	Definitions.	10-15-5.	Enforcement; investigation of violations.
10-15-2.	Disposal of business records containing personal information.	10-15-6.	Penalty; hearing; effect of judgment.
10-15-3.	Handling of receipts for credit card transactions.	10-15-7.	Penalty; authority to prosecute.
10-15-4.	Prohibited activities involving magnetic strip or stripe on payment card.		

**Law reviews.** — For note on the 2002 enactment of §§ 10-15-1 to 10-15-4, see 19 Ga. St. U.L. Rev. 81 (2002).

10-15-1. Definitions.

As used in this chapter, the term:

(1) “Administrator” means the administrator of the “Fair Business Practices Act of 1975” appointed pursuant to subsection (a) of Code Section 10-1-395, or the administrator’s designee.

(2) “Business” means a sole proprietorship, partnership, corporation, association, or other group, however organized and whether or not organized to operate at a profit. The term includes a financial institution organized, chartered, or holding a license or authorization certificate under the laws of this state, any other state, the United States, or any other country, or the parent or the subsidiary of any such financial institution. The term also includes an entity that destroys records. However, for purposes of this chapter, the term shall not include any bank or financial institution that is subject to the privacy and security provisions of the Gramm-Leach-Bliley Act, 15 U.S.C. 6801, et seq., as amended, and as it existed on January 31, 2002, nor shall it include any hospital or health care institution licensed under Title 31 which is subject to the privacy and security provisions of the federal Health Insurance Portability and Accountability Act of 1996, P.L. 104-191, nor any other entity which is governed by federal law, provided that the federal law governing the business requires the business to discard a record containing personal information in the same manner as Code Section 10-15-2.

(3) “Cardholder” means any person or organization named on the face of a payment card to whom or for whose benefit the payment card is issued.

(4) “Customer” means an individual who provides personal information to a business for the purpose of purchasing or leasing a product or obtaining a service from the business.

(5) “Discard” means to throw away, get rid of, or eliminate.

(6) “Dispose” means the sale or transfer of a record for value to a company or business engaged in the business of record destruction.

(7) “Merchant” means any person or governmental entity which receives from a cardholder a payment card or information from a payment card as the instrument for obtaining, purchasing, or receiving goods, services, money, or anything else of value from a person or governmental entity.

(8) “Payment card” means a credit card, charge card, debit card, or any other card that is issued to a cardholder and that allows the cardholder to obtain, purchase, or receive goods, services, money, or anything else of value from a merchant.

(9) “Personal information” means:

(A) Personally identifiable data about a customer’s medical condition, if the data are not generally considered to be public knowledge;

(B) Personally identifiable data which contain a customer’s account or identification number, account balance, balance owing, credit balance, or credit limit, if the data relate to a customer’s account or transaction with a business;

(C) Personally identifiable data provided by a customer to a business upon opening an account or applying for a loan or credit; or

(D) Personally identifiable data about a customer’s federal, state, or local income tax return.

(10)(A) “Personally identifiable” means capable of being associated with a particular customer through one or more identifiers, including, but not limited to, a customer’s fingerprint, photograph, or computerized image, social security number, passport number, driver identification number, personal identification card number, date of birth, medical information, or disability information.

(B) A customer’s name, address, and telephone number shall not be considered personally identifiable data unless one or more of them are used in conjunction with one or more of the identifiers listed in subparagraph (A) of this paragraph.

(11) “Record” means any material on which written, drawn, printed, spoken, visual, or electromagnetic information is recorded or preserved, regardless of physical form or characteristics.

(12) “Reencoder” means an electronic device that places encoded information from the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different payment card.

(13) “Scanning device” means a scanner, reader, or any other electronic device that is used to access, read, scan, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card. (Code 1981, § 10-15-1, enacted by Ga. L. 2002, p. 551, § 8; Ga. L. 2003, p. 339, § 1.)

**Cross references.** — Identity fraud, Art. 8, Ch. 9, T. 16.

### **10-15-2. Disposal of business records containing personal information.**

A business may not discard a record containing personal information unless it:

- (1) Shreds the customer’s record before discarding the record;
- (2) Erases the personal information contained in the customer’s record before discarding the record;
- (3) Modifies the customer’s record to make the personal information unreadable before discarding the record; or
- (4) Takes actions that it reasonably believes will ensure that no unauthorized person will have access to the personal information contained in the customer’s record for the period between the record’s disposal and the record’s destruction. (Code 1981, § 10-15-2, enacted by Ga. L. 2002, p. 551, § 8.)

**Law reviews.** — For article, “The Growing Threat of Identity Theft and Its Implications for Employers,” see 11 Ga. St. B.J. 27 (2006).

### **10-15-3. Handling of receipts for credit card transactions.**

(a) A merchant who accepts a payment card for the transaction of business shall not print more than five digits of the payment card’s account number or print the payment card’s expiration date on a receipt provided to the cardholder. This subsection applies only to receipts described in subsection (b) of this Code section and does not apply to a transaction in which the sole means of recording the payment card’s account number or expiration date is by handwriting or by an imprint or copy of the payment card.

(b)(1) Effective July 1, 2004, subsection (a) of this Code section applies to receipts that are electronically transferred by a payment card processor and printed using a cash register or other machine or device that is first used on or after July 1, 2004.



(2) Effective July 1, 2006, subsection (a) of this Code section applies to all receipts that are electronically transferred by a payment card processor and printed, including those printed using a cash register or other machine or device that is first used before July 1, 2004. (Code 1981, § 10-15-4, enacted by Ga. L. 2002, p. 551, § 8; Ga. L. 2003, p. 339, § 2; Code 1981, § 10-15-3, as redesignated by Ga. L. 2003, p. 140, § 10.)

**Code Commission notes.** — The amendment of this Code section by Ga. L. 2003, p. 140, § 10, irreconcilably conflicted with and was treated as superseded by Ga. L. 2003, p. 339, § 2. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

#### **10-15-4. Prohibited activities involving magnetic strip or stripe on payment card.**

(a) No person shall use a scanning device to access, read, obtain, memorize, or store, temporarily or permanently, information encoded on the magnetic strip or stripe of a payment card with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant.

(b) No person shall use a reencoder to place information encoded on the magnetic strip or stripe of a payment card onto the magnetic strip or stripe of a different card with the intent to defraud the authorized user, the issuer of the authorized user's payment card, or a merchant. (Code 1981, § 10-15-4, enacted by Ga. L. 2003, p. 339, § 2.)

**Code Commission notes.** — The amendment of this former Code section by Ga. L. 2003, p. 140, § 10, irreconcilably conflicted with and was treated as superseded by Ga. L. 2003, p. 339, § 2. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

**Editor's notes.** — Ga. L. 2003, p. 339, § 2, provided for the repeal of former Code Section 10-15-4, effective July 1, 2003. For present comparable provisions, see Code Section 10-15-6.

#### **10-15-5. Enforcement; investigation of violations.**

(a) The administrator shall be authorized to enforce the provisions of this chapter.

(b) The administrator shall have the authority to investigate alleged violations of this chapter, including all investigative powers available under the "Fair Business Practices Act of 1975," Code Section 10-1-390, et seq., including, but not limited to, the power to issue investigative demands and subpoenas as provided in Code Sections 10-1-403 and 10-1-404.

(c) Nothing contained in this Code section precludes law enforcement or prosecutorial agencies from investigating violations of Code Section 10-15-4. (Code 1981, § 10-15-5, enacted by Ga. L. 2003, p. 339, § 2.)

**10-15-6. Penalty; hearing; effect of judgment.**

(a) If the administrator determines, after notice and hearing, that a business has violated Code Section 10-15-2, the administrator may issue an administrative order imposing a penalty of not more than \$500.00 for each customer's record that contains personal information that is wrongfully disposed of or discarded; provided, however, in no event shall the total fine levied by the administrator exceed \$10,000.00. It shall be an affirmative defense to the wrongful disposing of or discarding of a customer's record that contains personal information if the business can show that it used due diligence in its attempt to properly dispose of or discard such records.

(b) If the administrator determines, after notice and hearing, that a business has violated Code Section 10-15-3, the administrator may issue an administrative order imposing a penalty of not more than \$250.00 for the first violation of Code Section 10-15-3, and a penalty of \$1,000.00 for a second or subsequent violation of Code Section 10-15-3.

(c) The hearing and any administrative review in connection with alleged violations of Code Section 10-15-2 or 10-15-3 shall be conducted in accordance with the procedure for contested cases pursuant to Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." Any person who has exhausted all administrative remedies available and who is aggrieved or adversely affected by a final order or action of the administrator shall have the right of judicial review in accordance with Chapter 13 of Title 50, the "Georgia Administrative Procedure Act."

(d) The administrator may file in the superior court of the county in which the person under an order resides, or if the person is a corporation, in the superior court of the county in which the corporation under an order maintains its principal place of business, a certified copy of or the final order of the administrator, whether or not the order was appealed. Thereafter the court shall render a judgment in accordance with the order and notify the parties. The judgment shall have the same effect as a judgment rendered by the court. (Code 1981, § 10-15-6, enacted by Ga. L. 2003, p. 339, § 2; Ga. L. 2005, p. 60, § 10/HB 95.)

**10-15-7. Penalty; authority to prosecute.**

(a) A violation of Code Section 10-15-4 shall be punishable by imprisonment for not less than one nor more than three years or a fine not to exceed \$10,000.00, or both. Any person who commits a violation for the second or any subsequent offense shall be punished by imprisonment for not less than three nor more than ten years or a fine not to exceed \$50,000.00, or both.

(b) Any person found guilty of a violation of this chapter may be ordered by the court to make restitution to any consumer victim or any business victim of the fraud.

(c) Each violation of this chapter shall constitute a separate offense.

(d) The Attorney General and prosecuting attorneys shall have the authority to conduct the prosecution for a violation of Code Section 10-15-4.

(e) Upon a violation of this chapter, the court may issue any order necessary to correct a public record that contains false information resulting from the actions which resulted in the violation. (Code 1981, § 10-15-7, enacted by Ga. L. 2003, p. 339, § 2.)



# Index

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## A

### ABANDONMENT.

#### Georgia Museum property act.

Property loaned to museum or archives repository, §10-1-529.4.

#### Museum property act.

Property loaned to museum or archives repository, §10-1-529.4.

#### Property loaned to museum or archives repository, §10-1-529.4.

### ABRASIVES.

#### Marks.

Registration.

Abrasives and polishing materials, §10-1-443.

### ABUSIVE LANGUAGE.

#### Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.

### ACCOUNTANTS.

#### Geo. L. Smith II Georgia World Congress Center.

Employment, §§10-9-21, 10-9-24.

### ACCOUNTS AND ACCOUNTING.

#### Agents.

Profits from principal's property, §10-6-25.

Required to keep account, §10-6-30.

#### Business opportunity sales.

Trust accounts and escrow accounts, §10-1-412.

#### Cemeteries.

Preneed dealers.

Escrow account, §§10-14-4, 10-14-7, 10-14-12.

Separate accounts to be maintained by registrants, §10-14-12.

#### Conservators.

Duty to keep accounts, neglect, effect, §10-6-30.

#### Decedents' estates.

Executors and administrators.

Required to keep accounts, §10-6-30.

#### Executors and administrators.

Required to keep accounts, §10-6-30.

#### Fiduciaries.

Required to keep account, §10-6-30.

#### Geo. L. Smith II Georgia World Congress Center, §10-9-19.

## ACCOUNTS AND ACCOUNTING

—Cont'd

### Guardian and ward.

Required to keep accounts, §10-6-30.

### Preneed dealer escrow account, §§10-14-4, 10-14-7, 10-14-12.

### Receivers.

Required to keep accounts, §10-6-30.

### Revolving accounts.

Retail installment contracts and revolving accounts generally, §§10-1-1 to 10-1-16.

### Trustees.

Required to keep accounts, §10-6-30.

## ACTIONS.

### Agents.

Damages for unreasonable revocation, §10-6-33.

Interference with agent's possession, §10-6-83.

Prosecution of legal remedies for principal, §10-6-80.

Right of action against purported agent, §10-6-89.

Right of action on principal's contract, §10-6-82.

Wrongful discharge before termination of contract, §10-6-37.

### Art.

Limited edition art reproductions.

Civil remedies for violations, §10-1-435.

Printer contracting with customer to duplicate works of fine art.

Customer falsely stating legal right or licensing authorizing, §10-1-510.

### Auctioneers.

Actions by auctioneers in own names for goods sold, §10-6-82.

Sale of stolen horse or mule.

Liability, §10-1-530.

### Beauty pageants.

Liability for failure to post bond or establish escrow account, §10-1-838.

### Cemeteries.

Evidence in civil actions, §10-14-27.

Pending actions under prior law, §10-14-28.

Purchaser's remedy for violations, §10-14-21.

Venue, §10-14-13.

**ACTIONS —Cont'd**

**Commodities and commodity contracts and options.**

Actions by commissioner if chapter, rule or order violated, §§10-5A-21, 10-5A-22.

Venue, §10-5A-23.

**Deceptive trade practices.**

Fair business practices act of 1975.

Civil remedies by individuals, §10-1-399.

Limitation on recovery in case of bona fide error, §10-1-400.

**Farm tractor warranty act.**

Replacement of or refund for nonconforming tractor, §10-1-814.

Statute of limitations, §10-1-818.

Violation of informal dispute settlement procedures, §10-1-816.

**Gasoline below cost sales, §10-1-255.**

**Gasoline marketing practices.**

Actions by dealers against distributors for violations, §10-1-235.

Proceedings upon notice of termination prior to expiration, §10-1-237.

Actions by distributors against dealers for breach, §10-1-238.

Limitation of actions, §10-1-239.

**Geo. L. Smith II Georgia World Congress Center.**

Enforcement actions, §10-9-22.

Revenue bonds.

Enforcement rights by bondholders, receivers or indenture trustees, §10-9-52.

Venue and jurisdiction of actions against authority under chapter, §10-9-11.

**Heavy equipment multiline dealers, §10-1-739.**

**Horses.**

Liability of auctioneer for sale of stolen horse, §10-1-530.

**Indorser of note sued with maker, drawer or acceptor, §10-3-2.**

Indorser's action for payment of debt past due, §10-7-41.

**Interference with agent's possession, §10-6-83.**

**Lease-purchase agreements.**

Limitation of actions, §10-1-688.

Violations of article, §10-1-687.

**Lemon law.**

Farm tractors.

Replacement of or refund for nonconforming tractor, §10-1-814.

**ACTIONS —Cont'd**

**Lemon law —Cont'd**

Farm tractors —Cont'd

Statute of limitations, §10-1-818.

Violation of informal dispute settlement procedures, §10-1-816.

Motor vehicles.

Exhaustion of remedies required, §10-1-788.

**Motion pictures.**

Bidding by exhibitors.

Enforcement of article by civil action, §10-1-294.

**Motor vehicle franchises.**

Attorneys' fees on enforcement of article, §10-1-628.

Statute of limitations on actions arising out of article, §10-1-625.

Violations of article, §10-1-623.

Warranty service and repair of predelivery transportation damages.

Payment of attorneys' fees by manufacturer, distributor or warrantor, §10-1-643.

**Motor vehicles.**

Lemon law.

Exhaustion of remedies required, §10-1-788.

**Motor vehicle sales finance act.**

Assertion of violation on loan or contract only in individual action, §10-1-36.1.

Subleasing vehicles subject to retail installment contract, §10-1-41.

**Mules.**

Liability of auctioneer for sale of stolen mule, §10-1-530.

**Notes.**

Indorser sued with maker, drawer or acceptor, §10-3-2.

**Possession of principal's property by agent.**

Interference with, §10-6-83.

**Promotional giveaways or contests, §10-1-393.**

**Secondary metals recyclers.**

Contesting identification or ownership of regulated metal property, §10-1-354.

**Securities.**

Civil liability enforcement, §10-5-58.

Exemptions to liability, actions barred, §10-5-59.

Injunction actions, §10-5-72.

Predecessor provisions, actions under, §10-5-90.

Violations, burden of proof in civil and criminal proceedings, §10-5-52.

**ACTIONS —Cont'd**

**Solicitations.**

- Unsolicited merchandise sent or unordered merchandise sent after membership terminated.
- Action to enjoin payment request, §§10-1-50, 10-1-51.

**Suretyship.**

- Compelling contribution.
- Controlling action on debt, §10-7-53.
- Corporate sureties.
- Bad faith refusal to perform suretyship contracts, §10-7-30.
- Parties claiming protection under a payment bond or security deposit, §10-7-31.
- Payment of debt past due by surety, §10-7-41.
- Payment of debt pending action, §10-7-49.
- Process sued out and judgment entered against surety, §10-7-28.
- Refusal to sue principal after notice by surety.
- Discharge of surety, §10-7-24.

**Telemarketing deception, fraud or abuse.**

- Private right of action for violations, §10-5B-6.

**Trademarks and service marks.**

- Fraud or false representation in registering mark, §10-1-449.
- Infringement of registered mark, §10-1-450.
- Persons causing seizure of goods not counterfeit, §10-1-451.

**Trade name registration.**

- Actions brought by unregistered businesses.
- Costs paid if name not registered, §10-1-491.

**Trade secret misappropriation, §10-1-763.**

- Attorneys' fees, §10-1-764.
- Limitation of actions, §10-1-766.
- Protection of secret during action, §10-1-765.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Civil remedies by individuals, §10-1-399.
- Limitation on recovery in case of bona fide error, §10-1-400.

**Unsolicited merchandise sent or unordered merchandise sent after membership terminated.**

- Action to enjoin payment request, §§10-1-50, 10-1-51.

**ACTIONS —Cont'd**

**Warehouses.**

- State licensed and bonded warehouses.
- Bond, §10-4-14.
- State warehouse commissioner.
- Actions by and against, §10-4-53.

**Wholesale distribution by out-of-state principal.**

- Action by sales representative for payment of commissions, §10-1-702.

**ACT OF GOD.**

**Heavy equipment multiline dealers.**

- Termination, cancellation or refusal to renew agreement, §10-1-732.

**Motor vehicle franchises.**

- Termination, cancellation or renewal of franchise, §10-1-651.

**ADHESIVES.**

**Marks.**

- Registration.
- Classes of goods and services, §10-1-443.

**ADMINISTRATIVE PROCEDURE.**

**Buying clubs or services.**

- Applicability of administrative procedure act, §10-1-602.

**Certified public weighers.**

- Administrative penalty, §10-2-53.

**Commodities and commodity contracts and options, §10-5A-28.**

- Judicial review of commissioner's orders, §10-5A-29.

**Motor vehicle franchises.**

- Review of alleged violations, §10-1-667.

**Tobacco.**

- Carry-over storage and sale.
- Revocation or suspension of license, §10-4-153.
- Leaf tobacco sales and storage.
- Administrative review of objections to rules and regulations, §10-4-121.
- Judicial review of administrative decisions, §10-4-122.
- Licenses.
- Notice and hearing in revocation or suspension proceeding, §10-4-118.
- Revocation for early sale, §10-4-111.
- Suspension or revocation pending investigation, §10-4-119.

**Warehouses.**

- State licensed and bonded warehouses.
- Judicial review of administrative decisions, §10-4-9.



**ADMINISTRATIVE PROCEDURE**

—Cont'd

**Warehouses —Cont'd**

State licensed and bonded warehouses

—Cont'd

Rules and regulations.

Administrative review of objections,  
§10-46.

**Weights and measures.**

Administrative penalty for violating  
article, §10-2-21.

Certified public weighers.

Administrative penalty, §10-2-53.

**ADULTERATION.**

**Antifreeze, §10-1-201.**

Contents statement, §10-1-207.

Inspection, §10-1-203.

**Brake fluid, §10-1-181.**

Condemnation, §10-1-186.

Inspection, §10-1-185.

Sales prohibited, §10-1-183.

**Petroleum products.**

Sale of adulterated products, §10-1-162.

**ADVERTISING.**

**Antifreeze.**

References to licensing, §10-1-206.

**Art.**

Limited edition art reproductions.

Advertising and sale of multiples  
generally, §10-1-431.

**Attorneys at law.**

False advertising of legal services,  
§10-1-427.

**Bait and switch.**

Fair business practices act of 1975.

Deceptive practices in consumer  
transactions generally, §10-1-393.

Uniform deceptive trade practices act,  
§10-1-372.

**Brake fluid.**

References to licensing, §10-1-187.

**Career consulting firms.**

Requirements, §10-1-393.

**Deceptive trade practices.**

Fair business practices act of 1975.

General provisions, §§10-1-390 to  
10-1-407.

Uniform deceptive trade practices act.

General provisions, §§10-1-370 to  
10-1-375.

**False advertising, §§10-1-420 to 10-1-427.**

Advertising without intending to sell on  
stated terms, §10-1-420.

Attorneys at law.

Legal services, §10-1-427.

**ADVERTISING —Cont'd**

**False advertising —Cont'd**

Auction sales.

Misrepresenting ownership,  
§§10-1-425, 10-1-426.

Broadcasters and publishers.

False advertising of legal services.

Exemption when acting in good  
faith, §10-1-427.

False or fraudulent statements in  
advertising.

Excepted when acting in good faith,  
§10-1-421.

Liquidation, auction or  
going-out-of-business sales.

Misrepresenting ownership.

Excepted when acting in good  
faith, §10-1-426.

Misrepresenting nature of business.

Excepted when acting in good faith,  
§10-1-426.

Child support collectors, private.

False impression of affiliation with  
governmental entity, §10-1-393.10.

Deceptive trade practices generally,  
§10-1-372.

Consumer transactions, §10-1-393.

Disclaimers as to availability of products,  
§10-1-420.

Doctor or Dr.

Degree to be designated in  
advertisements using, §10-1-422.

Enjoining prohibited advertising,  
§10-1-423.

False or fraudulent statements in  
advertising, §10-1-421.

Going-out-of-business sales.

Misrepresenting ownership,  
§§10-1-425, 10-1-426.

Legal services, §10-1-427.

Liquidation sales.

Misrepresenting ownership,  
§§10-1-425, 10-1-426.

Motor vehicle franchises, §10-1-662.

Nature of business.

Misrepresenting, §§10-1-424, 10-1-426.

Office supply transactions, §10-1-393.1.

Wholesaler, retailer or words of similar  
import.

Misrepresenting nature of business,  
§10-1-424.

Wholesale defined, §10-1-424.

**Gasoline.**

Advertising free gifts or services,  
§10-1-164.

**ADVERTISING —Cont'd**

**Gasoline —Cont'd**

Requirements for signs advertising retail motor fuels, §10-1-164.

**Gifts.**

Retail motor fuels.

Advertising free gifts or services, §10-1-164.

**Lease-purchase agreements, §10-1-683.**

**Loans.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Local telephone classified advertising.**

Nonlocal business publisher without stating nonlocal location, §10-1-393.

**Motor fuels.**

Advertising free gifts or services, §10-1-164.

Requirements for signs advertising retail motor fuels, §10-1-164.

**Motor vehicle franchises.**

Advertising campaigns or contests, §10-1-663.

Failure to deliver advertised products, §10-1-662.

False advertising, §10-1-662.

**Nonlocal business publishing local telephone number in telephone classified advertising directory.**

Nondisclosure of nonlocal location, §10-1-393.

**Office supply transactions.**

Unfair or deceptive acts or practices, §10-1-393.1.

**Packaged commodities must state quantity with retail price, §10-2-13.**

**Petroleum products sales.**

Retail motor fuels.

Advertising free gifts or services, §10-1-164.

Requirements for signs, §10-1-164.

**Real property.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Securities.**

Advertising or other sales literature.

Requirement to file, §10-5-53.

**Telephone numbers with prefix of 900 or 976.**

Automatic imposition of per-call charge or cost.

Deceptive trade practices, §10-1-393.

**ADVERTISING —Cont'd**

**Telephone numbers with prefix of 900 or 976 —Cont'd**

Automatic imposition of per-call charge or cost —Cont'd

Suspension of charges, §10-1-397.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Deceptive practices in consumer transactions generally, §10-1-393.

General provisions, §§10-1-390 to 10-1-407.

Uniform deceptive trade practices act.

General provisions, §§10-1-370 to 10-1-375.

**AFFIDAVITS.**

**Agents.**

Parol authority to execute, §10-6-80.

**Cotton storage.**

Adverse lien, title or claim, §10-4-76.

False affidavit, §10-4-78.

**Petroleum products sales.**

Condemnation of inaccurate pumps.

Affidavits by inspectors, §10-1-159.

**Trade name registration.**

Registration statement verified by affidavit, §10-1-490.

**AGED PERSONS.**

**Computers or computer network.**

Persons engaging in activities using.

Unfair or deceptive trade practices.

Targeting elderly persons, §10-1-393.5.

**Credit report security freezes.**

No fee to be charged, §10-1-914.

**Fraud.**

Unfair or deceptive trade practices, §§10-1-850 to 10-1-857.

**Home repair or home improvement work.**

Unfair or deceptive trade practices.

Targeting elderly persons, §10-1-393.5.

**Telemarketing.**

Unfair or deceptive trade practices.

Targeting elderly persons, §10-1-393.5.

**Unfair or deceptive trade practices,**

§§10-1-850 to 10-1-857.

**AGENTS, §§10-6-1 to 10-6-142.**

**Accounting for profits from principal's property, §10-6-25.**

Accounts required, §10-6-30.

**Actions.**

Damages for unreasonable revocation, §10-6-33.

Interference with agent's possession, §10-6-83.

**AGENTS —Cont'd**

**Actions —Cont'd**

- Prosecution of legal remedies for principal, §10-6-80.
- Right of action against purported agent, §10-6-89.
- Right of action on principal's contract, §10-6-82.
- Wrongful discharge of agent before termination of contract, §10-6-37.

**Affidavits.**

- Parol authority to execute, §10-6-80.

**Agents receiving money for third persons, §§10-6-100 to 10-6-102.**

- Bond to be posted by agent in business of receiving cash, §10-6-100.
- Penalties for failure to post bond, §10-6-102.
- Right to restitution from bond, §10-6-101.

**Agent's rights and liabilities, §§10-6-80 to 10-6-89.**

- Action for interference with possession, §10-6-83.
- Actions against purported agents, §10-6-89.
- Actions on principal's contracts, §10-6-82.
- Authority exceeded.
  - Enforcement of contract by agent, §10-6-84.
  - Liability of agent by undertaking, §10-6-85.
- Contracts of principal.
  - Right of action, §10-6-82.
- Credit given.
  - When agent responsible for, §10-6-87.
- Enforcement of contracts.
  - Agents exceeding authority, §10-6-84.
- Interference with possession.
  - Right of action by agent, §10-6-83.
- Mistake.
  - Recovery of money paid to or by agent, §10-6-81.

- Negligence of underservants, §10-6-85.

**Nonexistent principals.**

- Contracts for void, §10-6-89.
- Parol authority, §10-6-80.
- Prosecution of legal remedies for principal, §10-6-80.
- Right of action on principal's contracts, §10-6-82.

**Public agents.**

- Liability on public contracts, §10-6-88.
- Public contracts.
  - Liability of public agents, §10-6-88.

**AGENTS —Cont'd**

**Agent's rights and liabilities —Cont'd**

- Purported agents.
  - Actions against, §10-6-89.
- Repudiation.
  - Liability of act repudiated, §10-6-80.
- Signing instrument as agent or fiduciary.
  - Liability of persons, §10-6-86.
- Torts.
  - Liability of agent, §10-6-85.
- When agent exceeding authority may enforce contract, §10-6-84.

**Armed forces members.**

- Effect of death on power of attorney by, §10-6-35.

**Authority, §10-6-5.**

- Delegation, §10-6-5.
- Exceeding authority.
  - Enforcement of contract, §10-6-84.
  - Liability of agent by undertaking, §10-6-85.
- Extent, §10-6-21.
- Form in which agent acts immaterial, §10-6-53.
- Liability for exceeding, violating or disregarding instructions, §10-6-21.
- Parol authority, §10-6-80.
- Proving, §10-6-57.
- Scope of authority, §10-6-50.
  - Principal bound by acts within, §10-6-51.

**Bailments.**

- Bailees for hire.
  - Diligence required of agent for hire, §10-6-22.

**Banks and trust companies.**

- Bank failures.
  - Liability for depositing principal's money, §10-6-28.

**Benefits from agent's contract.**

- When principal to benefit, §10-6-62.

**Bonds, surety.**

- Agent in business of receiving cash for payment to third persons, §10-6-100.
- Failure to post bond, §10-6-102.
- Restitution from bond, §10-6-101.
- Parol authority to execute, §10-6-80.
- Suretyship generally, §§10-7-1 to 10-7-57.

**Breach of contract.**

- Action for wrongful discharge of agent before termination of contract, §10-6-37.

**Buying or selling for himself, §10-6-24.**

**Commingleing goods of principal and agent, §10-6-29.**



**AGENTS —Cont'd**

**Commissions.**

- Broker's right to commissions, §10-6-32.
- When entitled to, §10-6-31.

**Commodities.**

- Liability for acts or omissions, §10-5A-7.

**Concealment.**

- When principal bound, §10-6-56.

**Conditional power of attorney, §10-6-6.**

**Conflicts of interest.**

- Buying or selling for himself, §10-6-24.

**Conspiracies with third persons.**

- Principal not bound, §10-6-59.

**Contracts.**

- Wrongful discharge before termination of contract, §10-6-37.

**Conveyances by attorneys in fact.**

- Fiduciaries, §10-6-4.

**Copyrights.**

- Consideration to be stated on notes or contracts for sale, §10-3-3.
- Penalty for violations, §10-3-5.
- Purchaser takes subject to equities, §10-3-4.

**Corporations.**

- Formality necessary to create agency, §10-6-2.

**Creation of relation of principal and agent,**

§10-6-1.

- Formality necessary, §10-6-2.

**Credit given.**

- Effect of seller giving, §10-6-55.
- When agent responsible for, §10-6-87.

**Damages.**

- Action for wrongful discharge of agent before termination of contract, §10-6-37.
- Subsequent earnings in mitigation of damages on improper dismissal, §10-6-38.
- Unreasonable revocation, §10-6-33.

**Death.**

- Effect on power of attorney by member of armed forces, seamen or person on war service, §10-6-35.

**Debtors making payment to agent not producing obligation, §10-6-57.**

**Declarations.**

- Admissibility, §10-6-64.

**Deeds.**

- Formality necessary to create agency, §10-6-2.

**Defenses against undisclosed principals, §10-6-62.**

**Delegation of authority, §10-6-5.**

**AGENTS —Cont'd**

**Deposits.**

- Liability for bank failure, §10-6-28.
- Right of principal to follow money deposited, §10-6-27.

**Diligence required, §10-6-22.**

**Estoppel to dispute principal's title, §10-6-26.**

**Evidence.**

- Admissibility of agent's declarations, §10-6-64.

**Expenses.**

- When entitled to, §10-6-31.

**Extent of authority, §10-6-21.**

**Financial power of attorney.**

- Explanation for principals, §10-6-141.
- Statutory form, §10-6-142.
- Not exclusive method of creating, §10-6-140.

**Formality necessary to create agency, §10-6-2.**

**Form in which agent acts immaterial, §10-6-53.**

**Fraud.**

- Principal bound for, §10-6-60.
- Representations or concealment by agent binding principal, §10-6-56.

**Illegally paid money taken by agent.**

- When principal may recover, §10-6-63.

**Illegal purposes.**

- Rights under agency, §10-6-20.

**Incompetency or incapacity of principal.**

- Power not revoked until guardian or receiver appointed, §10-6-36.

**Injuries by other agents.**

- Liability of principal, §10-6-39.

**Instructions.**

- Following instructions from one of several principals, §10-6-23.
- Liability for exceeding, violating or disregarding, §10-6-21.
- Private instructions or limitations not known to persons dealing with agents, §10-6-50.

**Interference with agent's possession.**

- Right of action, §10-6-83.

**Liability for exceeding authority, §10-6-21.**

**Liability of principal for injuries by other agents, §10-6-39.**

**Military affairs.**

- Effect of death on power of attorney by member of armed forces, seamen or persons on war service, §10-6-35.

**Mingling goods of principal and agent, §10-6-29.**

**AGENTS —Cont'd**

**Minors.**

Principals bound by acts of infant agents, §10-6-3.

**Misrepresentation.**

Representations of agent binding principal, §10-6-56.

**Mistake.**

Money paid by mistake to agent, §10-6-63.

Recovery of money paid to or by agent, §10-6-81.

**Negligence.**

Liability for negligence of underservants, §10-6-85.

Liability of principal for injuries by other agents, §10-6-39.

Principal bound for neglect, §10-6-60.

**Nonexisting principal.**

Contract for void, §10-6-89.

**Notice to agent is notice to principal,**  
§10-6-58.

**Overseers.**

Duties, §10-6-120.

Parol contracts between employer and overseer, §10-6-121.

Powers, §10-6-120.

**Owner's right to sell property placed with broker,** §10-6-32.

**Patents.**

Consideration to be stated on notes or contracts for sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Pledges of stock with power of attorney.**

Effect of death or disability, §10-6-34.

**Possession of property of principal.**

Interference with, §10-6-83.

**Power coupled with interest in agent.**

Revocation of agency, §10-6-33.

Unreasonable instructions disregarded, §10-6-21.

**Principal's rights and liabilities, §§10-6-50 to 10-6-64.**

Acts within scope of agent's authority, §10-6-51.

Benefit of principal from agent's contract, §10-6-62.

Competency of agent as witness, §10-6-64.

Concealment of agent binding principal, §10-6-56.

Conspiracies of agents with third persons, §10-6-59.

**AGENTS —Cont'd**

**Principal's rights and liabilities —Cont'd**  
Credit to agent.

Effect of seller giving, §10-6-55.

Dealing with special agents, §10-6-50.

Declarations of agents, §10-6-64.

Defenses against undisclosed principal, §10-6-62.

Effect of private instructions, §10-6-50.

Evidence.  
Admissibility of agent's declaration, §10-6-64.

Form in which agent acts.

Immaterial, §10-6-53.

Fraud of agents, §10-6-60.

Illegally paid money, §10-6-63.

Immateriality of form in which agent acts, §10-6-53.

Liability on contract of undisclosed principal, §10-6-54.

Mistakenly paid money, §10-6-63.

Neglect of agents, §10-6-60.

Notice to agent is notice to principal, §10-6-58.

Payment to agent not producing obligation made at debtor's risk, §10-6-57.

Proving agent's authority, §10-6-57.

Ratification, §10-6-52.

In-part ratification, §10-6-51.

Relation back to agent's act, §10-6-52.

Revocation, §10-6-52.

Recovery of money or goods illegally or mistakenly paid, §10-6-63.

Representations of agent binding principal, §10-6-56.

Scope of agent's authority, §10-6-50.

Seller giving credit to agent, §10-6-55.

Trespass of agents, §10-6-61.

Undisclosed principal's liability on contract, §10-6-54.

When principal to benefit from agent's contract, §10-6-62.

Willful trespass of agents, §10-6-61.

Witnesses.

Agent as witness, §10-6-64.

Wrongful transfer of money or goods by agents, §10-6-63.

**Profits from principal's property.**

Accounting, §10-6-25.

**Property.**

Owner's right to sell property placed with broker, §10-6-32.

**Proprietary rights.**

Consideration to be stated on notes or contracts for sale, §10-3-3.

Penalty for violations, §10-3-5.

**AGENTS —Cont'd**

**Proprietary rights —Cont'd**

Consideration to be stated on notes or contracts for sale —Cont'd

Purchaser takes subject to equities, §10-3-4.

**Public agents.**

Liability on public contract, §10-6-88.

**Public contracts.**

Liability of public agents on, §10-6-88.

**Purported agents.**

Right of action against, §10-6-89.

**Ratification of acts by principal.**

How act ratified, §10-6-52.

No right to ratify in part, §10-6-51.

Relation back to agent's act, §10-6-52.

Revocation of ratification, §10-6-52.

**Representations when principal bound, §10-6-56.**

**Repudiation of acts.**

Liability of principal, §10-6-80.

**Revocation of agency, §10-6-33.**

Action for wrongful discharge before termination of contract, §10-6-37.

Death or disability on pledge of stock with power of attorney, §10-6-34.

Incompetency or incapacity of principal. Power not revoked until guardian or receiver appointed, §10-6-36.

Members of armed forces, seamen or persons on war service.

Effect of death on power of attorney, §10-6-35.

Subsequent earnings in mitigation of damages on improper dismissal, §10-6-38.

**Right of principal to follow money deposited, §10-6-26.**

**Rights under agency for illegal purpose, §10-6-20.**

**Sales.**

Buying or selling for himself, §10-6-24.

**Sales representatives.**

Wholesale distribution by out-of-state principal.

General provisions, §§10-1-700 to 10-1-704.

**Seamen.**

Effect of death on power of attorney by, §10-6-35.

**Several principals.**

Following instructions from, §10-6-23.

**Signatures.**

Liability of person signing instrument as agent, §10-6-86.

**AGENTS —Cont'd**

**Special agents.**

Dealing with, §10-6-50.

**Stock with power of attorney.**

Effect of death or disability on pledge, §10-6-34.

**Subsequent earnings in mitigation of damages on improper dismissal, §10-6-38.**

**Suretyship generally, §§10-7-1 to 10-7-57.**

**Title of principal.**

Estoppel, §10-6-26.

**Torts, §10-6-85.**

Liability of principal for injuries by other agents, §10-6-39.

Neglect and fraud of agent, §10-6-60.

Willful trespass.

Principal liable for, §10-6-61.

**Trespass.**

Principal liable for agent's willful trespass, §10-6-61.

**Undisclosed principals.**

Defenses against, §10-6-62.

Liability on contracts, §10-6-54.

**Voluntary agents without hire or reward.**

Diligence required, §10-6-22.

**What may be done by agents, §10-6-5.**

**When relation of principal and agent arises, §10-6-1.**

**Wholesale distribution by out-of-state principal.**

General provisions, §§10-1-700 to 10-1-704.

**Who may be agents, §10-6-3.**

**Witnesses.**

Competency as witness, §10-6-64.

**Wrongful transfer of money or goods by agent, §10-6-63.**

**AGRICULTURE.**

**Commodities.**

Commodities and commodity contracts and options.

General provisions, §§10-5A-1 to 10-5A-31.

**Common day of rest act of 1974.**

Agricultural operations exempt from article, §10-1-574.

**Department of agriculture.**

Warehouse section.

Establishment and appointment of supervisor, §10-4-3.

**Farm tractors.**

Farm tractor warranty act, §§10-1-810 to 10-1-819.



**AGRICULTURE —Cont'd**

**Flue-cured leaf tobacco.**

Carry-over tobacco, §§10-4-140 to 10-4-155.

Leaf tobacco sales and storage generally, §§10-4-100 to 10-4-123.

**Lemon law.**

Farm tractors.

General provisions, §§10-1-810 to 10-1-819.

**Motor vehicles.**

Lemon law.

Farm tractors.

General provisions, §§10-1-810 to 10-1-819.

**Receipts given by state licensed and bonded warehouses, §10-4-19.**

**Warranties.**

Farm tractor warranty act, §§10-1-810 to 10-1-819.

**ALUMINUM.**

**Secondary metals recyclers.**

General provisions, §§10-1-350 to 10-1-358.

Payment by recyclers for aluminum property, §10-1-352.1.

**ANTIFREEZE, §§10-1-200 to 10-1-211.**

**Administration of part, §10-1-204.**

**Adulteration, §10-1-201.**

**Advertising references to licensing, §10-1-206.**

**Commissioner of agriculture.**

Administration and enforcement of part, §10-1-204.

Enjoining violations, §10-1-210.

Issuance of license or permit for sales, §10-1-203.

List of inspected and licensed brands, §10-1-206.

Promulgation of rules and regulations, §10-1-209.

Requiring statement of formula or content, §10-1-207.

Seizure of noncomplying antifreeze, §10-1-205.

**Condemnation of noncomplying antifreeze, §10-1-205.**

**Confidentiality of information.**

Statement of formula or contents, §10-1-207.

**Definitions, §10-1-200.**

**Enforcement of part, §10-1-204.**

**Evidence.**

Certified analysis, §10-1-208.

**ANTIFREEZE —Cont'd**

**Fees.**

License or inspection fees, §10-1-203.

**Injunctions.**

Violations of part or rules and regulations, §10-1-210.

**Inspection of samples, §10-1-203.**

Certified analysis as evidence, §10-1-208.

Right of inspection, §10-1-204.

**License or permit for sale, §10-1-203.**

**List of inspected and licensed brands, §10-1-206.**

**Misbranding, §10-1-202.**

**Reclaimed antifreeze, §10-1-208.1.**

**Recycled antifreeze, §10-1-208.1.**

**Reprocessed antifreeze, §10-1-208.1.**

**Rules and regulations, §10-1-209.**

Enjoining violations, §10-1-210.

**Seizure of noncomplying antifreeze, §10-1-205.**

**Statement of formula or contents requiring, §10-1-207.**

**State oil chemist.**

Certified analysis as evidence, §10-1-208.

Inspection of antifreeze samples, §10-1-203.

**Stop-sale orders, §10-1-204.**

**Violations of part or rules and regulations, §10-1-211.**

Enjoining violations, §10-1-210.

**APPEALS.**

**Buying clubs or services.**

Imposition of civil penalty, §10-1-604.

**Cemeteries.**

Orders of Secretary of State.

Administrative appeal, §10-14-23.

Judicial appeal, §10-14-22.

**Certified public weighers.**

Imposition of administrative penalty, §10-2-53.

**Commodities and commodity contracts and options.**

Judicial review of commissioner's orders, §10-5A-29.

**Lemon law.**

Arbitration to compel replacement or repurchase of vehicle.

Appeal of decision, §10-1-787.

Determination of ineligibility, §10-1-786.

**Motor vehicle franchises.**

Judicial review of alleged violations, §10-1-667.

**Securities.**

Judicial review of orders and rules issued, §10-5-78.

**APPEALS —Cont'd**

**Tobacco.**

- Leaf tobacco sales and storage.
- Judicial review of administrative decisions, §10-4-122.
- Warehousemen's associations.
- Suspension or expulsion, §10-4-176.

**Tobacco master settlement agreement enhancements.**

- Review of Attorney General's decision to remove from directory, §10-13A-9.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Orders of administrator, §10-1-398.1.

**Warehouses.**

- State licensed and bonded warehouses.
- Judicial review of administrative decisions, §10-4-9.

**Weighers.**

- Certified public weighers.
- Imposition of administrative penalty, §10-2-53.

**Weights and measures.**

- Imposition of administrative penalty, §10-2-21.

**ARBITRATION.**

**Lemon law.**

- Arbitration to compel replacement or repurchase of vehicle, §10-1-785.

**Tobacco warehousemen's associations.**

- Local boards of trade disputes, §10-4-171.

**Warehouses.**

- Tobacco warehousemen's associations.
- Local boards of trade, §10-4-171.

**ARCHIVES AND HISTORY.**

**Property on loan to museums and archives repositories.**

- Georgia museum property act, §§10-1-529.1 to 10-1-529.7.

**ART.**

**Commodities and commodity contracts and options.**

- General provisions, §§10-5A-1 to 10-5A-31.

**Consignment of art, §§10-1-520 to 10-1-529.**

- Applicability of provisions.
- Contracts executed prior to July 1, 1995, §10-1-528.
- Art dealers.
- Defined, §10-1-521.

**ART —Cont'd**

**Consignment of art —Cont'd**

**Art dealers —Cont'd**

- Delivery of artwork to for exhibition or sale in exchange for commission, fee, or other compensation.
- What constitutes consignment, §10-1-522.
- Liability for violations, §10-1-529.
- Use or display of work of art or photograph thereof, §10-1-527.
- Violation of written contract requirement by.
- Artist's obligation rendered voidable, §10-1-523.

**Attorneys' fees.**

- Liability for violations by art dealers, §10-1-529.

**Citation of act.**

- Short title, §10-1-520.

**Contracts.**

- Applicability to contracts executed prior to July 1, 1995, §10-1-528.
- Waiver of liability for works of art consigned to cooperative.
- Contractual waiver, §10-1-526.
- Written contract required, §10-1-523.

**Co-operatives.**

- Defined, §10-1-521.

**Damages.**

- Liability for violations by art dealers, §10-1-529.

**Definitions, §10-1-521.**

**Effects, §10-1-524.**

**Liens.**

- Art received as consignment not subject to, §10-1-525.

**Security interests.**

- Art received as consignment not subject or subordinate to, §10-1-525.

**Title of act.**

- Short title, §10-1-520.

**Trust property.**

- Art received as consignment to remain trust property, §10-1-525.
- Consigned work of art to constitute, §10-1-524.
- Not subject or subordinate to claims, liens, or security interests, §10-1-525.

- Use or display of work of art or photograph thereof, §10-1-527.

- Waiver of liability for works of art consigned to cooperative.
- Contractual waiver, §10-1-526.

**ART —Cont'd**

**Consignment of art —Cont'd**

What constitutes, §10-1-522.

**Duplication of work of fine art, §10-1-510.**

**Limited edition art reproductions,**

§§10-1-430 to 10-1-437.

Action to enforce liability, §10-1-435.

Advertising multiples, §10-1-431.

Artist selling or consigning multiple of own creation.

Obligations incurred, §10-1-434.

Charitable organizations.

Exemptions, §10-1-437.

Civil penalties, §10-1-436.

Definitions, §10-1-430.

Descriptive information, §10-1-432.

Express warranties created, §10-1-433.

Disclaimers of express warranties, §10-1-433.

Disclosures.

Advertising and sale of multiples, §10-1-431.

Descriptive information required.

Generally, §10-1-432.

Express warranties created, §10-1-433.

Exemptions, §10-1-437.

Expert witness fees, §10-1-435.

Express warranties, §10-1-433.

Final judgment admissible as evidence of findings, §10-1-436.

Injunctions, §10-1-436.

Liabilities incurred by artists, dealers or consignees, §10-1-434.

Limitation of actions, §10-1-435.

Multiples.

Advertising and sale, §10-1-431.

Defined, §10-1-430.

Descriptive information required, §10-1-432.

Remedies.

Civil remedies for violations, §10-1-435.

Not inclusive, §10-1-434.

Sale of multiples, §10-1-431.

Warranties, §10-1-433.

**Rights in works of fine art, §10-1-510.**

**ASSIGNMENTS.**

**Motor vehicle sales finance act.**

Assignment of contract, §10-1-33.

**Retail installment contracts and revolving accounts, §10-1-9.**

Motor vehicle sales finance act.

Assignment of contract, §10-1-33.

**Trademarks and service marks.**

Registration, §10-1-446.

**ASSIGNMENTS FOR BENEFIT OF CREDITORS.**

**Heavy equipment multiline dealers.**

Good cause for unilateral amendment, cancellation, termination, etc., of agreements, §10-1-732.

Immediate termination, amendment, cancellation, etc., of agreements without notice, §10-1-733.

**ASSISTIVE TECHNOLOGY**

**WARRANTIES, §§10-1-870 to 10-1-875.**

**ASSOCIATIONS.**

**Business records, §§10-11-1 to 10-11-3.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**Commodities.**

Liability for acts or omissions of employees, officers or agents, §10-5A-7.

**Motor vehicle franchise practices act.**

Generally, §§10-1-620 to 10-1-670.

Standing of corporation comprising dealers and representing dealers, §10-1-623.

**Records.**

Business records, §§10-11-1 to 10-11-3.

**Tobacco.**

Warehousemen's associations, §§10-4-170 to 10-4-177.

**Trademarks and service marks.**

General provisions, §§10-1-440 to 10-1-454.

**Trade names.**

General provisions, §§10-1-490 to 10-1-493.

**Warehousemen's associations.**

Tobacco warehousemen's associations, §§10-4-170 to 10-4-177.

**ASSUMED BUSINESS NAMES.**

**Trade name registration, §§10-1-490 to 10-1-493.**

**ATHLETICS.**

**Geo. L. Smith II Georgia World Congress Center.**

General provisions, §§10-9-1 to 10-9-61.

**ATTACHMENT.**

**Indorser's right of attachment against principal, §10-7-40.**

**Suretyship.**

Right of surety to process of attachment against principal, §10-7-40.



**ATTORNEY GENERAL.**

**Art.**

- Limited edition art reproductions.
- Actions to enjoin violations, §10-1-436.

**Brake fluid.**

- Violations of part, rule, standard or specification.
- Duty to institute appropriate legal proceedings, §10-1-189.

**Commodities and commodity contract and options.**

- Institution of criminal proceedings, §10-5A-31.

**Fair business practices.**

- Demands for evidence, §§10-1-403, 10-1-404.

**Geo. L. Smith II Georgia World Congress Center.**

- Enforcement actions, §10-9-22.
- Legal service for authority, §10-9-16.

**Petroleum products misbranding.**

- Authority to bring action to enjoin misbranding, §10-1-162.

**Petroleum products sales.**

- Enjoining sale of used or reclaimed lubricating oils or lubricants, §10-1-162.

**Securities.**

- Penalties for willful violations.
- Institution of criminal proceedings, §10-5-57.

**ATTORNEY-IN-FACT.**

**Conveyances, §10-6-4.**

**ATTORNEYS.**

**Advertising.**

- False advertising of legal services, §10-1-427.

**Cease and desist orders.**

- False advertising of legal services, §10-1-427.

**Misdemeanors.**

- False advertising of legal services.
- Violation of cease and desist order, §10-1-427.

**ATTORNEYS' FEES.**

**Art.**

- Consignment of art.
- Liability for violations by art dealers, §10-1-529.
- Limited edition art reproductions.
- Civil remedies for violations, §10-1-435.

**ATTORNEYS' FEES —Cont'd**

**Art —Cont'd**

- Printer's contract with customer to duplicate fine art.
- Customer falsely stating legal right or license authorizing duplication, §10-1-510.

**Deceptive trade practices.**

- Disaster related violations, §10-1-438.
- Fair business practices act of 1975.
- Civil or equitable remedies by individuals, §10-1-399.
- Uniform deceptive trade practices act.
- Enjoining deceptive trade practices, §10-1-373.

**Disasters.**

- Unfair or deceptive trade practices.
- Disaster related violations, §10-1-438.

**Farm tractor warranty act.**

- Action for violation of informal dispute settlement procedures, §10-1-816.

**Gasoline below cost sales.**

- Actions for violations of article, §10-1-255.

**Gasoline marketing practices.**

- Actions by dealers against distributors, §10-1-235.
- Actions by distributors against dealers, §10-1-238.

**Heavy equipment multiline dealers.**

- Actions for violations of provisions, §10-1-739.

**Lease-purchase agreements.**

- Actions for violations of article, §10-1-687.

**Lemon law.**

- Farm tractors.
- Action for violation of informal dispute settlement procedures, §10-1-816.

**Motion pictures.**

- Bidding by exhibitors.
- Civil action to enforce article, §10-1-294.

**Motor vehicle franchises.**

- Actions to enforce article, §10-1-628.

**Motor vehicle sales finance act.**

- Contract referred for collection, §10-1-32.
- Subleasing vehicles subject to retail installment contract, §10-1-41.

**Retail installment contracts and revolving accounts.**

- Motor vehicle sales finance act.
- Contract referred for collection, §10-1-32.

**ATTORNEYS' FEES** —Cont'd

**Retail installment contracts and revolving accounts** —Cont'd

- Motor vehicle sales finance act —Cont'd
- Subleasing vehicles subject to retail installment contract, §10-1-41.
- Referred for collection, §10-1-7.

**Secondary metals recyclers.**

- Lawful owner recovering stolen regulated metal property from recycler, §10-1-354.

**Securities.**

- Violation of provisions.
- Civil liability enforcement, §10-5-58.

**Suretyship.**

- Corporate surety's bad faith refusal to perform contract, §10-7-30.

**Tobacco master settlement agreement enhancements.**

- Remedies for noncompliance, §10-13A-8.

**Trademarks and service marks.**

- Person causing seizure of goods not counterfeit.
- Fees expended in defending against seizure, §10-1-451.

**Trade secret misappropriation actions,** §10-1-764.

**Unfair or deceptive trade practices.**

- Disaster related violations, §10-1-438.
- Fair business practices act of 1975.
- Civil or equitable remedies by individuals, §10-1-399.
- Uniform deceptive trade practices act.
- Enjoining deceptive trade practices, §10-1-373.

**Unsolicited merchandise sent or unordered merchandise sent after membership terminated.**

- Action to enjoin payment request, §§10-1-50, 10-1-51.

**Wholesale distribution by out-of-state principal.**

- Action by sales representative for commissions due, §10-1-702.

**AUCTIONEERS.**

**Actions.**

- By auctioneers in own name for goods sold, §10-6-82.
- Sale of stolen horses, §10-1-530.

**AUCTIONS.**

**Advertising.**

- False advertising.
- Misrepresenting ownership in advertising auction sales, §§10-1-425, 10-1-426.

**AUCTIONS** —Cont'd  
**Horses.**

- Stolen horses.
- Liability for sale, §10-1-530.

**Mules.**

- Stolen mules.
- Liability for sale, §10-1-530.

**Tobacco.**

- Leaf tobacco sales and storage.
- Auction tobacco dealers.
- Licenses, §10-4-114.
- Reports and records, §10-4-114.
- General provisions, §§10-4-100 to 10-4-123.
- Warehousemen's associations.
- General provisions, §§10-4-170 to 10-4-177.

**AUDITS.**

**Geo. L. Smith II Georgia World Congress Center,** §10-9-19.

**AUTHORITIES.**

**Geo. L. Smith II Georgia World Congress Center Authority.**

- General provisions, §§10-9-1 to 10-9-19.

**AUTOMOBILES.**

**Franchises,** §§10-1-620 to 10-1-670.

**Lemon law,** §§10-1-780 to 10-1-797.

**Motor vehicles sales finance act,** §§10-1-30 to 10-1-42.

**B**

**BAD FAITH.**

**Corporate sureties,** §10-7-30.

**Unfair or deceptive trade practices.**

- Civil remedies, §§10-1-399, 10-1-435.
- Counterfeit goods.
- Seizure of non-counterfeit goods, §10-1-451.
- Equitable remedies, §10-1-399.
- Penalties, §10-1-687.

**BAGGAGE.**

**Registration of trademark,** §10-1-443.

**BAIT AND SWITCH.**

**Fair business practices act of 1975.**

- Deceptive practices in consumer transactions generally, §10-1-393.

**Uniform deceptive trade practices act,** §10-1-372.

**BALES.**

**Commissioner of agriculture.**

- Baling conditions studied, §10-4-54.

**BALES —Cont'd**

**Commissioner of agriculture —Cont'd**

Charges, §10-4-74.

Lint cotton storage, §10-4-71.

**BANKRUPTCY AND INSOLVENCY.**

**Heavy equipment multiline dealers.**

Immediate termination, amendment, etc., of agreements without notice, §10-1-733.

Unilateral amendment, cancellation, termination, etc., of agreements, §10-1-732.

**Marine manufacturers.**

Termination of contractual relationship between dealer and manufacturer, §10-1-677.

**Suretyship.**

Compelling contribution after paying more than equal share.

Effect of surety's insolvency, §10-7-50.

**BANKS AND TRUST COMPANIES.**

**Agents.**

Liability for bank failure when depositing principal's money, §10-6-28.

**BARLEY.**

**Warehouses.**

State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

**BEAUTY PAGEANTS, §§10-1-830 to 10-1-838.**

**Bonds, surety.**

Operators, §§10-1-832 to 10-1-834.

Escrow account option, §10-1-837.

Liability for failure to establish, §10-1-838.

Liability for failure to post bond, §10-1-838.

**Civil remedies for violations, §10-1-835.**

**Criminal law and procedure.**

Violations of provisions, §10-1-836.

**Definitions, §10-1-830.**

**Escrow accounts, §10-1-837.**

Liability for failure to establish, §10-1-838.

**Fees.**

Entrant's fee.

Defined, §10-1-830.

Information required as prerequisite to accepting, §10-1-831.

Refund on cancellation or default, §10-1-834.

**Misdemeanors.**

Violations of provisions, §10-1-836.

**BEAUTY PAGEANTS —Cont'd**

**Operators.**

Bonds, surety, §10-1-832.

Amount, §10-1-832.

Default by operator.

Liability of surety for unrefunded entrant's fees, §10-1-834.

Escrow account option, §10-1-837.

Liability for failure to establish account, §10-1-838.

Exemptions from requirements, §10-1-833.

Liability for failure to post bond, §10-1-838.

Required, exception, §10-1-832.

Defined, §10-1-830.

Exemptions from bond requirements, §10-1-833.

Required information to entrants, §10-1-831.

**Violations of provisions.**

Civil remedies, §10-1-835.

Misdemeanors, §10-1-836.

**BEGGING.**

**George L. Smith, II Georgia World**

Congress Center, §10-9-14.

**BELOW COST SALES ACT.**

General provisions, §§10-1-250 to 10-1-256.

Short title, §10-1-250.

**BENEVOLENT ORGANIZATIONS.**

Emblems, §§10-1-470 to 10-1-472.

Imitation, §10-1-470.

Injunction against infringements, §10-1-471.

Unauthorized use, §10-1-472.

False claim of membership, §10-1-472.

Names, §§10-1-470 to 10-1-472.

Imitation, §10-1-470.

Injunction against infringement, §10-1-471.

Priority of right to use, §10-1-470.

Unauthorized use, §10-1-472.

**BIDS AND BIDDING.**

Motion picture exhibitors, §§10-1-290 to 10-1-294.

**BIODIESEL FUELS.**

**Production and sale.**

Specifications and standards required to meet, §10-1-151.1.

**BIRTH DATE.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.



**BLIND BIDDING.**

**Motion pictures.**

Bidding by motion picture exhibitors,  
§§10-1-290 to 10-1-294.

**BLUE LAW.**

General provisions, §§10-1-570 to 10-1-576.

**BOARDS.**

Cemeterians, state board of, §10-1-43.1.

**BOATS AND OTHER WATERCRAFT.**

**Deceptive trade practices.**

Marine membership facilities, §§10-1-392,  
10-1-393.

**Fair business practices act of 1975.**

Marine membership facilities, §§10-1-392,  
10-1-393.

Marine manufacturers, §§10-1-675 to  
10-1-678.

Marine membership facilities, §§10-1-392,  
10-1-393.

**Unfair or deceptive trade practices.**

Marine membership facilities, §§10-1-392,  
10-1-393.

**Yacht clubs.**

Marine membership facilities, §§10-1-392,  
10-1-393.

**BONA FIDE PURCHASERS.**

**Suretyship.**

Protection when surety controls  
judgment, §10-7-55.

**BOND ISSUES.**

Geo. L. Smith II Georgia World Congress  
Center.

Refunding bonds, §10-6-55.

Revenue bonds, §§10-9-40 to 10-9-61.

**Securities.**

Uniform securities act of 2008, §§10-5-1  
to 10-5-90.

**BONDS, SURETY.**

**Agents.**

Agent in business of receiving cash for  
payment to third persons, §10-6-100.

Failure to post bond, §10-6-102.

Restitution from bond, §10-6-101.

Parol authority to execute, §10-6-80.

**Beauty pageants.**

Operators, §§10-1-832 to 10-1-834.

Escrow account option, §10-1-837.

Liability for failure to establish,  
§10-1-838.

Liability for failure to post bond,  
§10-1-838.

**Business opportunity sales.**

Bond or trust account required,  
§10-1-412.

**BONDS, SURETY —Cont'd**

**Buying clubs or services.**

Conditions of licensure, §10-1-593.

**Child support collectors, private,**  
§10-1-393.9.

**Grain dealers.**

Warehouseman also grain dealer,  
§10-4-12.

**Liquefied petroleum gas.**

Sale and storage.

Requirements for license or permit  
holders, §10-1-267.

**Oil inspectors,** §10-1-146.

**Petroleum products sales.**

State oil chemist and oil inspectors,  
§10-1-146.

**Securities.**

Broker-dealers and investment advisers,  
§10-5-40.

**State oil chemist,** §10-1-146.

**Suretyship generally,** §§10-7-1 to 10-7-57.

**Tobacco.**

Carry-over tobacco storage and sale.

Licensees to be bonded, §10-4-144.

Leaf tobacco sales and storage.

Nonauction tobacco dealers, §10-4-115.

**Warehouses.**

State warehouse commissioner, §10-4-51.

Employees, §10-4-52.

**BOOKS.**

**Sales.**

Tie-in sales, §§10-1-330, 10-1-331.

**BOYCOTTS.**

Violation of law, §10-1-631.

**BRAKE FLUID,** §§10-1-180 to 10-1-189.

**Administration of part,** §10-1-186.

**Adulteration,** §10-1-181.

Condemnation, §10-1-186.

Sales prohibited, §10-1-183.

**Advertising of brands in accord with part,**  
§10-1-187.

**Attorney general.**

Violations of part, rule, standard or  
specification.

Duty to institute appropriate legal  
proceedings, §10-1-189.

**Certified analysis as evidence,** §10-1-188.

**Commissioner of agriculture.**

Commissioner defined, §10-1-180.

Enforcement of part, §10-1-186.

Establishing minimum standards and  
specifications, §10-1-184.

Issuance of license or permit, §10-1-185.

Listing of inspected and licensed brands,  
§10-1-187.

**BRAKE FLUID —Cont'd**

**Commissioner of agriculture —Cont'd**

- Powers of agents, §10-1-187.
- Rules and regulations, §10-1-187.
- Stop-sale orders, §10-1-186.

**Condemnation of adulterated or misbranded fluid, §10-1-186.**

**Definitions, §10-1-180.**

**Enforcement of part, §10-1-186.**

**Evidence.**

- Certified analysis as evidence, §10-1-188.

**Fees.**

- License or inspection fee, §10-1-185.

**Inspection of samples, §10-1-185.**

- Certified analysis as evidence, §10-1-188.
- Right, §10-1-186.

**License or permit.**

- Authorizing sale, §10-1-185.

**List of brands in accord with part, §10-1-187.**

**Minimum standards and specifications.**

- Establishing, §10-1-184.

**Misbranding, §10-1-182.**

- Condemnation of fluid, §10-1-186.
- Sales prohibited, §10-1-183.

**Notice of cancellation of license or permit, §10-1-185.**

**Powers of commissioner's agents, inspectors and representatives, §10-1-187.**

**Rules and regulations, §10-1-187.**

- Violations, §10-1-189.

**Seizure of adulterated or misbranded fluid, §10-1-186.**

**Standards and specifications.**

- Establishing minimum standards and specifications, §10-1-184.
- Violations, §10-1-189.

**State oil chemist.**

- Certified analysis as evidence, §10-1-188.
- Chemist defined, §10-1-180.
- Inspection of samples, §10-1-185.

**Stop-sale orders, §10-1-186.**

**Violations of part or rule, regulation, standard or specification, §10-1-189.**

**BRANDS AND MARKS.**

**Antifreeze.**

- Misbranding, §10-1-202.

**Brake fluid.**

- Misbranding, §10-1-182.
- Sale of misbranded fluid prohibited, §10-1-183.
- When deemed misbranded, §10-1-182.

**BRANDS AND MARKS —Cont'd**

**Petroleum products sales.**

- Substitution or misbranding of petroleum products, §10-1-162.
- Violations, §10-1-163.

**BROADCASTERS.**

**Advertising.**

- False advertising of legal services.
- Exemption for broadcasters acting in good faith, §10-1-427.
- False or fraudulent statements in advertising.
- Excepted when acting in good faith, §10-1-421.
- Liquidation, auction or going-out-of-business sales.
- Misrepresenting ownership.
- Excepted when acting in good faith, §10-1-426.
- Misrepresenting nature of business.
- Excepted when acting in good faith, §10-1-426.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Exemption from part, §10-1-396.
- Uniform deceptive trade practices act.
- Exemptions from part, §10-1-374.

**BROKERS.**

**Commissions.**

- Right to commissions, §10-6-32.

**Owner's right to sell property placed with broker, §10-6-32.**

**BUILDINGS AND HOUSING.**

**Retail installment transactions.**

- Inclusion of construction permit costs, §10-1-3.

**BULK SALES.**

**Heating fuels.**

- Delivery tickets, §10-2-10.

**BULLION.**

**Precious metal.**

- Defined, §10-5A-1.

**Purchasers and sellers, §10-5A-3.**

**BURDEN OF PROOF.**

**Commodities and commodity contracts and options.**

- Exemptions, §10-5A-30.

**Heavy equipment multiline dealers.**

- Good cause for unilateral amendment, cancellation, etc., of agreements, §10-1-732.
- Justification for denying consent to transfer business, §10-1-734.

**BURDEN OF PROOF —Cont'd**

**Motor vehicle franchises.**

Good cause for refusal to honor succession, §10-1-652.

**Recreational vehicle dealers.**

Termination or change of dealership agreements.

Good cause, §10-1-679.4.

**Securities.**

Violations, burden of proof in civil and criminal proceedings, §10-5-52.

**BUSINESS CORPORATIONS.**

**Names.**

Trade name registration.

Exemption, §10-1-492.

**Shares and shareholders.**

**Securities.**

Uniform securities act of 2008, §§10-5-1 to 10-5-90.

**Trade name registration.**

Exemption, §10-1-492.

**BUSINESSES.**

**Business records.**

General provisions, §§10-11-1 to 10-11-3.

**Trademarks and service marks.**

General provisions, §§10-1-440 to 10-1-454.

**Trade names.**

General provisions, §§10-1-490 to 10-1-493.

**BUSINESS OPPORTUNITY SALES.**

**Bond or trust account required, §10-1-412.**

**Cancellation rights, §10-1-415.**

**Contracts, §10-1-415.**

Cancellation rights, §10-1-415.

Voiding for violations, §10-1-417.

**Corporations.**

Liability of officers and directors for violations of part, §10-1-417.

**Definitions, §10-1-410.**

**Disclosure statement, §10-1-411.**

Multilevel distribution company, §10-1-413.

**Escrow account required, §10-1-412.**

**Individual liability for violations, §10-1-417.**

**Marketing program.**

Participation in, §10-1-411.

**Multilevel distribution company.**

Defined, §10-1-410.

Disclosure statement, §10-1-413.

**Notice.**

Required notice regarding disclosures, §10-1-413.

Prohibited activities, §10-1-411.

**BUSINESS OPPORTUNITY SALES**

—Cont'd

**Notice.**

Multilevel distribution company.

Required notice regarding disclosures, §10-1-413.

**Notice of intent to void contract,**

§10-1-417.

**Partnerships.**

Liability of partners for violations of part, §10-1-417.

**Prohibited activities.**

Multilevel distribution company, §10-1-411.

Sellers, §10-1-414.

**Secretary of state.**

Appointment as agent for process, §10-1-416.

**Sellers.**

Prohibited activities, §10-1-414.

**Service of process, §10-1-416.**

**Sole proprietorships.**

Liability of owner for violation of part, §10-1-417.

**Unfair or deceptive act or practice,**

§10-1-417.

**Violations of part.**

Unfair or deceptive act or practice, §10-1-417.

Voiding of contract, §10-1-417.

**BUSINESS RECORDS, §§10-11-1 to 10-11-3.**

**Definitions, §10-11-1.**

**Disposal of business records containing personal information, §§10-15-1 to 10-15-7.**

Correction of public records.

Court orders to correct, §10-15-7.

Definitions, §10-15-1.

Destruction, §10-15-2.

Enforcement of chapter, §10-15-5.

Administrative penalty, §10-15-6.

Criminal penalty, §10-15-7.

Magnetic strip or stripes.

Prohibited activities involving, §10-15-4.

Receipts for credit card transactions.

Information included, §10-15-3.

Reencoders.

Prohibited activities involving, §10-15-4.

Restitution, §10-15-7.

**Personal information, §§10-15-1 to 10-15-7.**

Correction of public records.

Court orders to correct, §10-15-7.



**BUSINESS RECORDS —Cont'd**

**Personal information —Cont'd**

- Definitions, §10-15-1.
- Disposal, §10-15-2.
- Enforcement of chapter, §10-15-5.
  - Administrative penalty, §10-15-6.
  - Criminal penalty, §10-15-7.
- Magnetic strip or stripes.
  - Prohibited activities involving, §10-15-4.
- Receipts for credit card transactions.
  - Information included, §10-15-3.
- Reencoders.
  - Prohibited activities involving, §10-15-4.
- Restitution, §10-15-7.

**Retention.**

- Reproduction, §10-11-3.
- Time periods, §10-11-2.

**BUTANE.**

**Liquefied petroleum gas.**

- Sale and storage generally, §§10-1-260 to 10-1-272.

**BUTYLENE.**

**Liquefied petroleum gas.**

- Sale and storage generally, §§10-1-260 to 10-1-272.

**BUYING CLUBS OR SERVICES,**

§§10-1-590 to 10-1-605.

**Administrative procedure act.**

- Application, §10-1-602.

**Bonds, surety.**

- Conditions of licensure, §10-1-593.

**Buying services act of 1975.**

- Short title, §10-1-590.

**Civil penalty for violations, §10-1-604.**

**Contracts of membership.**

- Approval by administrator required, §10-1-596.
- Cancellation, §10-1-597.
- Duration, §10-1-599.
- Noncomplying contracts null, void and of no effect, §10-1-596.
- Notice of cancellation, §§10-1-597, 10-1-598.
- Notice of duration, §10-1-599.
- Refunds.
  - Cancellation, §10-1-597.
  - Requirements, §10-1-598.

**Criminal penalty for violating article, §10-1-605.**

**Definitions, §10-1-591.**

**Fair business practices act of 1975.**

- Application, §10-1-602.

**BUYING CLUBS OR SERVICES —Cont'd**

**Fees.**

- Licenses, §10-1-594.

**Injunctions, §10-1-603.**

**Judgments on final order of civil penalty, §10-1-604.**

**Licenses.**

- Application, §10-1-594.
- Conditions, §10-1-593.
- Renewal, §10-1-594.
- Required, §10-1-592.
- Revocation, suspension and nonrenewal, §10-1-595.

**Records, §10-1-600.**

**Remedies concurrent, alternative and cumulative, §10-1-604.**

**Rules and regulations, §10-1-601.**

**Short title.**

- Buying services act of 1975, §10-1-590.

**Violations of article.**

- Civil penalty, §10-1-604.
- Criminal penalty, §10-1-605.
- Injunctions, §10-1-603.

**BUYING SERVICES ACT OF 1975.**

**General provisions, §§10-1-590 to 10-1-605.**

**Short title, §10-1-590.**

**C**

**CABLEGRAMS.**

**Geo. L. Smith II Georgia World Congress Center.**

- Notice of special board meetings, §10-9-8.

**CALCIUM CHLORIDE.**

**Antifreeze.**

- When deemed adulterated, §10-1-201.

**CALIBRATION.**

**Petroleum tank trucks, meters, containers and other measures, §10-1-160.**

**Weights and measures primary standards, §10-2-3.**

**CAMPGROUND MEMBERSHIP FACILITIES.**

- Cancellation rights, §10-1-393.
- Contract requirements, §10-1-393.
- Deceptive trade practices in consumer transactions, §10-1-393.
- Defined, §10-1-392.

**Fair business practice act of 1975.**

- General provisions, §§10-1-390 to 10-1-407.

**Membership.**

- Defined, §10-1-392.

**CAMPGROUND MEMBERSHIP**

**FACILITIES —Cont'd**

Notice to the buyer, §10-1-393.

**CAMPGROUNDS.**

Campground membership facilities.

Contract requirements, §10-1-393.

Defined, §10-1-392.

**CAMPING.**

Recreational vehicle dealers, §§10-1-679 to 10-1-679.15.

**CANCELLATION.**

Beauty pageants, §10-1-834.

Buying services membership contracts, §§10-1-597, 10-1-598.

Campground membership or marine membership.

Notice to buyer, §10-1-393.

**Cotton storage.**

Cancellation of receipts, §10-4-71.

**Gasoline marketing practices.**

Acts of distributor violating article.

Canceling marketing agreement, §10-1-233.

Health spa contracts, §10-1-393.2.

**Home solicitation sale.**

Buyer's right, §10-1-6.

Motor vehicle franchises, §10-1-651.

Succession to franchise upon death of franchisee, §10-1-652.

**Multilevel distribution contracts.**

Right of participant, §10-1-415.

Multiline heavy equipment dealers agreements, §10-1-732.

Notice of intent, §10-1-733.

Recovery of losses and damages for violations, §10-1-739.

Purchase of property used as dwelling place by debtor.

Notice, §10-1-393.

**State licensed and bonded warehouses.**

Cancellation of warehouse receipts upon delivery, §10-4-22.

**Tobacco sales and storage.**

Insurance, §10-4-103.

Trademark and service mark registration, §10-1-448.

**CARBONATED BEVERAGES.**

Registration and use of trademarks and service marks.

Carbonated waters as class of goods to be registered, §10-1-443.

**CAREER CONSULTING FIRMS.**

Advertising requirements, §10-1-393.

**CAREER CONSULTING FIRMS —Cont'd**

Contract requirements, §10-1-393.

Defined, §10-1-392.

CARRY-OVER TOBACCO, §§10-4-140 to 10-4-155.

**CARS.**

Franchises, §§10-1-620 to 10-1-670.

Lemon law, §§10-1-780 to 10-1-797.

Motor vehicle sales finance act, §§10-1-30 to 10-1-42.

**CASKS.**

Labeling gasoline and kerosene containers, §10-1-152.

**CATALOG SALES.**

Retail installment contracts negotiated and entered into by mail or telephone, §10-1-5.

**CATALOGUES.**

Limited edition art reproductions.

Advertising and sale of multiples, §10-1-431.

**Motor vehicle franchises.**

Termination, cancellation or renewal of franchise.

Repurchase of parts offered for sale in current parts catalogue, §10-1-651.

Retail installment and home solicitation sales.

Mail order and telephone sales, §10-1-5.

**CEASE AND DESIST ORDERS.**

**Attorneys at law.**

False advertising of legal services, §10-1-427.

**Commodities and commodity contracts and options.**

Violations of chapter, rule or order, §10-5A-21.

**Lemon law.**

Motor vehicles.

Enforcement powers of administrator, §10-1-791.

Securities, §10-5-73.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-397.

Appeals from orders of administrator, §10-1-398.1.

Stay and hearing, §10-1-398.

**CEMETERIES.**

**Actions.**

Evidence in civil actions, §10-14-27.

Pending actions under prior law, §10-14-28.

**CEMETERIES —Cont'd**

**Actions —Cont'd**

Purchaser's remedy for violations,  
§10-14-21.

Venue, §10-14-13.

**Appeals.**

Orders of Secretary of State.

Administrative appeal, §10-14-23.

Judicial appeal, §10-14-22.

**Civil penalties, §10-14-19.**

**Construction of mausoleum or  
columbarium, §10-14-29.**

**Contracts.**

Written contract, §10-14-18.

**Criminal actions.**

Evidence in, §10-14-27.

Penalties for violations, §10-14-20.

Subpoenas, §10-14-19.

Venue, §10-14-13.

**Defenses.**

Purchase agreements.

Waiver of rights or defenses void,  
§10-14-25.

**Definitions, §10-14-3.**

**Employees.**

Prohibition of certain persons from  
employment, §10-14-8.

**Escrow account.**

Preneed dealers, §§10-14-4, 10-14-7,  
10-14-12.

**Evidence.**

Civil or criminal actions, §10-14-27.

Investigations by Secretary of State.

Subpoenas, §10-14-15.

**Fraud.**

Prohibited acts, §10-14-17.

**Georgia cemetery and funeral services act  
of 2000.**

General provisions, §§10-14-1 to 10-14-30.

Short title, §10-14-1.

**Injunctions.**

Enforcement powers of Secretary of  
State, §10-14-19.

**Installation of merchandise.**

Prohibited acts, §10-14-17.

**Investigations.**

Secretary of State, §10-14-15.

**Legislative declaration, §10-14-2.**

**Nonperpetual care cemeteries, §§10-14-4,  
10-14-7.**

**Notice.**

Administrative appeal from order of  
Secretary of State.

Notice of opportunity for hearing,  
§10-14-23.

**CEMETERIES —Cont'd**

**Notice —Cont'd**

Judicial appeal from order of Secretary  
of State, §10-14-22.

Prohibition of certain persons from  
employment, §10-14-8.

**Orders.**

Appeals from orders of Secretary of  
State.

Administrative appeal, §10-14-23.

Judicial appeal, §10-14-22.

Enforcement powers of Secretary of  
State, §10-14-19.

Prohibition of certain persons from  
employment.

Emergency orders, §10-14-8.

Stop order suspending or revoking  
registration, §10-14-11.

**Pending actions under prior law, §10-14-28.**

**Perpetual care cemeteries.**

Prohibited acts, §10-14-17.

Trust fund, §§10-14-4, 10-14-6, 10-14-7,  
10-14-12.

**Preconstruction trust funds, §10-14-29.**

**Preneed dealers.**

Escrow account, §§10-14-4, 10-14-7,  
10-14-12.

Regulation.

Legislative declaration, §10-14-2.

**Preneed sales agents, §10-14-5.**

**Prohibited acts, §10-14-17.**

Criminal penalties for, §10-14-20.

Purchaser's remedies for violations,  
§10-14-21.

**Purchase agreements.**

Waiver of rights or defenses void,  
§10-14-25.

**Registration, §§10-14-4, 10-14-7.**

Applications, §10-14-4.

Amendment, §10-14-9.

Denial or refusal, §10-14-11.

Duties of registrant, §10-14-18.

Preneed dealers, §10-14-7.

Preneed sales agents, §10-14-5.

Renewal.

Penalty for late filing of application,  
§10-14-11.

Sale of or transfer of interest in  
registrant, §10-14-9.

Size.

Minimum size requirements,  
§10-14-10.

Stop order suspending or revoking  
registration, §10-14-11.

**Reports.**

Perpetual care trust funds.

Quarterly financial report, §10-14-12.



**CEMETERIES —Cont'd**

**Reports —Cont'd**

Preneed escrow accounts.

Quarterly financial report, §10-14-12.

**Rules and regulations, §10-14-14.**

Authority of state board, §10-14-3.1.

Minimum standards, §10-14-30.

Owner of cemetery, §10-14-16.

**Sale of burial rights, burial or funeral services.**

Prohibited acts, §10-14-17.

**Secretary of State.**

Administration of provisions, §10-14-14.

Appeals from orders of Secretary of State.

Administrative appeal, §10-14-23.

Judicial appeal, §10-14-22.

Enforcement powers, §10-14-19.

Immunity from liability, §10-14-26.

Investigations, §10-14-15.

Minimum standards.

Adoption by rule, §10-14-30.

Prohibition of certain persons from employment, §10-14-8.

Rules and regulations, §10-14-14.

Minimum standards, §10-14-30.

State board of cemetarians.

Delegation to board of duties entrusted to secretary, §10-14-3.1.

Stop order suspending or revoking registration, §10-14-11.

**Service charges, §10-14-16.**

**Service of process.**

Consent to service.

Effect, §10-14-24.

**Size.**

Minimum size requirements, §10-14-10.

**State board of cemetarians.**

Authority, §10-14-3.1.

Powers, §10-14-3.1.

**Trust fund, §10-14-6.**

Perpetual care cemeteries, §§10-14-4, 10-14-6, 10-14-7, 10-14-12.

Preconstruction trust funds, §10-14-29.

**Venue.**

Civil or criminal actions, §10-14-13.

**CEMETERY AND FUNERAL SERVICES ACT OF 2000.**

**General provisions, §§10-14-1 to 10-14-30.**

**Short title, §10-14-1.**

**CERTIFICATES OF ANALYSIS.**

**Petroleum products.**

Analyses as evidence, §10-1-157.

Analysis of gasoline or illuminating or heating oils by purchasers, §10-1-154.

**CERTIFICATES OF REGISTRATION.**

**Gasoline dealers, §10-1-158.**

**Trademarks or service marks, §10-1-444.**

Assignment of mark, §10-1-446.

**CERTIFICATION MARKS.**

**Defined, §10-1-371.**

**CERTIFIED PUBLIC WEIGHERS.**

**General provisions, §§10-2-40 to 10-2-54.**

**CHARITABLE SOLICITATIONS.**

**Telemarketing deception, fraud or abuse, §10-5B-5.**

Required and prohibited telephone conduct and activities, §10-5B-4.

**CHARITIES.**

**Art.**

Limited edition art reproductions.

Exemptions from part, §10-1-437.

**Common day of rest act of 1974.**

Exemption from article, §10-1-575.

**Emblems, §§10-1-470 to 10-1-472.**

Imitation, §10-1-470.

Injunction against infringement, §10-1-471.

Unauthorized use, §10-1-472.

**False claim of membership, §10-1-472.**

**Limited addition art reproductions.**

Exemptions from part, §10-1-437.

**Membership.**

False claims, §10-1-472.

**Names, §§10-1-470 to 10-1-472.**

Imitation, §10-1-470.

Injunction against infringement, §10-1-471.

Priority of right to use, §10-1-470.

Unauthorized use, §10-1-472.

**Secondary metals recyclers.**

Purchases of regulated metal property from charitable organization exempted from article, §10-1-355.

**CHEATING.**

**Commodities and commodity contracts and options.**

Cheating or defrauding person, §10-5A-6.

**CHECKS.**

**Credit cards.**

Acceptance of check because credit card presented, §10-1-393.3.

Recording number of credit card as condition of acceptance, §10-1-393.3.

Requiring credit card information on checks as condition of acceptance, §10-1-393.3.

**CHECKS —Cont'd**

**Dishonor and notice of dishonor.**

Retail installment contracts for revolving account.

Fees for check dishonor, §10-1-7.

Self-service storage facilities.

Occupant deemed to be in default where check given in payment is dishonored, §10-4-213.

**Fees.**

Retail installment contracts or revolving accounts.

Dishonor fees, §10-1-7.

**Retail installment contracts or revolving accounts.**

Check dishonor fees, §10-1-7.

**CHILD SUPPORT.**

**Collection of delinquent accounts.**

Private child support collectors.

Contracts for collection, §10-1-393.10.

Registration, §10-1-393.9.

**Registration of private child support collectors, §10-1-393.9.**

Contracts for collection, §10-1-393.10.

**CHOSES IN ACTION.**

**Fair business practices act.**

Powers of receivers appointed under part, §10-1-397.

**CIGAR AND CIGARETTE TAXES.**

**Stamps.**

Master settlement agreement enhancements.

Affixing tax stamp to manufacturer or brand not in directory prohibited, §10-13A-5.

**CIGARETTE MANUFACTURERS.**

**Financial responsibility for burdens imposed on state from smoking, §§10-13-1 to 10-13-4.**

Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.

**CIGARS AND CIGARETTES.**

**Manufactures of cigarettes.**

Financial responsibility for burdens imposed on state from smoking, §§10-13-1 to 10-13-4.

Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.

**CLASS ACTIONS.**

**Below cost sales.**

Violations asserted in individual action only, §10-1-255.

**CLASS ACTIONS —Cont'd**

**Motor vehicle sales finance act.**

Violations asserted only in individual actions, §10-1-36.1.

**CLEANING GASOLINE OR KEROSENE.**

Labeling of containers, §10-1-152.

**CLEAR AND CONSPICUOUS.**

Retail installment contract requirements, §§10-1-3, 10-1-32.

Revolving account requirements, §10-1-4.

**CLEAR DESCRIPTION.**

**Limited edition art reproduction.**

Descriptive information, §10-1-432.

**CLEARINGHOUSES.**

Commodities and commodity contracts and options.

Exempt purchasers and sellers, §10-5A-3.

**CLOSE CORPORATIONS.**

**Shares and shareholders.**

Securities.

Uniform securities act of 2008, §§10-5-1 to 10-5-90.

**CLOTHING.**

Registration of marks, §10-1-443.

**Retail installment contracts or revolving accounts.**

Security interest not taken on certain items, §10-1-8.

**CLOVER.**

**Warehouses.**

State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

**CLUBHOUSES.**

**Geo. L. Smith II Georgia World Congress Center Act.**

Issuance of bonds authorized, §10-9-40.  
Project defined, §10-9-3.

**CLUBS.**

**Beauty pageants.**

Exemption from bond requirements.  
Bona fide civic clubs, §10-1-833.

**Buying clubs or services.**

General provisions, §§10-1-590 to 10-1-605.

**Multilevel distribution companies.**

Considered unlawful pyramid clubs, §10-1-410.

**COAL.**

Sales by itinerant dealers without having weight certified, §10-2-51.

**COEDUCATIONAL.**

**Health spa contract requirement.**

- Right of buyer to cancel.
- Change in coeducational provisions, §10-1-393.2.

**COERCION AND DURESS.**

**Gasoline marketing practices.**

- Acts of distributor violating article, §10-1-233.

**Motor vehicle dealer's day in court act.**

- Practices violative of existing law, §10-1-631.

**Motor vehicle fair practices act.**

- Advertising campaign participation, §10-1-663.
- Ordering or accepting delivery of new motor vehicle, part or accessory, §10-1-661.

**COINS.**

**Numismatic coin.**

- Commodity not to include, §10-5A-1.

**Precious metals.**

- Defined, §10-5A-1.

**COKE DEALERS.**

**Sales by itinerant dealers without having weight certified, §10-2-51.**

**COLISEUMS.**

**Geo. L. Smith II Georgia World Congress Center.**

- Revenue bonds, §§10-9-40 to 10-9-61.

**Geo. L. Smith II Georgia World Congress Center Authority.**

- Project.
- Defined, §10-9-3.

**COLLATERAL CHARGES.**

**Farm tractor warranty rights act.**

- Replacement of or refund for nonconforming farm tractor, §10-1-814.

**Motor vehicle lemon law.**

- Dealer or manufacturer not liable, §10-1-792.

**COLLATERAL ISSUES.**

**Proof of suretyship by parol, §10-7-45.**

**COLLATERAL PLEDGE OF LEASE.**

**Motor vehicle fair practices act.**

- Unreasonable restrictions or changes, §10-1-663.

**COLLECTION AGENCIES.**

**Bonds, surety.**

- Agent in collection business, §§10-6-100 to 10-6-102.

**COLLECTIVE MARKS.**

**Defined, §10-1-371.**

**Exemptions from service mark and trademark provisions, §10-1-374.**

**COMMERCE AND TRADE.**

**Agency.**

- Agents receiving moneys for third persons, §§10-6-100 to 10-6-102.
- Creation and nature of relationship, §§10-6-1 to 10-6-6.
- Overseers, §§10-6-120, 10-6-121.
- Relations between principal and agent, §§10-6-20 to 10-6-39.
- Rights and liabilities of agent as to third persons, §§10-6-80 to 10-6-89.
- Rights and liabilities of principal to third persons, §§10-6-50 to 10-6-64.

**Assistive technology warranties, §§10-1-870 to 10-1-875.**

**Brokerage relationships in real estate transactions, §§10-6A-1 to 10-6A-16.**

**Business records, §§10-11-1 to 10-11-3.**

**Commodities and commodity contracts and options.**

- Enforcement, §§10-5A-20 to 10-5A-31.

**Flea market vendors' record-keeping, §§10-1-360 to 10-1-362.**

**Geo. L. Smith II Georgia World Congress Center.**

- General provisions, §§10-9-1 to 10-9-19.
- Revenue bonds, §§10-9-40 to 10-9-61.

**Marine manufacturers, §§10-1-675 to 10-1-678.**

**Motorized wheelchair warranties, §§10-1-890 to 10-1-894.**

**Notes and other evidences of debt, §§10-3-1 to 10-3-5.**

**Real estate brokers and salespersons.**

- Brokerage relationships in real estate transactions, §§10-6A-1 to 10-6A-16.

**Securities.**

- Uniform securities act of 2008, §§10-5-1 to 10-5-90.

**Seed capital fund, §§10-10-1 to 10-10-7.**

**Selling and other trade practices.**

- Auctioneers, §10-1-530.
- Below cost sales, §§10-1-250 to 10-1-256.
- Bidding by motion picture exhibitors, §§10-1-290 to 10-1-294.
- Book, periodical or newspaper tie-in sales, §§10-1-330, 10-1-331.
- Buying services, §§10-1-590 to 10-1-605.
- Common day of rest, §§10-1-570 to 10-1-576.



**COMMERCE AND TRADE —Cont'd**

**Selling and other trade practices —Cont'd**

Consignment of art, §§10-1-520 to 10-1-529.

Deceptive or unfair practices.

Disaster related violations, §10-1-438.

Elderly or disabled persons, §§10-1-850 to 10-1-857.

Fair business practices act, §§10-1-390 to 10-1-407.

False advertising, §§10-1-420 to 10-1-427.

Limited edition art reproductions, §§10-1-430 to 10-1-437.

Sale of business opportunities, §§10-1-410 to 10-1-417.

Uniform deceptive trade practices act, §§10-1-370 to 10-1-375.

Farm tractor warranty act, §§10-1-810 to 10-1-819.

Furnishing names of prospective purchasers, §10-1-70.

Gasoline marketing practices, §§10-1-230 to 10-1-241.

Interstate purchase of rifles and shotguns, §§10-1-100, 10-1-101.

Labeling remanufactured or rebuilt items, §§10-1-80 to 10-1-83.

Lease-purchase agreements, §§10-1-680 to 10-1-689.

Motor vehicle franchises.

Continuation and succession of franchises, §§10-1-650 to 10-1-653.

Enforcement of article, §§10-1-665 to 10-1-668.

Motor vehicle dealer's day in court act, §§10-1-630, 10-1-631.

Motor vehicle fair practices act, §§10-1-660 to 10-1-664.1.

Motor vehicle warranty practices act, §§10-1-640 to 10-1-645.

Motor vehicle lemon law, §§10-1-780 to 10-1-797.

Motor vehicle sales financing, §§10-1-30 to 10-1-42.

Multiline heavy equipment dealers, §§10-1-730 to 10-1-740.

Retail installment and home solicitation sales, §§10-1-1 to 10-1-16.

Retail petroleum product dealers, §§10-1-720, 10-1-721.

Rights in works of fine art, §10-1-510.

Sale and storage of liquefied petroleum gas, §§10-1-260 to 10-1-272.

Sale of paints and flaxseed or linseed oil, §§10-1-120 to 10-1-127.

**COMMERCE AND TRADE —Cont'd**

**Selling and other trade practices —Cont'd**

Sale of petroleum products, brake fluid and antifreeze.

Antifreeze, §§10-1-200 to 10-1-211.

Brake fluid, §§10-1-180 to 10-1-189.

Petroleum products, §§10-1-140 to 10-1-169.

Secondary metals recyclers.

General provisions, §§10-1-350 to 10-1-358.

**Suretyship.**

Contract of suretyship, §§10-7-1 to 10-7-4.

Relative rights of creditor and surety, §§10-7-20 to 10-7-31.

Rights of surety against principal, cosureties and third persons, §§10-7-40 to 10-7-57.

**Telemarketing deception, fraud or abuse,** §§10-5B-1 to 10-5B-8.

**Ticket scalping.**

Trademarks, service marks and trade names.

Names and emblems of fraternal, charitable and other organizations, §§10-1-470 to 10-1-472.

Registration and use of trademarks and service marks, §§10-1-440 to 10-1-454.

Registration of businesses using trade names, §§10-1-490 to 10-1-493.

Trade secrets, §§10-1-760 to 10-1-767.

Unsolicited merchandise, §§10-1-50, 10-1-51.

Wholesale distribution by out-of-state principal, §§10-1-700 to 10-1-704.

**Warehousemen.**

Convenience warehousing, §§10-4-190 to 10-4-193.

Self-service storage facilities, §§10-4-210 to 10-4-215.

State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

State warehouse commissioner, §§10-4-50 to 10-4-60.

Storage of cotton, §§10-4-70 to 10-4-81.

Tobacco warehousing.

Carry-over leaf tobacco storage and sale, §§10-4-140 to 10-4-155.

Leaf tobacco sales and storage, §§10-4-100 to 10-4-123.

Tobacco warehousemen's associations, §§10-4-170 to 10-4-177.

**Weights and measures.**

Certified public weighers, §§10-2-40 to 10-2-54.

**COMMERCIAL CODE.**

**Secured transactions.**

- Security agreement.
- Default.
- Disposition of motor vehicles,  
§10-1-36.

**COMMERCIAL PAPER.**

**Suretyship.**

- Discharge of parties to negotiable instruments.
- Provisions of commercial paper article to control, §10-7-27.

**COMMINGLED PROPERTY.**

**Fair business practices act.**

- Receivers' powers, §10-1-397.

**COMMISSIONERS.**

**Warehouses.**

- State warehouse commissioner, §§10-4-50 to 10-4-60.

**COMMODITIES, §§10-5A-1 to 10-5A-31.**

**Actions by commissioner if chapter, rule or order violated, §10-5A-21.**

- Legal or equitable remedy, §10-5A-22.

**Administration of chapter, §10-5A-24.**

**Administrative proceeding, §10-5A-28.**

- Judicial review of commissioner's orders,  
§10-5A-29.

**Agents.**

- Liability for acts or omissions, §10-5A-7.

**Appeals.**

- Judicial review of commissioner's orders,  
§10-5A-29.

**Associations.**

- Liability for acts or omissions of employees, officers or agents,  
§10-5A-7.

**Board of trade.**

- Defined, §10-5A-1.
- Designation, §10-5A-5.
- Applicability of section, §10-5A-27.

**Broker-dealers registered with securities and exchange commission.**

- Exempt purchasers and sellers, §10-5A-3.

**Burden of proving exemption, §10-5A-30.**

**Cease and desist orders.**

- Violation of chapter, rule or order,  
§10-5A-21.

**Certified public weighers.**

- General provisions, §§10-2-40 to 10-2-54.

**Civil penalties, §10-5A-22.**

- Violation of chapter, rule or order,  
§10-5A-21.

**Commissioner of insurance.**

- Rules and regulations, §10-5A-26.

**COMMODITIES —Cont'd**

**Commissioner of securities.**

- Actions if chapter, rule or order violated,  
§§10-5A-21, 10-5A-22.
- Administration of chapter, §10-5A-24.
- Administrative proceeding, §10-5A-28.
- Assistant, §10-5A-24.
- Compensation and expenses, §10-5A-24.
- Cooperation with agencies,  
administrators and organizations,  
§10-5A-25.
- Investigations, §10-5A-20.
- Powers, §10-5A-24.
- Secretary of state designated as,  
§10-5A-24.

**Commodity exchange act.**

- Defined, §10-5A-1.
- Exempt transactions and contracts,  
§10-5A-4.

**Commodity futures trading commission.**

- Defined, §10-5A-1.
- Exempt purchasers and sellers, §10-5A-3.
- Exempt transactions and contracts,  
§10-5A-4.

**Commodity merchants.**

- Conditions for acting as, §10-5A-5.
- Applicability of section, §10-5A-27.
- Defined, §10-5A-1.

**Confidentiality of information, §10-5A-24.**

**Conservators, §§10-5A-21, 10-5A-22.**

**Construction of chapter, §10-5A-9.**

**Contempt.**

- Refusal to obey subpoena, §10-5A-20.

**Contracts.**

- Defined, §10-5A-1.
- Exempt contracts, §10-5A-4.
- Prohibited activities concerning purchase or sale, §10-5A-2.
- Applicability of section, §10-5A-27.

**Cooperation with agencies, administrators and organizations, §10-5A-25.**

**Corporations.**

- Liability for acts or omissions of employees, officers or agents,  
§10-5A-7.

**Criminal penalties for violating chapter, §10-5A-31.**

**Criminal proceedings.**

- Institutions, §10-5A-31.

**Declaratory judgments, §§10-5A-21, 10-5A-22.**

**Definitions, §10-5A-1.**

**Disclosure of information in connection with investigation, §10-5A-20.**

**Disgorgement, §§10-5A-21, 10-5A-22.**

**COMMODITIES —Cont'd**

- Equitable remedies**, §10-5A-22.
- Exempt purchasers and sellers**, §10-5A-3.
  - Burden of proving, §10-5A-30.
- Exempt transactions and contracts**, §10-5A-4.
  - Burden of proving, §10-5A-30.
- Financial institutions**.
  - Defined, §10-5A-1.
  - Exempt purchasers and sellers, §10-5A-3.
- Fraudulent or deceitful acts prohibited**, §10-5A-6.
  - Applicability of section, §10-5A-27.
- Hearings**.
  - Administrative proceeding, §10-5A-28.
  - Investigations, §10-5A-20.
- Injunctions**, §§10-5A-21, 10-5A-22.
- Insurance companies**.
  - Exempt transactions and contracts, §10-5A-4.
- Investigations**, §10-5A-20.
- Judicial review of commissioner's orders**, §10-5A-29.
- Legal remedies**, §10-5A-22.
- Liability for acts or omissions of employees, officers or agents**, §10-5A-7.
- Mandamus**, §10-5A-22.
- Notice of intent or summary order**, §10-5A-28.
- Offer to buy or sell or solicitation**.
  - Accepted in state, §10-5A-27.
  - Made in state, §10-5A-27.
  - Originating in state, §10-5A-27.
- Options**.
  - Defined, §10-5A-1.
  - Prohibited activities concerning purchase or sale, §10-5A-2.
  - Applicability of section, §10-5A-27.
- Orders**.
  - Judicial review, §10-5A-29.
  - Notice of intent or summary order, §10-5A-28.
- Partnerships**.
  - Liability for acts or omissions of employees, officers or agents, §10-5A-7.
- Precious metals**.
  - Defined, §10-5A-1.
  - Exempt purchasers and sellers, §10-5A-3.
  - Exempt transactions and contracts, §10-5A-4.
- Prohibited activities concerning purchase or sale**, §10-5A-2.
  - Applicability of section, §10-5A-27.

**COMMODITIES —Cont'd**

- Prohibition**, §10-5A-22.
  - Receivers**, §§10-5A-21, 10-5A-22.
  - Rules and regulations**, §§10-5A-4, 10-5A-26.
  - Securities broker-dealers**.
    - Exempt purchasers and sellers, §10-5A-3.
  - Securities law**.
    - Applicability, §10-5A-8.
  - Solicitations or sales accepted in state**, §10-5A-27.
  - Solicitations or sales made in state**, §10-5A-27.
  - Solicitations or sales originating in state**, §10-5A-27.
  - Special remedies**, §10-5A-22.
  - Subpoenas**.
    - Investigations, §10-5A-20.
  - Summary orders**, §10-5A-28.
    - Judicial review, §10-5A-29.
  - Telemarketing deception, fraud or abuse**, §10-5B-5.
    - Required and prohibited telephone conduct and activities, §10-5B-4.
  - Venue for civil and criminal actions**, §10-5A-23.
  - Weights and measures**.
    - Certified public weighers.
      - General provisions, §§10-2-40 to 10-2-54.
    - General provisions, §§10-2-1 to 10-2-54.
  - Willful misappropriation prohibited**, §10-5A-6.
    - Applicability of section, §10-5A-27.
  - Witnesses**.
    - Investigations, §10-5A-20.
- COMMODITY EXCHANGES.**
- Commodities generally**, §§10-5A-1 to 10-5A-31.
- COMMON DAY OF REST**, §§10-1-570 to 10-1-576.
- Agricultural operations**.
  - Exemption from article, §10-1-574.
- Benefit of day of rest**.
  - Employees of business or industry operating on Saturday or Sunday, §10-1-573.
- Casual transactions**.
  - Exemption from article, §10-1-574.
- Charitable or religious activities**.
  - Exemption from article, §10-1-575.
- Common day of rest act of 1974**.
  - Short title, §10-1-570.
- Definitions**, §10-1-571.
- Employees given benefit of day of rest**, §10-1-573.



**COMMON DAY OF REST —Cont'd**

**Exemptions from article.**

- Charitable or religious activities,  
§10-1-575.
- Generally, §10-1-574.
- Governmental departments, agencies  
and employees, §10-1-576.

**Governmental departments, agencies and  
employees.**

- Exemption from article, §10-1-576.

**Healing arts.**

- Exemption from article, §10-1-574.

**Legislative intent, §10-1-572.**

**Purpose of article, §10-1-572.**

**Saturday or Sunday operation.**

- Employees to be given benefit of day of  
rest, §10-1-573.

**Short title.**

- Common day of rest act of 1974,  
§10-1-570.

**COMMON DAY OF REST ACT OF 1974.**

**General provisions, §§10-1-570 to  
10-1-576.**

**Short title, §10-1-570.**

**COMMON LAW.**

**Commodities and commodity contracts and  
options.**

- Confidential information, §10-5A-24.

**Trademarks and service marks.**

- Rights and marks not affected by part,  
§10-1-452.

**Uniform deceptive trade practices act.**

- Enjoining deceptive trade practices.  
Relief in addition to remedies  
otherwise available under,  
§10-1-373.

- When trade practices deceptive.

- Common law and other remedies  
unaffected, §10-1-372.

**COMPLAINTS.**

**Warehouses.**

- State licensed and bonded warehouses.  
Breach of bond, §10-4-14.

**COMPRESSED COTTON PLANTS.**

**Purchase or lease of or contracting for by  
commissioner of agriculture, §10-4-56.**

**COMPROMISE AND SETTLEMENT.**

**Fair business practices act.**

- Civil penalties, §10-1-405.

**Farm tractor warranty act.**

- Informal dispute settlement procedures,  
§10-1-816.

**COMPROMISE AND SETTLEMENT**

**—Cont'd**

**Gasoline.**

- Below cost sales.
- Effect of written tender of settlement,  
§10-1-255.

**Heavy equipment multiline dealers.**

- Good faith settlement of disputes,  
§10-1-737.

**Lemon law.**

- Farm tractors.
- Informal dispute settlement  
procedures, §10-1-816.

**Tobacco products manufacturers.**

- Financial responsibility for burdens  
imposed on state from smoking,  
§§10-13-1 to 10-13-4.
- Master settlement agreement  
enhancements, §§10-13A-1 to  
10-13A-9.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Written tender of settlement,  
§10-1-399.

**CONDEMNATION.**

**Antifreeze.**

- Noncomplying antifreeze, §10-1-205.

**Brake fluid.**

- Adulterated or misbranded fluid,  
§10-1-186.

**Gasoline pumps.**

- Operating condemned self-measuring  
gasoline pumps, §10-1-167.

**Petroleum products sales.**

- Inaccurate measures, §10-1-160.
- Inaccurate pumps, §10-1-159.
- Self-measuring pumps.
- Operating condemned self-measuring  
gasoline pumps, §10-1-167.

**Tobacco.**

- Leaf tobacco sales and storage.
- Tobacco treated with unregistered  
pesticide, §10-4-117.1.

**CONDITIONAL POWER OF ATTORNEY,  
§10-6-6.**

**CONFIDENTIALITY OF INFORMATION.**

**Antifreeze.**

- Statement of formula or contents,  
§10-1-207.

**Business records.**

- Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**CONFIDENTIALITY OF INFORMATION**

—Cont'd

**Commodities and commodity contracts and options**, §10-5A-24.

Investigations, §10-5A-20.

**Deceptive trade practices.**

Fair business practices act of 1975, §10-1-404.

**Geo. L. Smith II Georgia World Congress Center.**

Board of governors.

Authority.

Criminal background checks on officers and employees, §10-9-9.

**Real estate brokers and salespersons.**

Brokerage relationships.

Exclusive representation, §10-6A-13.

**Securities.**

Confidential records, §10-5-76.

**Trade secrets.**

General provisions, §§10-1-760 to 10-1-767.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-404.

**CONFISCATION.**

**Antifreeze.**

Seizure of noncomplying antifreeze, §10-1-205.

**Brake fluid.**

Seizure of adulterated or misbranded fluid, §10-1-186.

**Gasoline.**

Substandard gasoline subject to petroleum products sales part, §10-1-151.

**Kerosene.**

Substandard kerosene subject to petroleum products sales part, §10-1-151.

**Petroleum products sales.**

Inaccurate measures, §10-1-160.

Inaccurate pumps, §10-1-159.

Substandard gasoline and kerosene, §10-1-151.

**Trademarks and service marks.**

Destruction or disposal of counterfeit trademarks, §10-1-451.

**Weights and measures.**

Seizure of illegal weights, measures or commodities, §10-2-6.

**CONFLICTS OF INTEREST.**

**Agents.**

Buying or selling for himself, §10-6-24.

**CONFLICTS OF INTEREST —Cont'd**

**Gasoline.**

State oil chemist or oil inspectors.

Interest in sale or manufacture of gasoline, §10-1-166.

**Petroleum products sales.**

State oil chemist or oil inspectors.

Interest in sale or manufacture of gasoline, §10-1-166.

**CONFLICTS OF LAW.**

**Liquefied petroleum gas.**

Sale and storage.

Conflicting local ordinances or regulations, §10-1-270.

**CONFUSION.**

**Deceptive trade practices**, §10-1-372.

Consumer transactions, §10-1-393.

Enjoining, §10-1-393.

Office supply transactions, §10-1-393.1.

**Trademark or service mark registration.**

Cancellation, §10-1-448.

Infringement action, §10-1-450.

Infringement injunction, §10-1-451.

When marks ineligible, §10-1-441.

**CONSENT.**

**Heavy equipment multiline dealers.**

Transfer of dealer's business, §10-1-734.

**CONSERVATORS.**

**Accounts.**

Duty to keep, neglect, effect, §10-6-30.

**Commodities and commodity contracts and options.**

Appointment if chapter, rule or order violated, §§10-5A-21, 10-5A-22.

**Conveyance by attorney in fact**, §10-6-4.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-397.

**CONSIDERATION.**

**Patent rights, copyrights or proprietary rights.**

Consideration stated on notes or contracts for purchase or sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Referral sales.**

Furnishing names of prospective purchasers.

Sales contract required to state consideration, §10-1-70.

**CONSIGNMENT OF ART ACT.**

**Georgia consignment of art act.**

General provisions, §§10-1-520 to 10-1-529.

Short title, §10-1-520.

**CONSPIRACIES.**

**Agents.**

Conspiring with third person.

Principal not bound, §10-6-59.

**Principal not bound by agent conspiring with third person, §10-6-59.**

**CONSUMER PREVENTIVE EDUCATION PLAN.**

Administrator authorized to establish, §10-1-381.

**CONSUMER PROTECTION.**

**Advertising.**

False advertising.

General provisions, §§10-1-420 to 10-1-427.

**Antifreeze sales, §§10-1-200 to 10-1-211.**

**Art.**

Limited edition art reproductions.

General provisions, §§10-1-430 to 10-1-437.

**Brake fluid sales.**

General provisions, §§10-1-180 to 10-1-189.

**Business opportunity sales.**

General provisions, §§10-1-410 to 10-1-417.

**Buying clubs or services.**

General provisions, §§10-1-590 to 10-1-605.

**Credit report security freezes, §§10-1-913 to 10-1-915.**

**Deceptive or unfair trade practices.**

Elderly or disabled persons, §§10-1-850 to 10-1-857.

Uniform deceptive trade practices act.

General provisions, §§10-1-370 to 10-1-375.

**Fair business practices act of 1975.**

General provisions, §§10-1-390 to 10-1-407.

**False advertising.**

General provisions, §§10-1-420 to 10-1-427.

**Farm tractor warranties, §§10-1-810 to 10-1-819.**

**Gasoline below cost sales, §§10-1-250 to 10-1-256.**

**Gasoline marketing practices, §§10-1-230 to 10-1-241.**

**CONSUMER PROTECTION —Cont'd  
Lease-purchase agreements.**

General provisions, §§10-1-680 to 10-1-689.

**Lemon law.**

Farm tractors, §§10-1-810 to 10-1-819.

Motor vehicles, §§10-1-780 to 10-1-797.

**Motor vehicle financing.**

Retail installment sales contracts.

General provisions, §§10-1-30 to 10-1-42.

**Motor vehicle warranties, §§10-1-780 to 10-1-797.**

**Petroleum products sales generally, §§10-1-140 to 10-1-169.**

**Referral sales.**

Furnishing names of prospective purchasers.

Sales contract required to state consideration, §10-1-70.

**Remanufactured or rebuilt items.**

Labeling requirements, §§10-1-80 to 10-1-83.

**Retail installment sales contracts and revolving accounts.**

General provisions, §§10-1-1 to 10-1-16.

Motor vehicle financing, §§10-1-30 to 10-1-42.

**Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

**Trade names.**

Registration, §§10-1-490 to 10-1-493.

**Unfair or deceptive trade practices.**

Elderly or disabled persons, §§10-1-850 to 10-1-857.

Fair business practices act of 1975.

General provisions, §§10-1-390 to 10-1-407.

Uniform deceptive trade practices act.

General provisions, §§10-1-370 to 10-1-375.

**Unsolicited or unordered merchandise, §§10-1-50, 10-1-51.**

**CONTEMPT.**

**Commodities and commodity contracts and options.**

Refusal to obey subpoena, §10-5A-20.

**Securities.**

Powers of commissioner, §10-5-71.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Cease and desist orders.

Failure to obey subpoenas, §10-1-398.



**CONTINUING EDUCATION.**

**Securities.**

Agents, broker-dealers, investment advisers and investment adviser representatives, §10-5-40.

**CONTRABAND.**

**Tobacco master settlement agreement enhancements.**

Remedies for noncompliance.  
Cigarettes declared contraband, §10-13A-8.

**CONTRACTORS.**

**Telemarketing deception, fraud or abuse,** §10-5B-5.

Required and prohibited telephone conduct and activities, §10-5B-4.

**CONTRACTS.**

**Agents.**

Action for wrongful discharge of agent before termination of contract, §10-6-37.

General provisions, §§10-6-1 to 10-6-142.

**Art.**

Duplication of works of fine art, §10-1-510.

**Business opportunity sales,** §10-1-415.

Voiding for violations, §10-1-417.

**Campground membership or marine membership facilities.**

Requirements, §10-1-393.

**Career consulting firms,** §10-1-393.

**Child support collectors, private.**

Contracts for collection, §10-1-393.10.

**Commodities generally,** §§10-5A-1 to 10-5A-31.

**Copyrights.**

Consideration to be stated on contract for purchase or sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Geo. L. Smith. II Georgia World Congress Center.**

Contracts for use of or conduct of activities, §10-9-14.

Lease of facilities.

Contracts by public entities, §10-9-49.

Planning, constructing, operating local trade and convention center, §10-9-16.1.

**Health spas.**

Requirements, §10-1-393.2.

**CONTRACTS —Cont'd**

**Heavy equipment multiline dealers.**

Agreements between dealers and suppliers generally, §§10-1-730 to 10-1-740.

**Installment contracts.**

Retail installment contracts.

General provisions, §§10-1-1 to 10-1-16.

Motor vehicle financing, §§10-1-30 to 10-1-42.

**Lease-purchase agreements,** §§10-1-680 to 10-1-689.

**Marine manufacturers.**

Termination of contractual relationship between dealer and manufacturer, §10-1-677.

**Novation.**

Defined, §10-7-21.

Effect on surety's liability, §10-7-21.

**Overseers.**

Parol contracts between employer and overseer, §10-6-121.

**Parol contracts.**

Between employer and overseer, §10-6-121.

**Patents.**

Consideration to be stated on contract for purchase or sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Printers.**

Duplication of work of fine art, §10-1-510.

**Promotional giveaways or contests.**

Noncomplying contracts voidable, §10-1-393.

**Proprietary rights.**

Consideration to be stated on contract for purchase or sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Real property.**

Deceptive trade practices in consumer transactions.

Purchase of property used as dwelling by defaulting debtor.

Debtor remaining in possession of property, §10-1-393.

**Retail installment contracts.**

General provisions, §§10-1-1 to 10-1-16.

Motor vehicle financing, §§10-1-30 to 10-1-42.

**CONTRACTS —Cont'd**

**Sales representatives.**

Wholesale distribution by out-of-state principal.

General provisions, §§10-1-700 to 10-1-704.

**Suretyship.**

General provisions, §§10-7-1 to 10-7-4.

Relative rights of creditor and surety, §§10-7-20 to 10-7-31.

Rights of surety against principal, cosureties and third persons, §§10-7-40 to 10-7-57.

**Tobacco contracts, §10-4-107.1.**

**Trade name registration.**

Contracts of unregistered businesses valid, §10-1-491.

**Void and illegal contracts.**

Child support collection, private agencies.

Waiver of rights, requirements or remedies provided by law, §10-1-393.10.

**Wholesale distribution by out-of-state principal.**

General provisions, §§10-1-700 to 10-1-704.

**CONTRIBUTION.**

**Securities.**

Right of contribution of liable person, §10-5-58.

**Suretyship.**

Compelling contribution, §10-7-50.

Controlling action on debt and judgment, §10-7-53.

Duty to account for indemnification, §10-7-52.

Interest on sum recovered, §10-7-51.

Transfer of security from principal, §10-7-52.

**CONVALESCENT CARE.**

**Unfair or deceptive practices in consumer transactions.**

Personal care means, §10-1-393.

**CONVENIENCE WAREHOUSE ACT OF 1975.**

General provisions, §§10-4-190 to 10-4-193.

Short title, §10-4-190.

**CONVENIENCE WAREHOUSING, §§10-4-190 to 10-4-193.**

**Convenience warehouse act of 1975.**

Short title, §10-4-190.

**Criminal penalties for violations, §10-4-193.**

Definitions, §10-4-191.

**CONVENIENCE WAREHOUSING**

—Cont'd

**Exemption of state licensed or bonded warehouses, §10-4-191.**

**Information to be obtained by persons renting or leasing storage space, §10-4-192.**

**Property ownership statement, §10-4-192. Short title.**

Convenience warehouse act of 1975, §10-4-190.

**CONVENTIONS.**

**Recreational vehicle dealers.**

Requirement of franchise agreement.

Exceptions for shows and conventions, §10-1-679.14.

**CONVEYANCES.**

**Art.**

Rights in works of fine art, §10-1-510.

**Attorneys in fact.**

Fiduciaries may convey by, §10-6-4.

**Conservators.**

Conveyance by attorney in fact, §10-6-4.

**Executors and administrators.**

Conveyance by attorneys in fact, §10-6-4.

**Fiduciaries may convey by attorneys in fact, §10-6-4.**

**Guardian and ward.**

Conveyance by attorneys in fact, §10-6-4.

**Trustees.**

Conveyance by attorneys in fact, §10-6-4.

**COPPER.**

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**Secondary metals recyclers.**

General provisions, §§10-1-350 to 10-1-358.

Payment by recyclers for copper property, §10-1-352.1.

**COPYRIGHTS.**

**Contracts.**

Consideration to be stated, §§10-3-3 to 10-3-5.

**Notes or contracts for purchase or sale.**

Consideration to be stated, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Sales.**

Consideration stated on notes or contracts, §§10-3-3 to 10-3-5.

**COPYRIGHTS —Cont'd**

**Works of fine art.**

Conveyance of rights, §10-1-510.

**CORN.**

**Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

**CORPORATIONS.**

**Agents.**

Formality necessary to create agency,  
§10-6-2.

**Business opportunity sales.**

Liability of officers and directors for  
violations of part, §10-1-417.

**Business records, §§10-11-1 to 10-11-3.**

Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**Commodities and commodity contracts and  
options.**

Liability for acts or omissions of  
employees, officers and agents,  
§10-5A-31.

**Fictitious business names.**

Trade name registration generally,  
§§10-1-490 to 10-1-493.

**Motor vehicle franchise practices act.**

Generally, §§10-1-620 to 10-1-670.  
Standing of corporation comprising  
dealers and representing dealers,  
§10-1-623.

Venue of action against corporate  
manufacturer, franchisor or  
distributor, §10-1-623.

**Names.**

Trade names.  
General provisions, §§10-1-490 to  
10-1-493.

**Petroleum products sales.**

Deception, substitution and  
misbranding.  
Directors, officers, agents, etc.,  
participating in acts guilty of  
misdemeanor, §10-1-163.

**Records.**

Business records, §§10-11-1 to  
10-11-3.

**Stock and stockholders.**

Securities.  
Uniform securities act of 2008,  
§§10-5-1 to 10-5-90.

**Sureties.**

Bad faith refusal of corporate surety to  
perform contract, §10-7-30.

**CORPORATIONS —Cont'd**

**Telemarketing violations.**

Criminal penalties, §10-1-393.6.

**Trademarks and service marks.**

General provisions, §§10-1-440 to  
10-1-454.

**Trade name registration.**

Exemption, §10-1-492.  
Trade names generally, §§10-1-490 to  
10-1-493.

**COST PER UNIT INFORMATION.**

Packaged commodities, §10-2-5.

**COSTS.**

**Art.**

Contract of printer with customer to  
duplicate fine art.

Customer falsely stating legal right or  
license authorizing duplication,  
§10-1-510.

Limited edition art reproductions.

Civil remedies for violations, §10-1-435.

**Deceptive trade practices.**

Fair business practices act of 1975.

Civil or equitable remedies by  
individuals, §10-1-399.

Uniform deceptive trade practices act.

Enjoining deceptive trade practices,  
§10-1-373.

**Farm tractor warranty act.**

Action for violation of informal dispute  
settlement procedures, §10-1-816.

**Gasoline below cost sales.**

Actions for violations of article,  
§10-1-255.

**Heavy equipment multiline dealers.**

Actions for violations of provisions,  
§10-1-739.

**Indorser's payment of debt past due.**

Action for money paid, §10-7-41.

**Lease-purchase agreements.**

Actions for violations of article,  
§10-1-687.

**Lemon law.**

Farm tractors.

Action for violation of informal  
dispute settlement procedures,  
§10-1-816.

Motor vehicles.

Arbitration to compel replacement or  
repurchase of vehicle.

Appeal of decision, §10-1-787.

Appeal of ineligibility  
determination.

Frivolous filing of, §10-1-786.



**COSTS —Cont'd**

**Motor vehicles.**

Lemon law.

Arbitration to compel replacement or repurchase of vehicle.

Appeal of decision, §10-1-787.

Appeal of ineligibility determination.

Frivolous filing of, §10-1-786.

**Motor vehicle sales finance act.**

Court costs when contract referred for collection, §10-1-32.

Subleasing vehicles subject to retail installment contract, §10-1-41.

**Retail installment contracts and revolving accounts.**

Court costs when referred for collection, §10-1-7.

Motor vehicle sales finance act.

Court costs when contract referred for collection, §10-1-32.

Subleasing vehicles subject to retail installment contract, §10-1-41.

**Secondary metals recyclers.**

Lawful owner recovering stolen property from recycler, §10-1-354.

**Securities.**

Violation of provisions.

Civil liability enforcement, §10-5-58.

**Suretyship.**

Action for payment by surety of debt past due, §10-7-41.

**Tobacco master settlement agreement enhancements.**

Remedies for noncompliance.

Recovery of enforcement costs, §10-13A-8.

**Trademarks and service marks.**

Person causing seizure of goods not counterfeit.

Costs incurred in defending against seizure, §10-1-451.

**Trade name registration.**

Actions bought by unregistered businesses.

Costs paid if name not registered, §10-1-491.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Civil or equitable remedies by individuals, §10-1-399.

Uniform deceptive trade practices act.

Enjoining deceptive trade practices, §10-1-373.

**COSTS —Cont'd**

**Unsolicited merchandise sent or unordered merchandise sent after membership terminated.**

Action to enjoin payment request, §§10-1-50, 10-1-51.

**COTTON.**

**Receipts given by state licensed and bonded warehouses, §10-4-19.**

**Storage, §§10-4-70 to 10-4-81.**

Charges, §10-4-74.

Classifications, §10-4-70.

Commissions, §10-4-74.

Investigation of liens and titles, §10-4-76.

Liens.

Investigation of adverse lien, §10-4-76.

Penalty for failure to give notice, §10-4-77.

Penalty for false affidavit, §10-4-78.

Lint cotton, §10-4-71.

Loans on receipts, §10-4-73.

Priority of claim of receipt holder, §10-4-76.

Rates.

Fixing, §10-4-72.

Receipts.

Books, §10-4-75.

Execution and sealing, §10-4-75.

Lint cotton, §10-4-71.

Loans on receipts, §10-4-73.

Lost or destroyed receipts, §10-4-81.

Penalties for delivering cotton without production of receipt or failing to cancel, §10-4-79.

Penalty for issuing duplicate or additional receipts, §10-4-81.

Penalty for issuing receipt for cotton not in warehouse, §10-4-80.

Priority of claim of receipt holder, §10-4-76.

Sales, §10-4-73.

Standards, §10-4-70.

State warehouse commissioner.

Duties of commissioner generally, §10-4-54.

General provisions, §§10-4-50 to 10-4-60.

Limitations on liability, §10-4-53.

Linters not to be stored, §10-4-53.

Purchasing, leasing or contracting for compress plant, §10-4-56.

Tags, §10-4-71.

Terms.

Fixing, §10-4-72.

**COTTON —Cont'd**

**Storage —Cont'd**

Title.

Investigation of adverse title,  
§10-4-76.

**COTTON WAREHOUSING.**

**Storage of cotton generally**, §§10-4-70 to  
10-4-81.

**COUNTERCLAIMS.**

**Lease-purchase agreements.**

Provisions requiring lessee to waive  
counterclaim prohibited,  
§10-1-684.

**COUNTERFEITING.**

**Trademarks and service marks**, §10-1-454.

**COUNTIES.**

**Common day of rest act of 1974.**

Exemption of governmental  
departments, agencies and  
employees, §10-1-576.

**Identity theft.**

Breach of security regarding personal  
information.

Notification requirements,  
§10-1-912.

Data collector defined, §10-1-911.

**Personal information.**

Identity theft.

Breach of security regarding personal  
information.

Notification requirements,  
§10-1-912.

Data collector defined, §10-1-911.

**CREDIT CARDS.**

**Address on application in response  
solicitation not substantially same as  
address on solicitation.**

Unsolicited offer by mail to apply for  
card.

Issuance of card without verifying  
address.

Unfair or deceptive business  
practice, §10-1-393.

**Checks.**

Acceptance of check because credit card  
presented, §10-1-393.3.

Recording number of credit card as  
condition of acceptance,  
§10-1-393.3.

Requiring credit card information on  
checks as condition of acceptance,  
§10-1-393.3.

**CREDIT CARDS —Cont'd**

**Deceptive trade practices.**

Prohibited use of credit card  
information by merchant,  
§10-1-393.3.

**Drafts.**

Acceptance of draft because credit card  
presented, §10-1-393.3.

Recording number of credit card as  
condition of acceptance,  
§10-1-393.3.

Requiring credit card information on  
draft as condition of acceptance,  
§10-1-393.3.

**Identity theft.**

General provisions, §§10-1-910 to  
10-1-915.

**Magnetic strip or stripes.**

Prohibited activities involving.

Personal information protection,  
§10-15-4.

**Merchants.**

Prohibited use of information,  
§10-1-393.3.

**Personal information protection**, §§10-15-1  
to 10-15-7.

Correction of public records.

Court orders to correct, §10-15-7.

Definitions, §10-15-1.

Disposal of business records, §10-15-1.

Enforcement of chapter, §10-15-5.

Administrative penalty, §10-15-6.

Criminal penalty, §10-15-7.

Magnetic strip or stripes.

Prohibited activities involving,  
§10-15-4.

Receipts for credit card transactions.

Information included, §10-15-3.

Reencoders.

Prohibited activities involving,  
§10-15-4.

Restitution, §10-15-7.

**Receipts for credit card transactions.**

Personal information protection,  
§10-15-3.

**Reencoders.**

Prohibited activities involving, §10-15-4.

**Telephones.**

Merchant requiring purchaser to provide  
personal or business telephone  
number, §10-1-393.3.

**Unfair or deceptive trade practices.**

Prohibited use of credit card  
information by merchant,  
§10-1-393.3.

**CREDIT CARDS —Cont'd**

**Unfair or deceptive trade practices**

—Cont'd

Unsolicited offer by mail to apply for card.

Address on application in response not substantially same as address on solicitation.

Issuance of card without verifying address, §10-1-393.

**Unsolicited offer by mail to apply for card.**

Address on application in response not substantially same as address on solicitation.

Issuance of card without verifying address.

Unfair or deceptive business practice, §10-1-393.

**CREDIT HISTORY OR CREDIT RECORD.**

**Telemarketer requesting fee advance to remove derogatory information, §10-1-393.6.**

**CREDIT REPORTS.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

Personal information protection.

Court orders to correct public records, §10-15-7.

**Security freezes, §§10-1-913 to 10-1-915.**

Definitions, §10-1-913.

Duties of reporting agency on request, §10-1-914.

Entities exempt from provisions, §10-1-914.

Fees, §10-1-914.

Notice of rights to consumer, §10-1-915.

Procedures, §10-1-914.

Removal, §10-1-914.

Temporary lifting of freeze, §10-1-914.

**CRIME INFORMATION CENTER.**

**Geo. L. Smith II Georgia World Congress Center.**

Board of governors of authority.

Conviction data with respect to officers and employees, §10-9-9.

**Records checks.**

Securities.

Agents, broker-dealers, investment advisers and investment adviser representatives.

Fingerprinting and criminal background check, §10-5-35.

**CRIMINAL LAW AND PROCEDURE.**

**Advertisements.**

False advertising.

Advertising without intending to sell on stated terms, §10-1-420.

Doctor or Dr.

Degree to be designated in advertisements.

Violations, §10-1-422.

Legal services.

Violation of cease and desist order, §10-1-427.

Liquidation, auction or going-out-of-business sales.

Misrepresenting ownership, §10-1-426.

Misrepresenting nature of business, §10-1-426.

**Agent in business of receiving cash for payment to third persons.**

Failure to post bond, §10-6-102.

**Antifreeze sales.**

Violations of part or rules and regulations, §10-1-211.

**Auctions.**

False advertising.

Misrepresenting ownership in advertising auction sales, §10-1-426.

**Beauty pageants.**

Violations of provisions, §10-1-836.

**Benevolent organizations.**

False claim of membership, §10-1-472.

Unauthorized use of emblem or name, §10-1-472.

**Books.**

Tie-in sales, §10-1-331.

**Business opportunity sales.**

Violations of part, §10-1-417.

**Business records.**

Disposal of business records containing personal information, §10-15-7.

Personal information, §10-15-7.

**Buying clubs or services.**

Violations of article, §10-1-605.

**Cemeteries.**

Evidence in criminal actions, §10-14-27.

Penalties for violations, §10-14-20.

Subpoenas in criminal actions, §10-14-19.

Venue of criminal actions, §10-14-13.

**Certified public weighers.**

Violations, §10-2-54.

**Charities.**

False claim of membership, §10-1-472.

Unauthorized use of emblem or name, §10-1-472.



**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Coal or coke itinerant dealers.**

Sale without having weight certified,  
§10-2-51.

**Commodities and commodity contracts and options.**

Criminal penalties for violating chapter,  
§10-5A-31.

Institution of criminal proceedings,  
§10-5A-31.

Venue for criminal actions, §10-5A-23.

**Convenience warehousing, §10-4-193.**

**Cotton.**

Storage.

Delivering cotton without production  
of receipt or failing to cancel,  
§10-4-79.

Failure to give notice of lien, §10-4-77.

False affidavit as to lien, §10-4-78.

Issuing duplicate or additional  
receipts, §10-4-81.

Issuing receipts for cotton not in  
warehouse, §10-4-80.

**Credit cards.**

Personal information protection,  
§10-15-7.

**Emblems.**

Benevolent organizations, charities,  
fraternal organizations, etc.

Unauthorized use, §10-1-472.

**Flea market vendors' record-keeping,  
§10-1-360.**

**Fraternal organizations.**

False claim of memberships, §10-1-472.

Unauthorized use of emblems or names,  
§10-1-472.

**Gasoline.**

Drivers holding special disability permit.  
Violations of self-service gasoline price,  
§10-1-164.1.

Operating condemned self-measuring  
gasoline pumps, §10-1-167.

Operating short-measure gasoline  
pumps, §10-1-168.

Retail motor fuel advertising  
requirements violations, §10-1-164.

Self-service for handicapped person,  
§10-1-164.1.

State oil chemist or inspector having  
interest in sale or manufacture,  
§10-1-166.

**Geo. L. Smith II Georgia World Congress  
Center.**

Commercial activity prohibition  
violation, §10-9-14.

**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Going-out-of-business sales.**

Misrepresenting ownership in  
advertising, §10-1-426.

**Health spas, §10-1-393.2.**

**Humane organizations.**

False claim of membership, §10-1-472.

Unauthorized use of emblem or name,  
§10-1-472.

**Labeling remanufactured or rebuilt items.**

Violations of article, §10-1-83.

**Lease-purchase agreements.**

Violations of article, §10-1-687.

**Liquefied petroleum gas.**

Sale and storage.

Violation of article or rules and  
regulations, §10-1-272.

**Liquidation sales.**

Misrepresenting ownership in  
advertising, §10-1-426.

**Magazines.**

Tie-in sales, §10-1-331.

**Motor fuels.**

Advertising violations, §10-1-164.

Drivers holding special disability permit.

Violations of self-service gasoline price.  
Requirement, §10-1-164.1.

Operating condemned self-measuring  
gasoline pumps, §10-1-167.

Operating short-measure gasoline  
pumps, §10-1-168.

State oil chemist or inspector having  
interest in sale or manufacture of  
gasoline, §10-1-166.

**Motor vehicle sales finance act, §10-1-38.**

Subleasing vehicles subject to retail  
installment contract, §10-1-40.

**Names.**

Benevolent organizations, charities,  
fraternal organizations, etc.

Unauthorized use, §10-1-472.

**Newspapers.**

Tie-in sales, §10-1-331.

**Paint.**

Sale of deceptively labeled paint,  
§10-1-127.

Timber-marking paint sale and labeling  
requirement violations, §10-1-126.

**Patent rights, copyrights or proprietary  
rights.**

Consideration to be stated on notes or  
contracts for purchase or sale.

Violation, §10-3-5.

**Petroleum products sales.**

Deception, substitution and  
misbranding, §10-1-163.

**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Petroleum products sales —Cont'd**

- Drivers holding special disability permit.
- Violations of self-service gasoline price requirements, §10-1-164.1.
- Operating condemned self-measuring gasoline pumps, §10-1-167.
- Operating short-measure gasoline pumps, §10-1-168.
- Regulations or specifications for petroleum products.
- Violations, §10-1-169.
- Retail motor fuel advertising requirements violations, §10-1-164.
- State oil chemist or inspector having interest in sale or manufacture of gasoline, §10-1-166.
- Violations of part, §10-1-169.
- Violations of regulations or specifications for petroleum products, §10-1-155.

**Recreational vehicle dealers.**

- Violations as misdemeanors, §10-1-679.15.

**Referral sales.**

- Furnishing names of prospective purchasers.
- Contract failing to state consideration, §10-1-70.

**Remanufactured or rebuilt items.**

- Labeling requirements.
- Violations of article, §10-1-83.

**Retail installment and home solicitation sales act, §10-1-15.**

**Sales.**

- Referral sales.
- Furnishing names of prospective purchasers.
- Sales contract failing to state consideration, §10-1-70.

**Secondary metals recyclers.**

- Violations of provisions, §10-1-357.

**Securities.**

- Penalties for willful violations, §10-5-57.
- Violations, burden of proof in civil and criminal proceedings, §10-5-52.

**Social organizations.**

- False claim of membership, §10-1-472.
- Unauthorized use of emblems or names, §10-1-472.

**Telemarketing, §10-1-393.6.**

**Telephones.**

- Telemarketing deception, fraud or abuse, §10-5B-6.

**Tie-in sales.**

- Books, magazines, periodicals or newspapers, §10-1-331.

**CRIMINAL LAW AND PROCEDURE**

—Cont'd

**Timber.**

- Timber-marking paint sale and labeling requirement violations, §10-1-126.

**Tobacco and tobacco products.**

- Carry-over storage and sale, §10-4-155.
- Leaf tobacco sales and storage, §10-4-123.

**Tobacco master settlement agreement enhancements.**

- Unlawful sale or distribution of noncomplying cigarettes, §10-13A-8.

**Trademarks and service marks.**

- Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.
- Unauthorized and deceitful use of name or seal, §10-1-454.

**Trade name registration.**

- Failing to register, §10-1-493.

**Warehouses.**

- State licensed and bonded warehouses.
- Violations, §10-4-32.

**Weighers.**

- Certified public weighers.
- Violations, §10-2-54.

**Weights and measures.**

- Coal or coke itinerant dealers.
- Sale without having weight certified, §10-2-51.
- Violating article or rules and regulations, §10-2-22.

**CROSS-BUILT TOBACCO.**

**Leaf tobacco sales.**

- Allocating sales opportunities among licensed warehouses, §10-4-104.

**CROSS COMMISSIONS.**

**Defined, §10-1-410.**

**Multilevel distribution company or participant in marketing program.**

- Prohibited activities, §10-1-411.

**D**

**DAMAGES.**

**Agents.**

- Action for wrongful discharge of agent before termination of contract, §10-6-37.
- Subsequent earnings in mitigation of damages on improper dismissal, §10-6-38.
- Unreasonable revocation, §10-6-33.

**DAMAGES —Cont'd**

**Art.**

- Consignment of art.
  - Liability for violations by art dealers, §10-1-529.
- Limited edition art reproductions.
  - Civil remedies for violations, §10-1-435.
  - Customer falsely stating legal right or license authorizing duplication, §10-1-510.

**Auctioneers.**

- Sale of stolen horse or mule, §10-1-530.

**Beauty pageants.**

- Liability for failure to post bond or establish escrow account, §10-1-838.

**Business opportunity sales.**

- Breach of obligations, §10-1-412.

**Deceptive trade practices.**

- Disaster related violations, §10-1-438.
- Fair business practices act of 1975.
  - Actions by individuals.
    - Limitation on recovery in case of bona fide error, §10-1-400.
  - Right to set off damages, §10-1-401.
  - Remedies by individuals, §10-1-399.

**Disasters.**

- Unfair or deceptive trade practices.
  - Disaster related violations, §10-1-438.

**Gasoline.**

- Below cost sales, §10-1-255.

**Gasoline marketing practices.**

- Actions by dealers against distributors, §10-1-235.

**Heavy equipment multiline dealers,**

§10-1-739.

**Horses.**

- Liability of auctioneer for sale of stolen horse, §10-1-530.

**Lease-purchase agreements.**

- Actions for violations of article, §10-1-687.

**Mitigation of damages.**

- Agents.
  - Subsequent earnings in mitigation on improper dismissal of agent, §10-6-38.

**Motion pictures.**

- Bidding by exhibitors.
  - Civil actions for damages, §10-1-294.

**Motor vehicle franchises.**

- Actions for violation of article, §10-1-623.
- Subleasing vehicles subject to retail installment contract, §10-1-41.

**Mules.**

- Liability of auctioneer for sale of stolen mule, §10-1-530.

**DAMAGES —Cont'd**

**Punitive damages.**

- Business practices.
  - Unfair practices, §10-1-399.
- Trade secrets.
  - Misappropriation, §10-1-763.
- Wholesale distribution by out-of-state principal, §10-1-702.

**Quantum meruit, §10-6-37.**

**Recreational vehicle dealers.**

- Remedies for violations, §10-1-679.11.

**Securities.**

- Civil liability enforcement, §10-5-58.

**Special damages.**

- Gasoline below cost sales, §10-1-255.
- Heavy equipment multiline dealers, §10-1-739.

**Suretyship.**

- Corporate sureties.
  - Bad faith refusal to perform contract, §10-7-30.

**Trademarks and service marks.**

- Fraud or false representation in registering, §10-1-449.
- Infringement of registered mark, §10-1-450.
  - Recovery of profits and damages in injunction action, §10-1-451.
- Person having financial interest in seized goods not counterfeit, §10-1-451.

**Trade secret misappropriation, §10-1-763.**

**Unfair or deceptive trade practices.**

- Disaster related violations, §10-1-438.
- Fair business practices act of 1975.
  - Action by individuals.
    - Limitation on recovery in case of bona fide error, §10-1-400.
  - Right to set off damages, §10-1-401.
  - Remedies by individuals, §10-1-399.

**Wholesale distribution by out-of-state principal.**

- Action by sales representative for commissions, §10-1-702.

**DATA COLLECTORS.**

**Identity theft.**

- Breach of security regarding personal information.
  - Notification requirements, §10-1-912.
- Defined, §10-1-911.
- Generally, §§10-1-910 to 10-1-915.

**DAY IN COURT.**

**Motor vehicle dealer's day in court act, §§10-1-630, 10-1-631.**

**DAY OF REST, §§10-1-570 to 10-1-576.**



**DEALERS.**

**Art dealers.**

- Consignment of art.
- General provisions, §§10-1-520 to 10-1-529.
- Limited edition art reproductions.
- General provisions, §§10-1-430 to 10-1-437.

**Books, periodicals or magazines.**

- Tie-in sales, §§10-1-330, 10-1-331.

**Coal or coke itinerant dealers.**

- Sales without having weight certified, §10-2-51.

**Heavy equipment.**

- Multiline dealers, §§10-1-730 to 10-1-740.

**Junk dealers.**

- Recordkeeping, §10-1-351.

**Metal dealers.**

- Recordkeeping, §10-1-351.

**Motor vehicles.**

- Dealer's day in court act, §§10-1-630, 10-1-631.
- Franchises generally, §§10-1-620 to 10-1-670.
- Recreational vehicle dealers, §§10-1-679 to 10-1-679.15.

**Petroleum products.**

- Retail dealers, §§10-1-720, 10-1-721.

**Recreational vehicle dealers, §§10-1-679 to 10-1-679.15.**

**Tobacco.**

- Leaf tobacco sales and storage.
- Auction tobacco dealers.
- Licenses, §10-4-114.
- Nonauction tobacco dealers.
- Licenses, §10-4-115.

**DEALERS' ASSOCIATIONS.**

**Motor vehicle franchise practices act.**

- Generally, §§10-1-620 to 10-1-670.
- Standing of corporation comprising dealers and representing dealers, §10-1-623.

**DEALER'S DAY IN COURT.**

**Motor vehicle dealer's day in court act, §§10-1-630, 10-1-631.**

**DEATH.**

**Agents.**

- Power of attorney by member of armed forces personnel on war service, §10-6-35.

**Health spas.**

- Member dying during membership term, §10-1-393.2.

**DEATH —Cont'd**

**Motor vehicle franchises.**

- Succession to franchise upon death of franchisee, §10-1-652.
- Termination, cancellation or nonrenewal on death of owner, §10-1-651.

**Petroleum products retail dealers.**

- Successor to deceased retail dealer, §10-1-721.

**Powers of attorney.**

- Effect on pledge of stock with power of attorney, §10-6-34.
- Effect on power by member of armed forces personnel on war service, §10-6-35.

**DEBTORS AND CREDITORS.**

**Credit report security freezes.**

- Effect on application for credit, §10-1-914.

**Notes.**

- General provisions, §§10-3-1 to 10-3-5.

**Suretyship.**

- Contract of suretyship, §§10-7-1 to 10-7-4.
- General provisions, §§10-7-1 to 10-7-57.
- Relative rights of creditor and surety, §§10-7-20 to 10-7-31.
- Rights of surety against principal, cosureties and third persons, §§10-7-40 to 10-7-57.

**DECEDENTS' ESTATES.**

**Art.**

- Rights in works of fine art, §10-1-510.

**DECEIT OR DECEPTION.**

**Advertising.**

- False advertising.
- General provisions, §§10-1-420 to 10-1-427.

**Trade practices.**

- Elderly or disabled persons, §§10-1-850 to 10-1-857.
- Fair business practices act of 1975.
- Deceptive practices in consumer transactions generally, §10-1-393.
- General provisions, §§10-1-390 to 10-1-407.
- Uniform deceptive trade practices act.
- Deceptive practices generally, §10-1-372.
- General provisions, §§10-1-370 to 10-1-375.

**DECEPTIVE TRADE PRACTICES.**

**Art.**

- Limited edition art reproductions.
- General provisions, §§10-1-430 to 10-1-437.

**DECEPTIVE TRADE PRACTICES**

—Cont'd

**Business opportunity sales.**

General provisions, §§10-1-410 to 10-1-417.

**Disaster related violations, §10-1-438.**

**Elderly or disabled persons, §§10-1-850 to 10-1-857.**

**Emblems.**

Benevolent organizations, charities, fraternal organizations, etc., §§10-1-470 to 10-1-472.

**False advertising.**

General provisions, §§10-1-420 to 10-1-427.

**General provisions, §§10-1-370 to 10-1-407.**

**Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

**DECEPTIVE TRADE PRACTICES ACT.**

General provisions, §§10-1-370 to 10-1-375.

Short title, §10-1-370.

**DECLARATORY JUDGMENTS.**

**Commodities and commodity contracts and options, §§10-5A-21, 10-5A-22.**

**Gasoline marketing practices.**

Violations by distributors, §10-1-235.

**Heavy equipment multiline dealers, §10-1-739.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-397.

**DEEDS.**

**Agents.**

Formality necessary to create agency, §10-6-2.

**DEFACEMENT.**

**Art reproductions.**

Limited edition reproductions.

Descriptive information, §10-1-432.

**DEFAMATION.**

**Securities.**

Agents, broker-dealers, investment advisers and investment adviser representatives.

Not liable for defamation contained in required record, §10-5-56.

**DEFENSES.**

**Agents.**

Against undisclosed principals, §10-6-62.

**Cemeteries.**

Waiver of rights or defenses void, §10-14-25.

**DEFENSES —Cont'd**

**Farm tractor warranty act.**

Affirmative defenses against claims under article, §10-1-817.

**Lemon law.**

Farm tractors.

Affirmative defenses against claims under article, §10-1-817.

**Motor vehicle sales finance act.**

Assertion of violation on loan or contract only in individual action, §10-1-36.1.

**DEFINED TERMS.**

**Account.**

Revolving account, §10-1-2.

**Adjusted capitalized cost.**

Motor vehicle lemon law, §10-1-782.

**Adjusted for inflation.**

Tobacco products manufacturers, §10-13-2.

**Administrators.**

Disposal of business records containing personal information, §10-15-1.

Fair business practices act of 1975.

Administrative resolution, §10-1-380.

Motor vehicle lemon law, §10-1-782.

**Adult.**

Retail petroleum products dealers, §10-1-720.

**Advanced technology development center.**

Seed capital fund, §10-10-1.

**Affiliate.**

Cemetery and funeral services act, §10-14-3.

Tobacco products manufacturers, §10-13-2.

**Agencies.**

Real estate brokerage relationships, §10-6A-3.

**Agent.**

Securities, §10-5-2.

**Agreement.**

Business opportunity sales, §10-1-410.

Electronic transactions, §10-12-2.

Gasoline marketing practices act, §10-1-232.

Multiline heavy equipment dealer act, §10-1-731.

**Agricultural products.**

Georgia state warehouse act, §10-4-2.

**Allowable share.**

Tobacco products manufacturers, §10-13-2.

**Aluminum property.**

Secondary metals recyclers, §10-1-352.1.

**DEFINED TERMS —Cont'd**

**Antifreeze**, §10-1-200.

**Applicant.**

Registration and use of trademarks and service marks, §10-1-440.

**Archives repository.**

Georgia museum property act, §10-1-529.2.

**Art dealer.**

Consignment of art, §10-1-521.  
Limited edition art reproductions, §10-1-430.

**Article.**

Uniform deceptive trade practices act, §10-1-371.

**Artist.**

Consignment of art, §10-1-521.  
Limited edition art reproductions, §10-1-430.  
Rights in works of fine art, §10-1-510.

**Assistive technology device dealer.**

Assistive technology warranties, §10-1-871.

**Assistive technology device lessor.**

Assistive technology warranties, §10-1-871.

**Assistive technology devices.**

Assistive technology warranties, §10-1-871.

**Assistive technology warranties.**

Express written warranties, §10-1-872.

**Authorized agent.**

Motor vehicle lemon law, §10-1-782.

**Automated transaction.**

Electronic transactions, §10-12-2.

**Automotive gasoline dealer.**

Gasoline marketing practices act, §10-1-232.

**Automotive gasoline distributor.**

Gasoline marketing practices act, §10-1-232.

**Bank.**

Securities, §10-5-2.

**Beauty pageant**, §10-1-830.

**Bid.**

Motion picture fair competition act, §10-1-292.

**Blended fuel.**

Gasoline marketing practices act, §10-1-232.

**Blender.**

Gasoline marketing practices act, §10-1-232.

**Blind bidding.**

Motion picture fair competition act, §10-1-292.

**DEFINED TERMS —Cont'd**

**Brake fluid**, §10-1-180.

**Brand family.**

Tobacco master settlement agreement enhancements, §10-13A-2.

**Breach of the security of the system.**

Identity theft, §10-1-911.

**Broker.**

Real estate brokerage relationships, §10-6A-3.

**Brokerage.**

Real estate brokerage relationships, §10-6A-3.

**Brokerage engagement.**

Real estate brokerage relationships, §10-6A-3.

**Brokerage relationships.**

Real estate brokers, §10-6A-3.

**Broker-dealer.**

Securities, §10-5-2.

**Bulk sale.**

Weights and measures, §10-2-1.

**Burial merchandise.**

Cemetery and funeral services act, §10-14-3.

**Burial right.**

Cemetery and funeral services act, §10-14-3.

**Burial service.**

Cemetery and funeral services act, §10-14-3.

**Business.**

Disposal of business records containing personal information, §10-15-1.

**Business day.**

Buying services act of 1975, §10-1-591.

**Business opportunity**, §10-1-410.

**Business opportunity seller or company**, §10-1-410.

**Business record**, §10-11-1.

**Buyer.**

Motor vehicle sales finance act, §10-1-31.  
Retail installment and home solicitation sales act, §10-1-2.

**Buying club**, §10-1-591.

**Buying service**, §10-1-591.

**Campground membership.**

Fair business practices act of 1975, §10-1-392.

**Campground membership facility.**

Fair business practices act of 1975, §10-1-392.

**Cardholder.**

Disposal of business records containing personal information, §10-15-1.



**DEFINED TERMS —Cont'd**

**Care and maintenance.**

Cemetery and funeral services act,  
§10-14-3.

**Career consulting firm.**

Fair business practices act of 1975,  
§10-1-392.

**Carry-over tobacco, §10-4-141.**

**Cash sale price.**

Motor vehicle sales finance act, §10-1-31.  
Retail installment and home solicitation  
sales act, §10-1-2.

**Casket.**

Cemetery and funeral services act,  
§10-14-3.

**Cemetery, §10-14-3.**

**Cemetery company, §10-14-3.**

**Central registration depository.**

Securities, §10-5-2.

**Certification mark.**

Uniform deceptive trade practices act,  
§10-1-371.

**Charitable contribution.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Child support enforcement.**

Fair business practices act of 1975,  
§10-1-392.

**Cigarette.**

Tobacco master settlement agreement  
enhancements, §10-13A-2.  
Tobacco products manufacturers,  
§10-13-2.

**Client.**

Real estate brokerage relationships,  
§10-6A-3.

**Club.**

Buying services act of 1975, §10-1-591.

**Collateral charges.**

Motor vehicle lemon law, §10-1-782.

**Collateral costs.**

Assistive technology warranties,  
§10-1-871.  
Motorized wheelchair warranties,  
§10-1-891.

**Collective mark.**

Uniform deceptive trade practices act,  
§10-1-371.

**Columbarium.**

Cemetery and funeral services act,  
§10-14-3.

**Commerce.**

Fair business practices act of 1975,  
§10-1-392.

**Commodities, §10-5A-1.**

**DEFINED TERMS —Cont'd**

**Commodity contract, §10-5A-1.**

**Commodity exchange act, §10-5A-1.**

**Commodity futures trading commission,  
§10-5A-1.**

**Commodity futures trading commission  
rule, §10-5A-1.**

**Commodity merchant, §10-5A-1.**

**Commodity option, §10-5A-1.**

**Common business enterprise.**

Cemetery and funeral services act,  
§10-14-3.

**Common source information companies.**

Real estate brokerage relationships,  
§10-6A-3.

**Community of interest.**

Recreational vehicle dealers, §10-1-679.

**Company.**

Business opportunity sales, §10-1-410.

**Compressed natural gas.**

Weights and measures, §10-2-19.

**Computer program.**

Electronic transactions, §10-12-2.

**Conditional power of attorney, §10-6-6.**

**Consignment.**

Art, §10-1-521.

**Conspicuously.**

Promotional giveaways or contests,  
§10-1-393.

**Consumer.**

Assistive technology warranties,  
§10-1-871.  
Credit report security freezes, §10-1-913.  
Fair business practices act of 1975,  
§10-1-392.  
Farm tractor warranty act, §10-1-811.  
Motorized wheelchair warranties,  
§10-1-891.  
Motor vehicle lemon law, §10-1-782.

**Consumer acts or practices.**

Fair business practices act of 1975,  
§10-1-392.

**Consumer credit report.**

Credit report security freezes, §10-1-913.

**Consumer credit reporting agency.**

Credit report security freezes, §10-1-913.

**Consumer report.**

Fair business practices act of 1975,  
§10-1-392.

**Consumer reporting agency.**

Fair business practices act of 1975,  
§10-1-392.

**Consumer transaction.**

Fair business practices act of 1975,  
§10-1-392.

**DEFINED TERMS —Cont'd**

**Contract.**

- Buying services act of 1975, §10-1-591.
- Electronic transactions, §10-12-2.
- Motor vehicle sales finance act, §10-1-31.
- Retail installment and home solicitation sales act, §10-1-2.

**Contract of suretyship or guaranty, §10-7-1.**

**Control, controlling or controlled by.**

- Telemarketing deception, fraud or abuse, §10-5B-2.

**Convenience warehouse, §10-4-191.**

**Co-operative.**

- Consignment of art, §10-1-521.

**Copper property.**

- Secondary metals recyclers, §10-1-352.1.

**Correct.**

- Weights and measures, §10-2-1.

**Costs.**

- Geo. L. Smith II Georgia World Congress Center Act, §10-9-3.

**Covered communication.**

- Telemarketing, §10-1-393.

**Credit union.**

- Securities, §10-5-2.

**Cremation.**

- Cemetery and funeral services act, §10-14-3.

**Crypt.**

- Cemetery and funeral services act, §10-14-3.

**Customer.**

- Disposal of business records containing personal information, §10-15-1.
- Real estate brokerage relationships, §10-6A-3.
- Rights in works of fine art, §10-1-510.

**Data collector.**

- Identity theft, §10-1-911.

**Day.**

- Motor vehicle lemon law, §10-1-782.

**Dealer.**

- Motor vehicle franchise practices act, §10-1-622.
- Retail petroleum products dealers, §10-1-720.

**Dealership.**

- Motor vehicle franchise practices act, §10-1-622.

**Dealership facilities.**

- Motor vehicle franchise practices act, §10-1-622.

**Deceit.**

- Securities, §10-5-2.

**Defraud.**

- Securities, §10-5-2.

**DEFINED TERMS —Cont'd**

**Demonstrator.**

- Assistive technology warranties, §10-1-871.
- Motorized wheelchair warranties, §10-1-891.

**Depository institution.**

- Securities, §10-5-2.

**Designated agent.**

- Real estate brokerage relationships, §10-6A-3.

**Designated family member.**

- Retail petroleum products dealers, §10-1-720.

**Designated successor.**

- Motor vehicle franchise practices act, §10-1-622.

**Directory.**

- Tobacco master settlement agreement enhancements, §10-13A-2.

**Disabled persons.**

- Unfair or deceptive trade practices, §10-1-850.

**Disaster related violation.**

- Unfair or deceptive trade practices, §10-1-438.

**Discard.**

- Disposal of business records containing personal information, §10-15-1.

**Dispose.**

- Disposal of business records containing personal information, §10-15-1.

**Distributor.**

- Marine manufacturers, §10-1-676.
- Motion picture fair competition act, §10-1-292.
- Motor vehicle franchise practices act, §10-1-622.
- Tobacco master settlement agreement enhancements, §10-13A-2.

**Documentary material.**

- Fair business practices act of 1975, §10-1-392.

**Dual agent.**

- Real estate brokerage relationships, §10-6A-3.

**Duplicate.**

- Rights in works of fine art, §10-1-510.

**Early termination cost.**

- Assistive technology warranties, §10-1-871.
- Motorized wheelchair warranties, §10-1-891.

**Early termination savings.**

- Assistive technology warranties, §10-1-871.

## INDEX

### **DEFINED TERMS —Cont'd**

#### **Early termination savings —Cont'd**

Motorized wheelchair warranties,  
§10-1-891.

#### **Elder person.**

Unfair or deceptive trade practices,  
§10-1-850.

#### **Electronic.**

Electronic transactions, §10-12-2.

#### **Electronic agent.**

Electronic transactions, §10-12-2.

#### **Electronic record.**

Electronic transactions, §10-12-2.  
Telemarketing, §10-1-393.

#### **Electronic signature.**

Electronic transactions, §10-12-2.

#### **Enrollee.**

Unfair or deceptive practices, §10-1-393.

#### **Enterprise.**

Seed capital fund, §10-10-1.

#### **Entity.**

Cemetery and funeral services act,  
§10-1-43.

#### **Entombment.**

Cemetery and funeral services act,  
§10-1-43.

#### **Entrant's fee.**

Beauty pageants, §10-1-830.

#### **Equity contribution.**

Seed capital fund, §10-10-1.

#### **Examination.**

Fair business practices act of 1975,  
§10-1-392.

#### **Executive officer.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

#### **Exhibit.**

Motion picture fair competition act,  
§10-1-292.

#### **Exhibition.**

Motion picture fair competition act,  
§10-1-292.

#### **Exhibitor.**

Motion picture fair competition act,  
§10-1-292.

#### **Express warranty.**

Motor vehicle lemon law, §10-1-782.

#### **Farm tractor.**

Farm tractor warranty act, §10-1-811.

#### **Federal covered investment adviser.**

Securities, §10-5-2.

#### **Federal covered security.**

Securities, §10-5-2.

#### **Ferrous metals.**

Secondary metals recyclers, §10-1-350.

### **DEFINED TERMS —Cont'd**

#### **File.**

Fair business practices act of 1975,  
§10-1-392.

#### **Filing.**

Securities, §10-5-2.

#### **Final disposition.**

Cemetery and funeral services act,  
§10-1-43.

#### **Finance charge.**

Motor vehicle sales finance act, §10-1-31.

#### **Financial institutions.**

Commodities and commodity contracts  
and options, §10-5A-1.

#### **Fine art.**

Rights in works of fine art, §10-1-510.

#### **Fine art multiple.**

Limited edition art reproductions,  
§10-1-430.

#### **Fine print.**

Rights in works of fine art, §10-1-510.

#### **Flea market.**

Vendors' record-keeping, §10-1-360.

#### **Forged or counterfeited trademark, service mark or copyrighted or registered design, §10-1-454.**

#### **Franchise.**

Marine manufacturers, §10-1-676.

Motor vehicle franchise practices act,  
§10-1-622.

Recreational vehicle dealers, §10-1-679.

Retail petroleum products dealers,  
§10-1-720.

#### **Franchise agreement.**

Retail petroleum products dealers,  
§10-1-720.

#### **Franchisor.**

Motor vehicle franchise practices act,  
§10-1-622.

#### **Fraud.**

Securities, §10-5-2.

#### **Fuel alcohol.**

Gasoline marketing practices act,  
§10-1-232.

#### **Fully operational and available for use.**

Requirements for health spas,  
§10-1-393.2.

#### **Funeral director.**

Cemetery and funeral services act,  
§10-1-43.

#### **Funeral merchandise.**

Cemetery and funeral services act,  
§10-1-43.

#### **Funeral service.**

Cemetery and funeral services act,  
§10-1-43.



**DEFINED TERMS —Cont'd**

**Gasohol.**

Gasoline marketing practices act,  
§10-1-232.

**Gasoline.**

Gasoline marketing practices act,  
§10-1-232.

Sale of petroleum products, §10-1-140.

**Gasoline dealer.**

Gasoline marketing practices act,  
§10-1-232.

**General use gift card.**

Unfair or deceptive practices, §10-1-393.

**Gift certificate.**

Unfair or deceptive practices, §10-1-393.

**Going-out-of-business sale.**

Fair business practices act of 1975,  
§10-1-392.

**Good faith.**

Motor vehicle franchise practices act,  
§10-1-622.

**Goods.**

Retail installment and home solicitation  
sales act, §10-1-2.

**Governmental agency.**

Electronic transactions, §10-12-2.

**Grain.**

Georgia state warehouse act, §10-4-2.

**Grantor.**

Recreational vehicle dealers, §10-1-679.

**Grave space.**

Cemetery and funeral services act,  
§10-14-3.

**Guaranteed.**

Securities, §10-5-2.

**Health benefit plans.**

Unfair or deceptive practices, §10-1-393.

**Health spa.**

Fair business practices act of 1975,  
§10-1-392.

**Heavy equipment.**

Multitline heavy equipment dealer act,  
§10-1-731.

**Holders.**

Motor vehicle sales finance act, §10-1-31.

Retail installment and home solicitation  
sales act, §10-1-2.

**Home solicitation sale,** §10-1-2.

**Human remains.**

Cemetery and funeral services act,  
§10-14-3.

**Improper means.**

Trade secrets act of 1990, §10-1-761.

**Incidental costs.**

Motor vehicle lemon law, §10-1-782.

**DEFINED TERMS —Cont'd**

**In conjunction with and in immediate proximity to.**

Promotional giveaways or contests,  
§10-1-393.

**Incubator.**

Seed capital fund, §10-10-1.

**Indoor swap meet.**

Flea market vendors' record-keeping,  
§10-1-360.

**Induce.**

Motor vehicle subleasing, §10-1-39.

**Industrial design.**

Rights in work of fine art, §10-1-510.

**Informal dispute settlement mechanism.**

Motor vehicle lemon law, §10-1-782.

**Information.**

Electronic transactions, §10-12-2.

**Information broker.**

Identity theft, §10-1-911.

**Information processing system.**

Electronic transactions, §10-12-2.

**Initial payment.**

Business opportunity sales, §10-1-410.

**Institutional investor.**

Securities, §10-5-2.

**Insurance company.**

Securities, §10-5-2.

**Insured.**

Securities, §10-5-2.

**Insurer.**

Unfair or deceptive practices, §10-1-393.

**Intentional violation.**

Fair business practices act of 1975,  
§10-1-392.

**Interment.**

Cemetery and funeral services act,  
§10-14-3.

**International banking institution.**

Securities, §10-5-2.

**Inurnment.**

Cemetery and funeral services act,  
§10-14-3.

**Investment adviser.**

Securities, §10-5-2.

**Investment adviser registration depository.**

Securities, §10-5-2.

**Investment adviser representative.**

Securities, §10-5-2.

**Investment entity.**

Seed capital fund, §10-10-1.

**Invitation to bid.**

Motion picture fair competition act,  
§10-1-292.

**Issuer.**

Securities, §10-5-2.

**DEFINED TERMS —Cont'd**

**Jobber.**

Gasoline marketing practices act,  
§10-1-232.

**Kerosene.**

Sale of petroleum products, §10-1-140.

**Last known address.**

Self-service storage facility act, §10-4-211.

**Law enforcement officer.**

Secondary metals recyclers, §10-1-350.

**Lease.**

Geo. L. Smith II Georgia World  
Congress Center Act, §10-9-49.

**Lease-purchase agreement, §10-1-681.**

**Lemon law rights period.**

Motor vehicle lemon law, §10-1-782.

**Lessee.**

Lease-purchase agreement act, §10-1-681.

Motor vehicle lemon law, §10-1-782.

Motor vehicle subleasing, §10-1-39.

**Lessee cost.**

Motor vehicle lemon law, §10-1-782.

**Lessor.**

Lease-purchase agreement act, §10-1-681.

Motor vehicle lemon law, §10-1-782.

Motor vehicle subleasing, §10-1-39.

**License agreement.**

Motion picture fair competition act,  
§10-1-292.

**Limited agent.**

Real estate brokerage relationships,  
§10-6A-3.

**Limited edition.**

Limited edition art reproductions,  
§10-1-430.

**Liquefied petroleum gas, §10-1-262.**

**Loan.**

Georgia museum property act,  
§10-1-529.2.

**Local.**

Unfair or deceptive practices and  
consumer transactions, §10-1-393.

**Local telephone classified advertising  
directory.**

Unfair or deceptive practices and  
consumer transactions unlawful,  
§10-1-393.

**Local telephone number.**

Unfair or deceptive practices and  
consumer transactions unlawful,  
§10-1-393.

**Local trade and convention center.**

Geo. L. Smith II Georgia World  
Congress Act, §10-9-16.1.

**Lubricating oils.**

Sale of petroleum products, §10-1-140.

**DEFINED TERMS —Cont'd**

**Major life activities.**

Unfair or deceptive trade practices.

Elderly or disabled persons, §10-1-850.

**Manufacturers.**

Assistive technology warranties,  
§10-1-871.

Farm tractor warranty act, §10-1-811.

Marine manufacturers, §10-1-676.

Motorized wheelchair warranties,  
§10-1-891.

Motor vehicle franchise practices act,  
§10-1-622.

Motor vehicle lemon law, §10-1-782.

**Manufacturer sales representative.**

Marine manufacturers, §10-1-676.

**Manufacturer's express warranty.**

Farm tractor warranty, §10-1-811.

**Marine dealer, §10-1-676.**

**Marine membership.**

Fair business practices act of 1975,  
§10-1-392.

**Marine membership facility.**

Fair business practices act of 1975,  
§10-1-392.

**Marine product, §10-1-676.**

**Mark.**

Uniform deceptive trade practices act,  
§10-1-371.

**Marketing agreement.**

Gasoline marketing practices act,  
§10-1-232.

**Master.**

Limited edition art reproductions,  
§10-1-430.

**Master settlement agreement.**

Tobacco master settlement agreement  
enhancements, §10-13A-2.

Tobacco products manufacturers,  
§10-13-2.

**Mausoleum.**

Cemetery and funeral services act,  
§10-14-3.

**Mausoleum section.**

Cemetery and funeral services act,  
§10-14-3.

**Measure, §10-2-1.**

**Members.**

Buying services act of 1975, §10-1-591.

**Merchants.**

Disposal of business records containing  
personal information, §10-15-1.

Prohibited use of credit card  
information by merchant,  
§10-1-393.3.

**DEFINED TERMS —Cont'd**

**Ministerial acts.**

Real estate brokerage relationships,  
§10-6A-3.

**Misappropriation.**

Trade secrets act of 1990, §10-1-761.

**Monument.**

Cemetery and funeral services act,  
§10-14-3.

**Motorized wheelchair dealers, §10-1-891.**

**Motorized wheelchair lessors, §10-1-891.**

**Motorized wheelchairs, §10-1-891.**

**Motor vehicle.**

Motor vehicle franchise practices act,  
§10-1-622.

Motor vehicle sales finance act, §10-1-31.

Retail installment and home solicitation  
sales act, §10-1-2.

**Motor vehicle lease contract.**

Motor vehicle subleasing, §10-1-39.

**Multilevel distribution company.**

Business opportunity sales, §10-1-410.

**Multiline dealer.**

Multiline heavy equipment dealer act,  
§10-1-731.

**Museum.**

Georgia museum property act,  
§10-1-529.2.

**Natural disaster.**

Unfair or deceptive trade practices,  
§10-1-438.

**New motor vehicle.**

Motor vehicle franchise practices act,  
§10-1-622.

Motor vehicle lemon law, §10-1-782.

**New motor vehicle dealer.**

Motor vehicle lemon law, §10-1-782.

**Niche.**

Cemetery and funeral services act,  
§10-14-3.

**Unclassified advertising local telephone  
directory.**

Unfair or deceptive practices and  
consumer transactions, §10-1-393.

**Nonconformity.**

Assistive technology warranties,  
§10-1-871.

Farm tractor warranty act, §10-1-811.

Motorized wheelchair warranties,  
§10-1-891.

Motor vehicle lemon law, §10-1-782.

**Nonferrous metals.**

Secondary metals recyclers, §10-1-350.

**Nonissuer distribution.**

Securities, §10-5-2.

**DEFINED TERMS —Cont'd**

**Nonissuer transaction.**

Securities, §10-5-2.

**Nonlocal business.**

Unfair or deceptive practices and  
consumer transactions, §10-1-393.

**Nonparticipating manufacturer.**

Tobacco master settlement agreement  
enhancements, §10-13A-2.

**Nonperpetual care.**

Cemetery and funeral services act,  
§10-14-3.

**Nonregistered vendor.**

Flea market vendors' record-keeping,  
§10-1-360.

**Normal business hours.**

Credit report security freezes, §10-1-913.

**Notice.**

Identity theft, §10-1-911.

Promotional giveaways or contests,  
§10-1-393.

**Novation, §10-7-21.**

**Obligee.**

Fair business practices act of 1975,  
§10-1-392.

Suretyship, §10-7-30.

**Obligor.**

Fair business practices act of 1975,  
§10-1-392.

**Occupant.**

Self-service storage facility act, §10-4-211.

**Offer to purchase.**

Securities, §10-5-2.

**Office.**

Fair business practices act of 1975,  
§10-1-392.

**Office supplier.**

Fair business practices act of 1975,  
§10-1-392.

**Office supply transactions.**

Fair business practices act of 1975,  
§10-1-392.

**Official fees.**

Motor vehicle sales finance act, §10-1-31.

Retail installment and home solicitation  
sales act, §10-1-2.

**Operator.**

Beauty pageants, §10-1-830.

Carry-over tobacco, §10-4-141.

**Outer burial container.**

Cemetery and funeral services act,  
§10-14-3.

**Owners.**

Motor vehicle franchise practices act,  
§10-1-622.



**DEFINED TERMS —Cont'd**

**Owners —Cont'd**

Self-service storage facility act, §10-4-211.

**Package.**

Weights and measures, §10-2-1.

**Paint,** §10-1-120.

**Panel.**

Motor vehicle lemon law, §10-1-782.

**Participant.**

Business opportunity sales, §10-1-410.

Promotional giveaways or contests,  
§10-1-393.

**Participating manufacturer.**

Tobacco master settlement agreement  
enhancements, §10-13A-2.

**Patient.**

Unfair or deceptive practices, §10-1-393.

**Payment card.**

Disposal of business records containing  
personal information, §10-15-1.

**Periods.**

Lease-purchase agreement act, §10-1-681.

**Perpetual care.**

Cemetery and funeral services act,  
§10-14-3.

**Person.**

Below cost sales act, §10-1-251.

Business opportunity sales, §10-1-410.

Cemetery and funeral services act,  
§10-14-3.

Commodities and commodity contracts  
and options, §10-5A-1.

Consignment of art, §10-1-521.

Convenience warehouse act of 1975,  
§10-4-191.

Credit report security freezes, §10-1-913.

Electronic transactions, §10-12-2.

Fair business practices act of 1975,  
§10-1-392.

Georgia state warehouse act, §10-4-2.

Identity theft, §10-1-911.

Limited edition art reproductions,  
§10-1-430.

Motion picture fair competition act,  
§10-1-292.

Motor vehicle franchise practices act,  
§10-1-622.

Motor vehicle lemon law, §10-1-782.

Motor vehicle sales finance act, §10-1-31.

Multiline heavy equipment dealer act,  
§10-1-731.

Recreational vehicle dealers, §10-1-679.

Registration and use of trademarks and  
service marks, §10-1-440.

Retail installment and home solicitation  
sales act, §10-1-2.

**DEFINED TERMS —Cont'd**

**Person —Cont'd**

Rights in works of fine art, §10-1-510.

Sale of antifreeze, §10-1-200.

Sale of petroleum products, §10-1-162.

Secondary metals recyclers, §10-1-350.

Securities, §10-5-2.

Telemarketing deception, fraud or  
abuse, §10-5B-2.

Trade secrets act of 1990, §10-1-761.

Uniform deceptive trade practices act,  
§10-1-371.

Weights and measures, §10-2-1.

**Personal identification card.**

Secondary metals recyclers, §10-1-350.

**Personal information.**

Disposal of business records containing  
personal information, §10-15-1.

Identity theft, §10-1-911.

**Personally identifiable.**

Disposal of business records containing  
personal information, §10-15-1.

**Personal property.**

Self-service storage facility act, §10-4-211.

**Physician.**

Unfair or deceptive practices, §10-1-393.

**Place of business.**

Securities, §10-5-2.

**Position holder.**

Gasoline marketing practices act,  
§10-1-232.

**Precious metal.**

Commodities and commodity contracts  
and options, §10-5A-1.

**Predecessor act.**

Securities, §10-5-2.

**Preneed contract.**

Cemetery and funeral services act,  
§10-14-3.

**Preneed dealer.**

Cemetery and funeral services act,  
§10-14-3.

**Preneed interment service.**

Cemetery and funeral services act,  
§10-14-3.

**Preneed service.**

Cemetery and funeral services act,  
§10-14-3.

**Price amendment.**

Securities, §10-5-2.

**Primary standards.**

Weights and measures, §10-2-1.

**Principal.**

Cemetery and funeral services act,  
§10-14-3.

## INDEX

### **DEFINED TERMS —Cont'd**

#### **Principal —Cont'd**

Wholesale distribution by out-of-state principal, §10-1-700.

#### **Principal place of business.**

Securities, §10-5-2.

#### **Print.**

Limited edition art reproductions, §10-1-430.

#### **Printer.**

Rights in works of fine art, §10-1-510.

#### **Private child support collector.**

Fair business practices act of 1975, §10-1-392.

#### **Prize.**

Fair business practices act of 1975, §10-1-392.

Promotional giveaways or contests, §10-1-393.

#### **Producer.**

Carry-over tobacco, §10-4-141.

Georgia state warehouse act, §10-4-2.

Retail petroleum products dealers, §10-1-720.

#### **Products or services.**

Below cost sales act, §10-1-251.

#### **Projects.**

Geo. L. Smith II Georgia World Congress Center Act, §10-9-3.

#### **Promoter.**

Promotional giveaways or contests, §10-1-393.

#### **Promotion.**

Fair business practices act of 1975, §10-1-392.

#### **Proofs.**

Limited edition art reproductions, §10-1-430.

#### **Proper identification.**

Credit report security freezes, §10-1-913.

#### **Property.**

Georgia museum property act, §10-1-529.2.

#### **Public warehouse.**

Georgia state warehouse act, §10-4-2.

#### **Purchase.**

Below cost sales act, §10-1-251.

#### **Purchase price.**

Motor vehicle lemon law, §10-1-782.

Motor vehicle sales finance act, §10-1-31.

#### **Purchasers.**

Business opportunity sales, §10-1-410.

#### **Purchase transaction.**

Secondary metals recyclers, §10-1-350.

#### **Qualified escrow fund.**

Tobacco master settlement agreement enhancements, §10-13A-2.

### **DEFINED TERMS —Cont'd**

#### **Qualified escrow fund —Cont'd**

Tobacco products manufacturers, §10-13-2.

#### **Qualified security.**

Seed capital fund, §10-10-1.

#### **Rack.**

Gasoline marketing practices act, §10-1-232.

#### **Reacquired vehicle.**

Motor vehicle lemon law, §10-1-782.

#### **Reasonable allowance for prior use.**

Farm tractor warranty act, §10-1-811.

#### **Reasonable attempt to repair.**

Assistive technology warranties, §10-1-871.

Motorized wheelchair warranties, §10-1-891.

#### **Reasonable number of attempts.**

Motor vehicle lemon law, §10-1-782.

#### **Reasonable offset for use.**

Motor vehicle lemon law, §10-1-782.

Motor vehicle warranty rights act, §10-1-782.

#### **Rebuilt.**

Labeling remanufactured or rebuilt items, §10-1-80.

#### **Receipt.**

Georgia state warehouse act, §10-4-2.

#### **Record.**

Disposal of business records containing personal information, §10-15-1.

Electronic transactions, §10-12-2.

Securities, §10-5-2.

#### **Recreational vehicle.**

Dealers, §10-1-679.

#### **Recreational vehicle dealer, §10-1-679.**

#### **Recreational vehicle dealership, §10-1-679.**

#### **Redistributor.**

Retail petroleum products dealers, §10-1-720.

#### **Reencoder.**

Disposal of business records containing personal information, §10-15-1.

#### **Refiner.**

Gasoline marketing practices act, §10-1-232.

#### **Refinery.**

Gasoline marketing practices act, §10-1-232.

#### **Registrant.**

Registration and use of trademarks and service marks, §10-1-440.

#### **Regulated metal property.**

Secondary metals recyclers, §10-1-350.

**DEFINED TERMS —Cont'd**

**Related entity.**

Below cost sales act, §10-1-251.

**Released claim.**

Tobacco products manufacturers,  
§10-13-2.

**Releasing parties.**

Tobacco products manufacturers,  
§10-13-2.

**Relevant market area.**

Motor vehicle franchise practices act,  
§10-1-622.

**Remanufactured.**

Labeling remanufactured or rebuilt  
items, §10-1-80.

**Removal.**

Gasoline marketing practices act,  
§10-1-232.

**Rental agreement.**

Self-service storage facility act, §10-4-211.

**Replacement motor vehicle.**

Motor vehicle lemon law, §10-1-782.

**Reproduction.**

Business record, §10-11-1.

**Retail buyer.**

Motor vehicle sales finance act, §10-1-31.  
Retail installment and home solicitation  
sales act, §10-1-2.

**Retail installment contract, §10-1-2.**

Motor vehicle sales finance act, §10-1-31.

**Retail installment seller.**

Motor vehicle sales finance act, §10-1-31.

**Retail installment transaction, §10-1-2.**

Motor vehicle sales finance act, §10-1-31.

**Retail sale of automotive gasoline.**

Gasoline marketing practices act,  
§10-1-232.

**Retail seller.**

Retail installment and home solicitation  
sales act, §10-1-2.

**Revolving account, §10-1-2.**

**Run.**

Motion picture fair competition act,  
§10-1-292.

**Sale.**

Below cost sales act, §10-1-251.  
Cemetery and funeral services act,  
§10-14-3.  
Securities, §10-5-2.

**Sale from bulk.**

Weights and measures, §10-2-1.

**Sales agent.**

Cemetery and funeral services act,  
§10-14-3.

**Sales finance company.**

Motor vehicle sales finance act, §10-1-31.

**DEFINED TERMS —Cont'd**

**Sales finance company —Cont'd**

Retail installment and home solicitation  
sales act, §10-1-2.

**Salesperson.**

Cemetery and funeral services act,  
§10-14-3.

**Sales representative.**

Wholesale distribution by out-of-state  
principal, §10-1-700.

**Scanning device.**

Disposal of business records containing  
personal information, §10-15-1.

**Secondary metals recycler, §10-1-350.**

**Secondary standards.**

Weights and measures, §10-2-1.

**Secretary of state.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Securities and exchange commission.**

Securities, §10-5-2.

**Security.**

Securities, §10-5-2.

**Security freeze.**

Credit report security freezes, §10-1-913.

**Security procedure.**

Electronic transactions, §10-12-2.

**Self-regulatory organization.**

Securities, §10-5-2.

**Self-service storage facility, §10-4-211.**

**Sell.**

Cemetery and funeral services act,  
§10-14-3.

**Seller.**

Business opportunity sales, §10-1-410.  
Motor vehicle sales finance act, §10-1-31.  
Retail installment and home solicitation  
sales act, §10-1-2.

**Seller or telemarketer, §10-1-393.**

**Sell telephonically.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Serious safety defect.**

Motor vehicle lemon law, §10-1-782.

**Service.**

Retail installment and home solicitation  
sales act, §10-1-2.

**Service mark, §10-1-440.**

Uniform deceptive trade practices act,  
§10-1-371.

**Service station.**

Retail petroleum products dealers,  
§10-1-720.

**Sign.**

Securities, §10-5-2.



**DEFINED TERMS —Cont'd**

**Signed.**

Limited edition art reproductions,  
§10-1-430.

**Solicitation.**

Cemetery and funeral services act,  
§10-14-3.

**Solicitor.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Sponsors.**

Promotional giveaways or contests,  
§10-1-393.

**State.**

Electronic transactions, §10-12-2.  
Securities, §10-5-2.

**State oil chemist.**

Sale of brake fluid, §10-1-180.

**Store gift card.**

Unfair or deceptive practices, §10-1-393.

**Storer.**

Georgia state warehouse act, §10-4-2.

**Subject motor vehicle.**

Motor vehicle subleasing, §10-1-39.

**Sublease.**

Motor vehicle subleasing, §10-1-39.

**Substantially limits.**

Unfair or deceptive trade practices.  
Elderly or disabled persons, §10-1-850.

**Superior court.**

Motor vehicle lemon law, §10-1-782.

**Supplier.**

Gasoline marketing practices act,  
§10-1-232.  
Multiline heavy equipment dealer act,  
§10-1-731.

**Swap meet.**

Flea market vendors' record-keeping,  
§10-1-360.

**Telemarketing.**

Fair business practices act of 1975,  
§10-1-393.5.

**Telephone classified advertising directory,**  
§10-1-393.1.

**Telephone soliciting business.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Telephone solicitor.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Telephonic offer for sale.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Telephonic sale.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**DEFINED TERMS —Cont'd**

**Telephonic selling.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Telephonic solicitation of sale.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Terminal.**

Gasoline marketing practices act,  
§10-1-232.

**Terminal operator.**

Gasoline marketing practices act,  
§10-1-232.

**Terminal transfer system.**

Gasoline marketing practices act,  
§10-1-232.

**Theater.**

Motion picture fair competition act,  
§10-1-292.

**Timely.**

Real estate brokerage relationships,  
§10-6A-3.

**Time price differential.**

Retail installment and home solicitation  
sales act, §10-1-2.

**Time sale price.**

Motor vehicle sales finance act, §10-1-31.

**Tobacco contract,** §10-4-107.1.

**Tobacco product manufacturers,** §10-13-2.

Tobacco master settlement agreement  
enhancements, §10-13A-2.

**To sell.**

Below cost sales act, §10-1-251.

**Trade.**

Fair business practices act of 1975,  
§10-1-392.

**Trademark,** §10-1-440.

Uniform deceptive trade practices act,  
§10-1-371.

**Trade names.**

Uniform deceptive trade practices act,  
§10-1-371.

**Trade screening.**

Motion picture fair competition act,  
§10-1-292.

**Trade secrets,** §10-1-761.

**Transaction.**

Electronic transactions, §10-12-2.  
Retail installment and home solicitation  
sales act, §10-1-2.

**Transaction broker.**

Real estate brokerage relationships,  
§10-6A-3.

**Transferable record.**

Electronic transactions, §10-12-16.

**DEFINED TERMS —Cont'd**

**Two consecutive days of Saturday and Sunday.**

Common day of rest act of 1974,  
§10-1-571.

**Two-party exchange.**

Gasoline marketing practices act,  
§10-1-232.

**Two rest days.**

Common day of rest act of 1974,  
§10-1-571.

**Under common control with.**

Telemarketing deception, fraud or  
abuse, §10-5B-2.

**Units sold.**

Tobacco master settlement agreement  
enhancements, §10-13A-2.

Tobacco products manufacturers,  
§10-13-2.

**Used personal property.**

Flea market vendors' record-keeping,  
§10-1-360.

**Used registration and use of trademarks and service marks, §10-1-440.**

**Value of the work of art.**

Consignment of art, §10-1-521.

**Vendor.**

Flea market vendors' record-keeping,  
§10-1-360.

**Verifiable retail value.**

Promotional giveaways or contests,  
§10-1-393.

**Warehouse.**

Georgia state warehouse act, §10-4-2.

**Warehousemen.**

Georgia state warehouse act, §10-4-2.

**Warrantor.**

Motor vehicle franchise practices act,  
§10-1-622.

Recreational vehicle dealers, §10-1-679.

**Warranty.**

Farm tractor warranty act, §10-1-811.

Motor vehicle franchise practices act,  
§10-1-622.

Motor vehicle lemon law, §10-1-782.

**Weight, §10-2-1.**

**Weights and measures, §10-2-1.**

**Wholesaler.**

Marine manufacturers, §10-1-676.

**Work of art.**

Consignment of art, §10-1-521.

**Work of fine art.**

Rights in work of fine art, §10-1-510.

**Written instrument.**

Limited edition art reproductions,  
§10-1-430.

**DEFRAUDING.**

**Advertising.**

False advertising.

General provisions, §§10-1-420 to  
10-1-427.

**Trade practices.**

Elderly or disabled persons, §§10-1-850  
to 10-1-857.

Fair business practices act of 1975.

Deceptive practices in consumer  
transactions generally, §10-1-393.

General provisions, §§10-1-390 to  
10-1-407.

Unfair or deceptive trade practices act.

Deceptive practices generally,  
§10-1-372.

General provisions, §§10-1-370 to  
10-1-375.

**DEPOSITIONS.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Cease and desist orders, §10-1-398.

**DEPOSITS.**

**Agents.**

Liability for bank failure, §10-6-28.

Right of principal to follow money  
deposited, §10-6-27.

**DEPUTIES.**

**Agricultural commissioner.**

Deputy commissioner.

Weights and measures.

Enforcement of laws, §10-2-14.

**Weights and measures, §§10-2-14, 10-2-49.**

**DETERGENTS.**

**Trademark registration, §10-1-443.**

**DIESEL ENGINES.**

**Multiline heavy equipment dealers.**

Definition of heavy equipment,  
§10-1-731.

**DIESEL FUEL.**

**Biodiesel fuel.**

Production and sale.

Specifications and standards required  
to meet, §10-1-151.1.

**DIPLOMAS.**

**Advertisements using Doctor or Dr.**

Designation of degree, §10-1-422.

**DISABLED PERSONS.**

**Assistive technology warranties, §§10-1-870 to 10-1-875.**

Actions for damages, §10-1-875.

Citation of article, §10-1-870.

**DISABLED PERSONS —Cont'd**

**Assistive technology warranties —Cont'd**

Definitions, §10-1-871.

Express written warranties.

Duration, §10-1-872.

Nonconforming devices.

Repairs, §10-1-873.

Refund or replacement of devices,  
§10-1-873.

Repairs.

Nonconforming devices, §10-1-873.

Return privileges.

Thirty-day return privileges, §10-1-874.

Rights and remedies under laws of  
contracts, §10-1-875.

Sale or lease of returned device,  
§10-1-873.

Short title, §10-1-870.

Thirty-day return privileges, §10-1-874.

Waivers void, §10-1-875.

**Gasoline.**

Self-service gasoline price.

Drivers holding special disability  
permit, §10-1-164.1.

**Health spas.**

Total and permanent disability during  
membership, §10-1-393.2.

**Motor fuels.**

Self-service gasoline price.

Drivers holding special disability  
permit, §10-1-164.1.

**Petroleum products sales.**

Self-service gasoline price.

Drivers holding special disability  
permit, §10-1-164.1.

**Unfair or deceptive trade practices,**

§§10-1-850 to 10-1-857.

**Wheelchairs.**

Motorized wheelchair warranties,  
§§10-1-390 to 10-1-394.

**DISASTERS.**

**Attorneys' fees.**

Unfair or deceptive trade practices.

Disaster related violations, §10-1-438.

**Damages.**

Unfair or deceptive trade practices.

Disaster related violations, §10-1-438.

**Deceptive trade practices.**

Disaster related violations, §10-1-438.

**Farm tractor warranty period.**

Extension, §10-1-815.

**Unfair or deceptive trade practices.**

Disaster related violations, §10-1-438.

**DISCLAIMERS.**

**Advertising.**

Disclaimers as to availability of products,  
§10-1-420.

**Art dealers.**

Limited edition art reproductions,  
§§10-1-431, 10-1-433, 10-1-435.

Exemptions, §10-1-437.

**DISCONTINUANCE.**

**Business opportunity sales, §10-1-415.**

**Gasoline retailers.**

Prohibited acts in sale of octane or  
cetane, §10-1-254.

**Motor vehicle franchises, §§10-1-651,  
10-1-652.**

**DISCOUNTED GOODS.**

**Motor fuel.**

Octane or cetane fuel, §10-1-254.

Signs advertising retail motor fuel,  
§10-1-164.

**Motor vehicle parts.**

Repurchased by franchisor upon  
termination, cancellation, etc., of  
franchise, §10-1-651.

**DISCOVERY.**

**Lemon law.**

Arbitration to compel replacement or  
repurchase of vehicle.

Arbitrator notes not subject to  
discovery, §10-1-786.

**Trade secret misappropriation actions.**

Protection of trade secret during action,  
§10-1-765.

**Unfair or deceptive trade practices.**

Cease and desist orders.

Taking of testimony by deposition or  
interrogatory, §10-1-398.

**DISCRIMINATION.**

**Gasoline below cost sales.**

Discrimination in price between  
different purchasers, §10-1-254.

Declaration of legislative intent in  
construing section, §10-1-256.

**Motor vehicle franchises.**

Dealer discrimination, §§10-1-662,  
10-1-663.

**DISGORGEMENT.**

**Commodities and commodity contracts and  
options.**

Actions by commissioner, §§10-5A-21,  
10-5A-22.

**Commodities violation, §§10-5A-21,  
10-5A-22.**



**DISHONOR AND NOTICE OF DISHONOR.**

**Checks.**

- Retail installment contracts for revolving account.
- Fees for check dishonor, §10-1-7.
- Self-service storage facilities.
- Occupant deemed to be in default where check given in payment is dishonored, §10-4-213.

**DISMANTLING.**

**Petroleum products.**

- Self-measuring pump.
- Show-cause order, §10-1-159.

**DISTRICT ATTORNEYS.**

**Art.**

- Limited edition art reproductions.
- Actions to enjoin violations, §10-1-436.

**Commodities and commodity contracts and options.**

- Institution of criminal proceedings, §10-5A-31.

**Petroleum products sales.**

- Enjoining sale of used or reclaimed lubricating oils or lubricants, §10-1-162.

**DOCUMENTS OF TITLE.**

**Warehouse receipts.**

- Cotton storage, §10-4-71.
- Books, §10-4-75.
- Delivering cotton without production of receipt or failing to cancel receipt, §10-4-79.
- Execution and sealing, §10-4-75.
- Issuing duplicate or additional receipts, §10-4-81.
- Issuing receipt for cotton not in warehouse, §10-4-80.
- Loans on receipts, §10-4-73.
- Lost or destroyed receipts, §10-4-81.
- Priority of adverse claim holder, §10-4-76.
- State licensed and bonded warehouses.
- Cancellation on delivery, §10-4-22.
- Electronic receipts.
- Use authorized, §10-4-19.
- Essential terms, §10-4-20.
- Impoundment of unused receipts upon suspension or revocation of license, §10-4-30.
- Liability for omission of terms, §10-4-20.

**DOCUMENTS OF TITLE —Cont'd**

**Warehouse receipts —Cont'd**

- State licensed and bonded warehouses —Cont'd
- Obligation to deliver product for each receipt issued, §10-4-21.
- Obtaining printed forms, §10-4-19.
- Required, §10-4-19.
- Surrender on delivery, §10-4-22.

**DONATIONS.**

**Brake fluid.**

- Misbranded or adulterated brake fluid.
- Prohibited, §10-1-183.

**DOOR-TO-DOOR SALES.**

**Cancellation of home solicitation sales.**

- Buyer's right, §10-1-6.

**Retail installment contracts and revolving accounts.**

- General provisions, §§10-1-1 to 10-1-16.

**DRAFTS.**

**Credit cards.**

- Acceptance of draft because credit card presented, §10-1-393.3.
- Recording number of credit card as condition of acceptance, §10-1-393.3.
- Requiring credit card information on draft as condition of acceptance, §10-1-393.3.

**DRIVERS' LICENSES.**

**Identification cards.**

- Persons without drivers' licenses.
- Business records.
- Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**DRY-WEIGHT.**

**Tobacco sold on dry-weight basis.**

- Charges and expenses may include cost of redrying, §10-4-145.

**DWELLINGS.**

**Deceptive practices in consumer transactions.**

- Loans on property used as dwelling place by debtor, §10-1-393.
- Purchase of property used as dwelling by defaulting debtor.
- Debtor remaining in possession, §10-1-393.

**E**

**EARTHENWARE.**

**Marks and brands.**

- Registration of marks.
- Classes of goods, §10-1-443.

**ECONOMIC DEVELOPMENT.**

**Seed capital fund, §§10-10-1 to 10-10-7.**

- Composition of fund, §10-10-3.
- Creation, §10-10-2.
- Definitions, §10-10-1.
- Direct purchases of qualified securities.
- Equity contributions through, §10-10-4.
- Disbursements, §10-10-3.
- Distribution to be deposited in fund, §10-10-6.
- Equity contributions.
- Defined, §10-10-1.
- Investments in, §10-10-4.
- Transfer from fund, §10-10-4.
- Investment and reinvestment of fund money, §10-10-3.
- Distributions deposited for future investment, §10-10-6.
- Investments in equity contributions, §10-10-4.
- Loans.
- Transfer from fund to make, §10-10-5.
- Management by advanced technology development center, §10-10-2.
- Qualified securities.
- Equity contribution through, §10-10-4.
- Reports, §10-10-7.

**EDITIONS.**

**Limited edition art reproductions, §§10-1-430 to 10-1-437.**

**ELDERLY PERSONS.**

**Unfair or deceptive trade practices, §§10-1-850 to 10-1-857.**

**ELECTRICAL AND LOW-VOLTAGE CONTRACTORS.**

**Telemarketing deception, fraud or abuse, §10-5B-4.**

**ELECTRONIC FILING.**

**Electronic transactions generally, §§10-12-1 to 10-12-20.**

**ELECTRONIC TRANSACTIONS, §§10-12-1 to 10-12-20.**

**Applicability of provisions.**

- Change or error in electronic records, §10-12-10.
- Electronic records and signatures related to a transaction, §10-12-3.

**ELECTRONIC TRANSACTIONS —Cont'd**

**Applicability of provisions —Cont'd**

- Electronic signatures in global and national commerce act, §10-12-20.

**Generally, §10-12-6.**

- Intent to conduct transaction by electronic means, §10-12-5.

- Records and signatures created on or after July 1, 2009, §10-12-4.

**Attributing record or signature to a particular person, §10-12-9.**

**Automated transactions, §10-12-14.**

**Change or error in electronic records.**

- Rules applicable, §10-12-10.

**Citation of act, §10-12-1.**

**Construction of provisions, §10-12-6.**

**Contracts.**

- Formation by automated transaction, §10-12-14.

- Legal effect or enforceability not to be denied because of electronic record, §10-12-7.

**Conversion of written records to electronic by agencies, §10-12-17.**

**Definitions, §10-12-2.**

**Determination of intent to conduct transaction by electronic means, §10-12-5.**

**Effective date of applicable records and signatures, §10-12-4.**

**Electronic signatures in global and national commerce act.**

- Effect of provisions on, §10-12-20.

**Evidence not to be excluded solely on basis of electronic format, §10-12-13.**

**Governing law, §10-12-3.**

**Governmental agencies.**

- Creation and retention of electronic records, determination as to whether and to what extent, §10-12-17.

**Standards for use.**

- Adoption, §10-12-18.

- Consistency and interoperability with standards employed by other agencies, §10-12-19.

- Utilization of electronic records, determination as to whether and to what extent, §10-12-18.

**Legal effect, §10-12-7.**

- Attributing record or signature to a particular person, §10-12-9.

**Notarization, acknowledgment, verification or oath requirement, satisfaction, §10-12-11.**

**ELECTRONIC TRANSACTIONS —Cont'd**

Posting and display of records, §10-12-8.  
 Receipt of electronic records, §10-12-15.  
 Requirement for electronic transaction not created, §10-12-5.

**Retention of electronic record.**

Ability to retain, §10-12-8.  
 Agency determination as to whether and to what extent it will retain electronic records, §10-12-17.  
 Satisfaction of requirement, §10-12-12.

**Satisfaction of in writing or signature requirement, §10-12-7.**

**Satisfaction of notarization, acknowledgment, verification or oath requirement, §10-12-11.**

**Satisfaction of retention requirement, §10-12-12.**

**Securities.**

Relationship to Electronic Signatures in Global and National Commerce Act, §10-5-5.

**Sending of electronic records, §10-12-15.**

**Standards for use by government agencies.**

Adoption, §10-12-18.  
 Consistency and interoperability with standards employed by other agencies, §10-12-19.

**Title of act, §10-12-1.**

**Transferable records, §10-12-16.**

**EMBLEMS.**

**Benevolent organizations, §§10-1-470 to 10-1-472.**

**Charities, §§10-1-470 to 10-1-472.**

**Fraternal organizations, §§10-1-470 to 10-1-472.**

**Humane organizations, §§10-1-470 to 10-1-472.**

**Social organizations, §§10-1-470 to 10-1-472.**

**EMERGENCIES.**

**Unfair or deceptive trade practices.**

Prohibited pricing practices during state of emergency, §10-1-393.4.

**EMPLOYMENT RELATIONS.**

**Common day of rest.**

General provisions, §§10-1-570 to 10-1-576.

**Overseers, §§10-6-120, 10-6-121.**

**ENGINES.**

**Definitions.**

Remanufactured or rebuilt items.  
 Inclusion of engines in definitions, §10-1-80.

**ENGINES —Cont'd**

**Labeling remanufactured or rebuilt items, §§10-1-80 to 10-1-83.**

**ENGRAVINGS.**

**Limited edition art reproductions.**

Generally, §§10-1-430 to 10-1-437.

**Rights in works of fine art, §10-1-510.**

**ENTREPRENEURSHIP.**

**Seed capital fund.**

General provisions, §§10-10-1 to 10-10-7.

**EQUITY.**

**Commodities and commodity contracts and options.**

Equitable remedies, §10-5A-22.

**Heavy equipment multiline dealer's equitable relief, §10-1-739.**

**Motor vehicle franchises.**

Equitable relief for violation of article, §10-1-623.

**ERASURE.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**ESCROW ACCOUNTS.**

**Beauty pageants, §§10-1-837, 10-1-838.**

**Business opportunity sales, §10-1-412.**

**Cemeteries.**

Preneed dealers, §§10-14-4, 10-14-7, 10-14-12.

**Preneed dealers, §§10-14-4, 10-14-7, 10-14-12.**

**Securities.**

Escrow deposit of security as condition of registration, §10-5-24.

**Tobacco product manufacturers.**

Financial responsibility for smoking.  
 Deposits, §10-13-3.

**ESPIONAGE.**

**Trade secrets.**

Definition of improper means, §10-1-761.

**ESTOPPEL.**

**Agents.**

Dispute of principal's titles, §10-6-26.

**ETCHINGS.**

**Limited edition art reproductions.**

Generally, §§10-1-430 to 10-1-437.

**Rights in works of fine art, §10-1-510.**

**EVIDENCE.**

**Agents.**

Admissibility of agent's declarations, §10-6-64.



**EVIDENCE —Cont'd**

**Antifreeze.**

Certified analysis, §10-1-208.

**Art.**

Limited edition art reproductions.

Final judgments admissible as evidence of specific findings, §10-1-436.

**Brake fluid.**

Certified analysis as evidence, §10-1-188.

**Cemeteries.**

Civil or criminal actions, §10-14-27.

Investigations by secretary of state.

Subpoenas, §10-14-15.

**Deceptive trade practices.**

Fair business practices act of 1975.

Final judgments obtained by administrator, §10-1-397.

Investigative demands for evidence, §10-1-403.

**Electronic transactions.**

Evidence not to be excluded solely on basis of electronic format, §10-12-13.

**Paints and flaxseed or linseed oil sales.**

Possession of improperly labeled article.

Prima-facie evidence of violation, §10-1-125.

**Petroleum products sales.**

Analysis of collected and tested samples, §10-1-157.

Refusal to allow inspection.

Prima-facie evidence of violation, §10-1-148.

**Suretyship.**

Proof by parol, §10-7-45.

**Trademarks and service marks.**

Registration certificate, §10-1-444.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Final judgments obtained by administrator, §10-1-397.

Investigative demands for evidence, §10-1-403.

**Warehouses.**

State licensed and bonded warehouses.

Inspection reports, §10-4-15.

**EXECUTIONS.**

**Indorser's right to control judgment on debt and execution, §10-7-54.**

**Suretyship.**

Control of execution by surety, §10-7-47.

When sued separately, §10-7-48.

Endorser's right to control judgment on debt and execution, §10-7-54.

**EXECUTORS AND ADMINISTRATORS, (PRE-1998 PROBATE CODE).**

**Accounts and accounting.**

Accounts required, §10-6-30.

**Conveyances.**

Attorneys in fact, §10-6-4.

**Settlement of accounts.**

Accounts required, §10-6-30.

**Signatures.**

Liability of persons signing instrument as fiduciary, §10-6-86.

**EXPERT WITNESSES.**

**Fees.**

Limited edition art reproductions, §10-1-435.

**EXPLANATION FOR PRINCIPAL.**

Financial power of attorney, §10-6-141.

**EXPRESS WARRANTIES.**

**Farm tractor warranty act.**

General provisions, §§10-1-810 to 10-1-819.

**Limited edition art reproductions,**

§10-1-433.

**Motor vehicle lemon law, §§10-1-780 to 10-1-797.**

**F**

**FAIR BUSINESS PRACTICES ACT OF 1975.**

General provisions, §§10-1-390 to 10-1-407.

Short title, §10-1-390.

**FALSE SWEARING.**

Convenience warehousing, §10-4-193.

**FARM EQUIPMENT MANUFACTURERS, DISTRIBUTORS, ETC..**

**Warranties.**

Lemon law.

Farm tractor warranties, §§10-1-810 to 10-1-819.

**FARMERS' MARKETS.**

**Flea market vendors' recordkeeping.**

Exemptions, §10-1-361.

**FARM TRACTOR MANUFACTURERS, DISTRIBUTORS, ETC..**

**Warranties.**

Lemon law.

Farm tractor warranties, §§10-1-810, 10-1-819.

**FARM TRACTOR WARRANTY ACT.**

**General provisions.**

Lemon law.

Farm tractors, §§10-1-810 to 10-1-819.

**FARM TRACTOR WARRANTY ACT**

—Cont'd

Short title, §10-1-810.

**FEDERAL AID.**

Geo. L. Smith II Georgia World Congress Center, §10-9-12.

**FEDERAL COVERED INVESTMENT ADVISERS.**

**Securities act.**

Defined, §10-5-2.

**FEES.**

**Antifreeze.**

License or inspection fees, §10-1-203.

**Beauty pageants.**

Entrant's fee.

Defined, §10-1-830.

Information required as prerequisite to accepting, §10-1-831.

Refund on cancellation or default, §10-1-834.

**Brake fluid.**

License or inspection fee, §10-1-185.

**Business opportunity sales.**

Secretary of state as agent for service of process.

Filing fees, §10-1-416.

**Buying clubs or services.**

Licenses, §10-1-594.

**Certified public weigher's licenses,**

§10-2-42.

**Checks.**

Retail installment contracts or revolving accounts.

Dishonor fees, §10-1-7.

**Child support, collection of delinquent accounts.**

Private child support collectors.

Restriction on charging and retention of fees, §10-1-393.10.

**Credit report security freezes, §10-1-914.**

**Expert witnesses.**

Limited edition art reproductions, §10-1-435.

**Lease-purchase agreements.**

Reinstatement fee, §10-1-686.

**Lemon law.**

Motor vehicles.

Consumer fees to implement provisions, §10-1-791.

**Liquefied petroleum gas.**

Sale and storage.

License or permit fees, §10-1-266.

**Retail installment contracts or revolving accounts.**

Check dishonor fees, §10-1-7.

**FEES —Cont'd**

**Secretary of state.**

Business opportunity sales.

Filing fees for secretary of state as agent for service of process, §10-1-416.

**Securities.**

Registration application and renewal.

Agents, broker-dealers, investment advisers and investment adviser representatives, §10-5-39.

**Service of process.**

Business opportunity sales.

Filing fees for secretary of state as agent for service of process, §10-1-416.

**Tobacco.**

Carry-over tobacco storage and sale.

Licenses, §10-4-142.

Warehousemen's associations, §10-4-173.

**Trademarks and service marks.**

Registration.

Application, §10-1-442.

Cancellation, §10-1-448.

Recordation of assignments, §10-1-446.

Renewal, §10-1-445.

**Warehouses.**

State licensed and bonded warehouses.

Uniform application, §10-4-7.

**Weighers.**

Certified public weigher's licenses, §10-2-42.

**FELONIES.**

**Cemeteries.**

Criminal penalties for violations, §10-14-20.

**Commodities and commodity contracts and options, §10-5A-31.**

**Cotton storage.**

Delivering cotton without production of receipt or failing to cancel, §10-4-79.

False affidavit as to lien, §10-4-78.

Issuing receipt for cotton not in warehouse, §10-4-80.

**Fines imposed in sentencing.**

Cotton warehousing.

State licensed and bonded warehouses.

Violation of provisions, §10-4-32.

**Health spas, §10-1-393.2.**

**Secondary metals recyclers.**

Violations of provisions, §10-1-357.

**Telephones.**

Telemarketing deception, fraud or abuse, §10-5B-6.

**FELONIES —Cont'd**

**Warehouses.**

State licensed and bonded warehouses,  
§10-4-32.

**FICTITIOUS BUSINESS NAMES.**

Trade name registration, §§10-1-490 to  
10-1-493.

**FIDUCIARIES.**

Accounts required, §10-6-30.

**Agents.**

General provisions, §§10-6-1 to 10-6-142.

Conveyances by attorneys in fact, §10-6-4.

**Principals and agents.**

General provisions, §§10-6-1 to 10-6-142.

**Signatures.**

Liability of persons signing instrument as  
fiduciaries, §10-6-86.

**FIELD PEAS.**

**Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

**FILM.**

Bidding on motion pictures by exhibitors,  
§§10-1-290 to 10-1-294.

**FINANCIAL INSTITUTIONS.**

**Business records.**

Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**FINANCIAL POWER OF ATTORNEY.**

Explanation for principals, §10-6-141.

Statutory form, §10-6-142.

Not exclusive method of creating,  
§10-6-140.

**FINANCIAL RESPONSIBILITY.**

**Tobacco products manufacturers.**

Burdens imposed on state from cigarette  
smoking, §§10-13-1 to 10-13-4.  
Master settlement agreement  
enhancements, §§10-13A-1 to  
10-13A-9.

**FINE ARTS.**

Consignment of art, §§10-1-520 to 10-1-529.

Rights in works, §10-1-510.

**FINES.**

**Advertisements.**

False advertising.  
False or fraudulent statements in  
advertising, §10-4-21.

Agents in business of receiving cash for  
payment to third persons.

Failure to post bond, §10-6-102.

**FINES —Cont'd**

**Business records.**

Disposal of business records containing  
personal information, §10-15-7.

Certified public weighers, §10-2-54.

Commodities and commodity contracts and  
options, §10-5A-31.

**Cotton storage.**

Delivering cotton without production of  
receipt or failing to cancel, §10-4-79.

Issuing receipt for cotton not in  
warehouse, §10-4-80.

**Cotton warehousing.**

State licensed and bonded warehouses,  
§10-4-32.

**Credit cards.**

Personal information protection,  
§10-15-7.

**Credit report security freezes.**

Violations, §10-1-914.

**Geo. L. Smith II Georgia World Congress  
Center.**

Ordinances of authority, §10-9-4.1.

Lease-purchase agreements, §10-1-687.

**Lemon law.**

Arbitration to compel replacement or  
repurchase of vehicle.

Manufacturer failure to comply with  
decision, §10-1-787.

Enforcement powers of administrator,  
§10-1-791.

**Motor vehicles.**

**Lemon law.**

Arbitration to compel replacement or  
repurchase of vehicle.

Manufacturer failure to comply with  
decision, §10-1-787.

Enforcement powers of administrator,  
§10-1-791.

Sales finance act, §10-1-38.

**Paint.**

Sale of deceptively labeled paint,  
§10-1-127.

**Retail installment and home solicitation  
sales act, §10-1-15.**

**Secondary metals recyclers.**

Violations of provisions, §10-1-357.

**Securities.**

Actions of commissioner, §10-5-72.

Agents, broker-dealers, investment  
advisers and investment adviser  
representatives, §10-5-41.

Cease and desist orders, §10-5-73.

Penalties for willful violations, §10-5-57.

Powers of commissioner, §10-5-71.



**FINES —Cont'd**

**Trademarks and service marks.**

Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.

**Warehouses.**

State licensed and bonded warehouses, §10-4-32.

**Weighers.**

Certified public weighers, §10-2-54.

**FINGERPRINTS.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**Securities.**

Agents, broker-dealers, investment advisers and investment adviser representatives.

Fingerprinting and criminal background check, §10-5-35.

**FIREARMS DEALERS.**

**Business records.**

Generally, §§10-11-1 to 10-11-3.

**Records.**

Business records generally, §§10-11-1 to 10-11-3.

**FIRES.**

**State fire marshal.**

Liquefied petroleum gas.

Sale and storage.

General provisions, §§10-1-260 to 10-1-272.

**FLAXSEED OIL.**

Enforcement of article and rules and regulations, §10-1-121.

Labeling tank cars, tanks, barrels, etc., §10-1-124.

**Possession of improperly labeled article.**

Prima-facie evidence of violation, §10-1-125.

Purity requirements, §10-1-123.

Sold under true name, §10-1-124.

**FLEA MARKET VENDORS'**

**RECORD-KEEPING,** §10-1-360.

Exemptions, §10-1-361.

Local ordinances or regulations, §10-1-362.

**FOREIGN CORPORATIONS.**

Tobacco master settlement agreement enhancements.

Foreign nonparticipating manufacturers, §10-13A-6.

**FOREIGN CURRENCY.**

Commodities and commodity contracts and options.

General provisions, §§10-5A-1 to 10-5A-31.

**FORFEITURES.**

**Petroleum products sales.**

Inaccurate measures, §10-1-160.

Inaccurate pumps, §10-1-159.

Tobacco master settlement agreement enhancements.

Seizure of contraband cigarettes.

Remedies for noncompliance, §10-13A-8.

**Trademarks and service marks.**

Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.

**FORGERY.**

**Cotton storage.**

Issuing duplicate or additional receipts.

Forgery in first degree, §10-4-81.

Trademarks and service marks, §10-1-454.

**FORMS.**

**Art.**

Contract with printer to duplicate work of fine art.

Statement from customer of legal right or license authorizing, §10-1-510.

Limited edition art reproductions.

Disclosures in advertising and sale of multiples, §10-1-431.

**Business opportunity sales.**

Cancellation rights, §10-1-415.

Disclosure statement, §10-1-411.

**Buying clubs or services contracts.**

Member's right to cancel, §10-1-598.

Campground membership or marine membership facilities.

Cancellation right of buyers, §10-1-393.

Certified public weigher's license applications, §10-2-41.

**Farm tractor warranty act.**

Written notice of warranty supplied by manufacturer, §10-1-812.

**Financial power of attorney.**

Explanation for principals, §10-6-141.

Statutory form, §10-6-142.

Not exclusive method of creating, §10-6-140.

**Georgia museum property act.**

Notice, loan terminated, property abandoned, intent to acquire title, §10-1-529.4.

**FORMS —Cont'd**

**Health spas.**

Notice of right to cancel contract,  
§10-1-393.2.

Notice to buyers making advance  
payments, §10-1-393.2.

**Lease-purchase agreements, §10-1-689.**

**Lemon law.**

Farm tractors.

Written notice of warranty supplied by  
manufacturer, §10-1-812.

**Museum property act.**

Notice, loan terminated, property  
abandoned, intent to acquire title,  
§10-1-529.4.

**Promotional giveaways or contests.**

Disclosure that participant required to  
purchase additional goods or  
services, §10-1-393.

**Real property.**

Purchase of property used as dwelling by  
defaulting debtor.

Debtor remaining in possession.

Notice of seller's right of  
cancellation, §10-1-393.

**Retail installment contracts.**

Notice to the buyer, §10-1-3.

**Revolving accounts.**

Notice to the buyer, §10-1-4.

**Self-service storage facilities.**

Rental agreements, §10-4-213.

**Weighers.**

Certified public weigher's license  
applications, §10-2-41.

**FRANCHISES.**

**Gasoline marketing practices, §§10-1-230 to  
10-1-241.**

**Heavy equipment multiline dealers.**

General provisions, §§10-1-730 to  
10-1-740.

**Marine manufacturers.**

General provisions, §§10-1-675 to  
10-1-678.

Termination of contractual relationship  
between dealer and manufacturer,  
§10-1-677.

**Motor vehicles.**

General provisions, §§10-1-620 to  
10-1-670.

**Petroleum products retail dealers,  
§§10-1-720, 10-1-721.**

**Recreational vehicle dealers.**

Requirement of franchise agreement,  
§10-1-679.14.

**FRATERNAL ORGANIZATIONS.**

**Emblems, §§10-1-470 to 10-1-472.**

Imitation, §10-1-470.

Injunction against infringement,  
§10-1-471.

Unauthorized use, §10-1-472.

**False claim of membership, §10-1-472.**

**Names, §§10-1-470 to 10-1-472.**

Imitation, §10-1-470.

Injunction against infringement,  
§10-1-471.

Priority of right to use, §10-1-470.

Unauthorized use, §10-1-472.

**FRAUD AND DECEIT.**

**Advertising.**

False advertising.

General provisions, §§10-1-420 to  
10-1-427.

**Agents.**

Principal bound for, §10-6-60.

Representations or concealment by agent  
binding principal, §10-6-56.

**Cemeteries.**

Prohibited acts, §10-14-17.

**Commodities, §§10-5A-6, 10-5A-27.**

**Heavy equipment multiline dealers.**

Immediate termination, amendment,  
etc., of agreements without notice,  
§10-1-733.

**Office supply transactions.**

Unfair or deceptive acts or practices,  
§10-1-393.1.

**Securities.**

False or misleading statements, §10-5-54.

Investment advisers, §10-5-51.

Remedies of defrauded person, §10-5-58.

Unlawful offer, sale or purchase of  
security, §10-5-50.

**Telephone solicitors.**

Telemarketing deception, fraud or  
abuse, §§10-5B-1 to 10-5B-8.

**Theft of identity.**

Business records.

Disposal of business records  
containing personal information,  
§§10-15-1 to 10-15-7.

**Trademarks and service marks.**

Registration, §10-1-449.

**Trade practices.**

Elderly or disabled persons, §§10-1-850  
to 10-1-857.

Fair business practices act of 1975.

Deceptive practices in consumer  
transactions generally, §10-1-393.

**FRAUD AND DECEIT —Cont'd**

**Trade practices —Cont'd**

Fair business practices act of 1975

—Cont'd

General provisions, §§10-1-390 to 10-1-407.

Uniform deceptive trade practices act.

Deceptive practices generally, §10-1-372.

General provisions, §§10-1-370 to 10-1-375.

**Weights and measures.**

Deception in pricing by weight, measure or count, §10-2-8.

**FRIVOLOUS ACTIONS.**

**Lemon law.**

Arbitration to compel replacement or repurchase of vehicle.

Appeal of ineligibility determination, frivolous filing of, §10-1-786.

**Wholesale distribution by out-of-state principal.**

Actions for timely payment of commissions, §10-1-702.

**FUELS.**

**Cetane rated fuels.**

Below cost sales.

General provisions, §§10-1-250 to 10-1-256.

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**Gasoline below cost sales,** §§10-1-250 to 10-1-256.

**Gasoline marketing practices,** §§10-1-230 to 10-1-241.

**Octane rated fuels.**

Below cost sales.

General provisions, §§10-1-250 to 10-1-256.

**FUNDS.**

**Seed capital fund,** §§10-10-1 to 10-10-7.

**FUNERAL DIRECTORS AND EMBALMERS.**

**Preneed funeral service contracts.**

Solicitation during final illness to seek refund.

Unfair or deceptive practices, §10-1-393.7.

**FUTURES.**

**Commodities generally,** §§10-5A-1 to 10-5A-31.

**G**

**GALLONAGE.**

**Gasoline marketing practices act.**

Acts of distributor violating marketing agreement, §10-1-233.

**GARAGES.**

**Service station.**

Garage defined as, §10-1-720.

**GAS.**

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**Compressed natural gas,** §10-2-19.

**Liquefied petroleum gas.**

Sale and storage, §§10-1-260 to 10-1-272.

**Sales.**

Liquefied petroleum gas.

Sale and storage generally, §§10-1-260 to 10-1-272.

**Storage.**

Liquefied petroleum gas.

Sale and storage generally, §§10-1-260 to 10-1-272.

**GASEOUS.**

**Commodity.**

Defined as including gaseous fuel, §10-5A-1.

**GASOLINE.**

**Advertising retail motor fuels.**

Advertising free gifts or services, §10-1-164.

Requirements for signs, §10-1-164.

**Below cost sales,** §§10-1-250 to 10-1-256.

Actions for violations of article, §10-1-255.

Below cost sales act.

Short title, §10-1-250.

Burden of rebutting prima-facie case, §10-1-254.

Competition.

Lessening, injuring, destroying or preventing, §10-1-254.

Declaration of legislative intent in construing section, §10-1-256.

Computation of costs, §10-1-253.

Construction of section prohibiting certain acts, §10-1-256.

Cost computation, §10-1-253.

Definitions, §10-1-251.

Discounts, allowances or rebates.

Computation of costs, §10-1-253.



**GASOLINE —Cont'd**

**Below cost sales —Cont'd**

- Discrimination in price between different purchasers, §10-1-254.
- Declaration of legislative intent in construing section, §10-1-256.

**Freight charges.**

- Computation of costs, §10-1-253.

**Injunctions.**

- Violations of article, §10-1-255.

**Limitation of actions, §10-1-255.**

**Monopolies.**

- Tending to create, §10-1-254.

- Declaration of legislative intent in construing section, §10-1-256.

**Prohibited acts, §10-1-254.**

- Declaration of legislative intent in construing section, §10-1-256.

**Reasonable cost of doing business.**

- Computation of costs, §10-1-253.

**Reasonable transfer price, §10-1-252.**

**Restraint of trade.**

- Lessening competition or tending to create monopolies, §10-1-254.

- Declaration of legislative intent in construing section, §10-1-256.

**Settlement of actions.**

- Effect of written tender of settlement, §10-1-255.

**Short title, §10-1-250.**

**Taxes.**

- Computation of costs, §10-1-253.

**Transfer price from related entity.**

- Reasonableness, §10-1-252.

**Violations of article.**

- Civil actions, §10-1-255.

**Conflicts of interest.**

**State oil chemist or oil inspectors.**

- Interest in sale or manufacture of gasoline, §10-1-166.

**Cooking fuels.**

- Petroleum products sales generally, §§10-1-140 to 10-1-169.

**Dealers.**

- Petroleum products retail dealers, §§10-1-720, 10-1-721.

**Registration.**

- Dealers subject to petroleum products sales part, §10-1-158.

**Defined, §10-1-140.**

**Disability permit holders.**

- Self-service gasoline price for drivers, §10-1-164.1.

**Franchises.**

- Petroleum products retail dealers, §§10-1-720, 10-1-721.

**GASOLINE —Cont'd**

**Heating fuels.**

- Petroleum products sales, §§10-1-140 to 10-1-169.

**Illuminating fuels.**

- Petroleum products sales generally, §§10-1-140 to 10-1-169.

**Marketing practices, §§10-1-230 to 10-1-241.**

- Actions by dealer against distributor for violations, §10-1-235.

- Limitation of actions, §10-1-239.

- Proceedings upon notice of termination prior to expiration, §10-1-237.

**Actions by distributor against dealer.**

- Breach of agreement, §10-1-238.

- Limitation of actions, §10-1-239.

**Acts of distributors violating articles, §10-1-233.**

**Agreements subject to article, §10-1-240.**

**Blenders.**

- Defined, §10-1-232.

- Suppliers not to inhibit distributors from being, §10-1-234.1.

**Breach of agreement.**

- Action by distributor, §10-1-238.

**Cancellation of agreements.**

- Proceedings upon notice prior to expiration, §10-1-237.

- Without good cause, §10-1-233.

**Controlled products.**

- Selling to another distributor for retail sale, §10-1-234.

**Days of operation.**

- Acts of distributor violating article, §10-1-233.

**Declaratory judgments against distributors, §10-1-235.**

**Definitions, §10-1-232.**

**Distress prices.**

- Selling to other dealers, §10-1-234.

**Distributors.**

- Acts violating article, §10-1-233.

**Effective date of article, §10-1-240.**

**Exclusive dealing.**

- Coercion, intimidation or threats, §10-1-233.

**Findings of the general assembly, §10-1-231.**

**Fixing or maintaining prices, §10-1-233.**

**Gasoline marketing practices act.**

- Short title, §10-1-230.

**Hours of operation.**

- Acts of distributor violating article, §10-1-233.

**GASOLINE —Cont'd**

**Marketing practices —Cont'd**

**Injunctions.**

Injunctions against distributors,  
§10-1-235.

Notice of termination prior to  
expiration, §10-1-237.

Legislative findings, §10-1-231.

Limitation of actions, §10-1-239.

Notice of cancellation or termination,  
§10-1-233.

Proceedings upon notice prior to  
expiration, §10-1-237.

Real property sales not affected,  
§10-1-241.

**Short title.**

Gasoline marketing practices act,  
§10-1-230.

**Standards of performance.**

Imposing standards other than those  
in marketing agreement,  
§10-1-233.

**Termination of agreements.**

Proceedings upon notice prior to  
expiration, §10-1-237.

Without good cause, §10-1-233.

**Unlawful predatory and unfair business  
practices.**

Selling controlled product to another  
distributor for retail sale,  
§10-1-234.

Selling to other dealers at distress  
prices, §10-1-234.

**Vacation of premises.**

Termination prior to expiration,  
§10-1-237.

**Violations of article.**

Actions by dealer against distributor,  
§10-1-235.

Acts of distributors, §10-1-233.

**Petroleum product sales.**

General provisions, §§10-1-140 to  
10-1-169.

**Petroleum products retail dealers,**

§§10-1-720, 10-1-721.

**Pumps.**

Condemnation of inaccurate pumps,  
§10-1-159.

Sealing accurate pumps, §10-1-159.

**Self-measuring pumps.**

Inspection of self-measuring pumps,  
§10-1-159.

Operating condemned pumps,  
§10-1-167.

**Short-measure pumps.**

Operating, §10-1-168.

**GASOLINE —Cont'd**

**Registration of dealers.**

Dealers subject to petroleum products  
sales part, §10-1-158.

**Self-measuring pumps.**

Inspections, §10-1-159.

Operating condemned pumps, §10-1-167.

**Self-service.**

Gasoline price.

For drivers holding special disability  
permits, §10-1-164.1.

**Short-measure gasoline pumps.**

Operating, §10-1-168.

**State oil chemist.**

Duties, §10-1-142.

**GASOLINE MARKETING PRACTICES  
ACT.**

**General provisions,** §§10-1-230 to 10-1-241.

**Short title,** §10-1-230.

**GEMS.**

**Commodities and commodity contracts and  
options.**

General provisions, §§10-5A-1 to  
10-5A-31.

**GENERAL ASSEMBLY.**

**Geo. L. Smith II Georgia World Congress  
Center authority overview committee,**  
§§10-9-20 to 10-9-24.

**House of representatives.**

**Speaker.**

Geo. L. Smith II Georgia World  
Congress Center authority  
overview committee.

Appointment of members, §10-9-20.

**Senate.**

**President.**

Geo. L. Smith II Georgia World  
Congress Center authority  
overview committee.

Appointment of members, §10-9-20.

**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER, §§10-9-1 to  
10-9-61.**

**Authority,** §§10-9-1 to 10-9-19.

Accounts, §10-9-19.

Attorney general.

Duties, §10-9-16.

Audits, §10-9-19.

Board of governors.

Appointment, §10-9-6.

Authority of officers, §10-9-9.

Criminal background checks on  
officers and employees, §10-9-9.

**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER —Cont'd**

**Authority —Cont'd**

- Board of governors —Cont'd
  - Delegation of authority to committees, §10-9-7.
  - Expenses, §10-9-6.
  - Fixing charges for use of projects, §10-9-14.
  - Management of business and affairs, §10-9-7.
  - Meetings, §10-9-8.
  - Number, §10-9-6.
  - Officers, §10-9-9.
  - Powers, §10-9-7.
    - Delegation of authority, §10-9-7.
  - Quorum, §10-9-7.
  - Removal, §10-9-8.
  - Rules and regulations for operation in use of project, §10-9-15.
  - Terms, §10-9-6.
    - Officers, §10-9-9.
  - Vacancies, §10-9-6.
- Charges for use of project.
  - Authority to fix, §10-9-14.
- Commercial activity prohibition, §10-9-14.
- Construction of chapter, §10-9-18.
- Contract required for use of project, §10-9-14.
- Contributions, §10-9-12.
- Costs of project, §10-9-5.
- Creation.
  - Recreation, §10-9-2.
- Defined, §10-9-3.
- Disposition of property not required, §10-9-16.2.
- Duties.
  - Transfer of duties of department of economic development, §10-9-5.
- Federal aid, §10-9-12.
- Georgia World Congress Center police, §10-9-15.
- Grants, §10-9-12.
- Jurisdiction of actions under chapter, §10-9-11.
- Local trade and convention center.
  - Contracts with counties, municipalities, etc., §10-9-16.1.
  - Defined, §10-9-16.1.
- Management of business and affairs.
  - Board of governors, §10-9-7.
- Money received considered trust fund, §10-9-13.
- Ordinances, §§10-9-4.1, 10-9-14.1.

**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER —Cont'd**

**Authority —Cont'd**

- Police power, §10-9-4.1.
- Powers, §§10-9-4, 10-9-4.1, 10-9-14.1.
  - Board of governors, §10-9-7.
  - Supplemental and additional powers, §10-9-17.
- Purposes, §10-9-4.
- Ratification of past actions, §10-9-5.
- Real property not required, disposition, §10-9-16.2.
- Re-creation, §10-9-2.
- Security guards, §10-9-15.
- Supplemental and additional powers, §10-9-17.
- Taxation.
  - Exemption, §10-9-10.
  - Revenue bonds, §10-9-43.
- Transfer of duties of department of economic development, §10-9-5.
- Trust funds.
  - Money received considered, §10-9-13.
- Use of projects.
  - Contract required, §10-9-14.
  - Fixing charges, §10-9-14.
  - Insuring of maximum use, §10-9-15.
  - Rules and regulations for operation, §10-9-15.
  - Terms and conditions, §10-9-14.
- Venue of actions under chapter, §10-9-11.

**Bond issues.**

- Refunding bonds, §10-9-55.

**Contracts with and on behalf of  
department of economic development.**

- Actions to be performed by authority under contract, §10-9-5.

**Definitions, §10-9-3.**

**Georgia World Congress Center police.**

- Authority, §10-9-15.

**Lease of facilities, §10-9-49.**

**Ordinances.**

- Authority, §§10-9-4.1, 10-9-14.1.

**Overview committee, §§10-9-20 to 10-9-24.**

- Composition, §10-9-20.
- Consultants, §10-9-21.
- Cooperation of other state agencies, §10-9-21.
- Cooperation with committee, §10-9-22.
- Creation, §10-9-20.
- Criteria for evaluating authority, §10-9-23.
- Duties, §10-9-20.
- Enforcement actions, §10-9-22.



**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER —Cont'd**

**Overview committee —Cont'd**

- Evaluation of authority.
  - Criteria, §10-9-23.
- Expenditure of funds, §10-9-24.
- Expenses of members, §10-9-24.
- Officers, §10-9-20.
- Reports, §10-9-22.
- Staff members, §10-9-21.

**Refunding bonds, §10-9-55.**

**Revenue bonds, §§10-9-40 to 10-9-61.**

- Additional bonds in case of deficiency, §10-9-45.
- Applicability of revenue bond law, §10-9-57.
- Conditions, §10-9-41.
- Covenants of state, §10-9-58.
- Cumulative nature of authority of powers, §10-9-61.
- Enforceability against authority, §10-9-50.
- Enforcement of rights, §10-9-52.
- Georgia state financing and investment commission.
  - Use of services, §10-9-54.
- Indenture trustee.
  - Enforcement of rights, §10-9-52.
- Interest rate, §10-9-44.
- Interim revenue receipts, certificates or bonds, §10-9-46.
- Investment and deposit purposes.
  - Bonds made securities for, §10-9-56.
- Issuance.
  - Additional bonds, §10-9-45.
  - Authorized, §10-9-40.
  - Interim revenue receipts, certificates or bonds, §10-9-46.
  - Proceedings and conditions, §10-9-48.
  - Refunding bond, §10-9-55.
- Jurisdiction over actions, §10-9-60.
- Lease of facilities financed by bond, §10-9-49.
- Legislative findings, §10-9-58.
- Limitation on state liability, §10-9-50.
- Mutilated, destroyed or lost bonds.
  - Replacement, §10-9-47.
- Payment of sale proceeds to trustees, §10-9-53.
- Power to pledge or assign rents, revenues, etc., §10-9-61.
- Professional services for project, §10-9-54.
- Protection of bondholder rights and remedies.
  - Enforcement of rights, §10-9-52.

**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER —Cont'd**

**Revenue bonds —Cont'd**

- Protection of bondholder rights and remedies —Cont'd
  - Provisions in resolution or trust indenture, §10-9-51.
- Purposes, §10-9-40.
- Receiver.
  - Enforcement of rights, §10-9-52.
- Refunding bond, §10-9-55.
- Replacement.
  - Mutilated, destroyed or lost bonds, §10-9-47.
- Resolution, §10-9-48.
- Sale, §10-9-44.
  - Payment of proceeds to trustees, §10-9-53.
- Seal, §10-9-42.
- Securities act, inapplicability, §10-9-59.
- Security, §10-9-51.
- Signature, §10-9-42.
- Sinking fund, §10-9-51.
- Tax exemption, §10-9-43.
- Term, §10-9-41.
- Use of proceeds, §10-9-45.
- Use of surplus, §10-9-45.
- Validation of bond, §10-9-57.

**Short title, §10-9-1.**

**GEO. L. SMITH II GEORGIA WORLD  
CONGRESS CENTER ACT.**

**General provisions, §§10-9-1 to 10-9-61.**

**Short title, §10-9-1.**

**GEORGIA CEMETERY AND FUNERAL  
SERVICES ACT OF 2000.**

**General provisions, §§10-14-1 to 10-14-30.**

**Short title, §10-14-1.**

**GEORGIA CONSIGNMENT OF ART  
ACT.**

**General provisions, §§10-1-520 to 10-1-529.**

**Short title, §10-1-520.**

**GEORGIA LEMON LAW.**

**Motor vehicles, §§10-1-780 to 10-1-797.**

**Short title, §10-1-780.**

**GEORGIA MOTION PICTURE FAIR  
COMPETITION ACT.**

**Bidding by exhibitors, §§10-1-290 to 10-1-294.**

**Short title, §10-1-290.**

**GEORGIA MOTOR VEHICLE DEALER'S  
DAY IN COURT ACT.**

**General provisions, §§10-1-630, 10-1-631.**

**Short title, §10-1-630.**

**GEORGIA MOTOR VEHICLE**

**FRANCHISE PRACTICES ACT.**

General provisions, §§10-1-620 to 10-1-628.

Short title, §10-1-620.

**GEORGIA MULTILINE HEAVY**

**EQUIPMENT DEALER ACT.**

General provisions, §§10-1-730 to 10-1-740.

Short title, §10-1-730.

**GEORGIA MUSEUM PROPERTY ACT.**

General provisions, §§10-1-529.1 to 10-1-529.7.

Short title, §10-1-529.1.

**GEORGIA SELF-SERVICE STORAGE**

**FACILITY ACT.**

General provisions, §§10-4-210 to 10-4-215.

Short title, §10-4-210.

**GEORGIA STATE WAREHOUSE ACT.**

**General provisions.**

State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

Short title, §10-4-1.

**GEORGIA TOBACCO ADVISORY**

**BOARD, §10-4-111.**

**GEORGIA TOBACCO MARKETING ACT OF 1995.**

Generally, §10-4-106.

Short title, §10-4-106.

**GEORGIA TRADE SECRETS ACT OF 1990.**

General provisions, §§10-1-760 to 10-1-767.

Short title, §10-1-760.

**GEORGIA UNIFORM SECURITIES ACT OF 2008.**

General provisions, §§10-5-1 to 10-5-90.

Short title, §10-5-1.

**GIFT CERTIFICATES.**

Unfair or deceptive practices in consumer transactions, §10-1-393.

**GIFTS.**

**Advertising.**

Retail motor fuels.

Advertising free gifts or services, §10-1-164.

**Gasoline.**

Advertising free gifts or services by persons dispensing motor fuels, §10-1-164.

**Motor fuels.**

Advertising free gifts or services by persons dispensing, §10-1-164.

**GIFTS —Cont'd**

**Petroleum products sales.**

Advertising free gifts or services by persons dispensing motor fuels, §10-1-164.

**Promotional giveaways or contests,**

§§10-1-392, 10-1-393.

**Solicitations.**

Unsolicited merchandise or unordered merchandise sent after membership terminated.

Recipient may treat as gift, §10-1-50.

**Unsolicited merchandise or unordered merchandise sent after membership terminated.**

Recipient may treat as gift, §§10-1-50, 10-1-51.

**GINNING.**

**State warehouse commissioner.**

Duty to study best system of ginning, §10-4-54.

Duty to study conditions under which cotton ginned, §10-4-54.

**GOING-OUT-OF-BUSINESS SALES.**

**Advertising.**

False advertising, §10-1-393.

Misrepresenting ownership in advertising, §§10-1-425, 10-1-426.

**Defined, §10-1-392.**

**Fair business practices act of 1975.**

General provisions, §§10-1-390 to 10-1-407.

**GOLD.**

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**GOOD FAITH.**

**Agents.**

Recovery of money paid by mistake, §10-6-81.

**Definitions.**

Motor vehicle franchises, §10-1-622.

**False or fraudulent statements in advertising.**

Broadcasters and publishers.

Acting in good faith excepted, §§10-1-420 to 10-1-427.

**Gasoline below cost sales.**

Burden of rebutting prima-facie case, §10-1-254.

**Gasoline marketing practices.**

Actions by dealers against distributors, §10-1-235.

**GOOD FAITH —Cont'd**

**Gasoline marketing practices —Cont'd**

Actions by distributors against dealers,  
§10-1-238.

**Heavy equipment multiline dealers.**

Good faith requirements, §10-1-738.  
Good faith settlement of disputes,  
§10-1-737.

**Limited edition art reproductions.**

Liabilities incurred by artists, dealers or  
consignees, §10-1-434.

**Military affairs.**

Powers of attorney.  
Effect of death on power by armed  
forces members, §10-6-35.

**Motor vehicle franchises.**

Dealer's day in court.  
Practices in violation of existing law,  
§10-1-631.  
False advertising, §10-1-662.  
Good faith defined, §10-1-622.

**News media.**

Unfair or deceptive trade practices.  
Exemption of publishers, broadcasters,  
printers, etc., §10-1-374.

**Promotional giveaways or contests.**

Deceptive trade practices in consumer  
transactions, §10-1-393.

**Self-service storage facilities.**

Lien of owner upon property located at  
facility, §10-4-213.

**Trademarks and service marks.**

Common-law rights in marks not  
affected, §10-1-452.

**GOOD WILL.**

**Assignments.**

Trademarks and service marks.  
Registration, §10-1-446.

**Heavy equipment multiline dealers.**

Recovery of loss of good will, §10-1-739.

**Motor vehicle franchises.**

Dealership defined, §10-1-622.

**Trademarks and service marks.**

Assignments.  
Registration, §10-1-446.

**GOVERNOR.**

**Appointments.**

Geo. L. Smith II World Congress Center.  
Board of governors of authority,  
§10-9-6.

**Geo. L. Smith II Georgia World Congress  
Center.**

Board of governors of authority.  
Appointment and removal, §§10-9-6,  
10-9-8.

**GRACE PERIODS.**

**Lease-purchase agreements.**

Grace period for compliance, §10-1-687.

**GRADUATION.**

**Advertising.**

False advertising.  
Doctor or Dr. designation in  
advertisements, §10-1-422.

**GRAIN.**

**Commodities and commodity contracts and  
options.**

General provisions, §§10-5A-1 to  
10-5A-31.

**Moisture testing equipment.**

Inspections, §10-2-15.  
Permit for operator, §10-2-16.  
Standards, §10-2-15.

**Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

**GRAIN DEALERS.**

**Bonds, surety.**

Warehouseman also grain dealer,  
§10-4-12.

**Warehouses.**

State licensed and bonded warehouses.  
Bond for warehouseman also grain  
dealer, §10-4-12.

**GRANTORS.**

**Art.**

Rights in works of fine art, §10-1-510.

**GRANTS.**

**Geo. L. Smith II Georgia World Congress  
Center, §10-9-12.**

**GRAPHIC MATTER.**

**Fine art defined, §10-1-510.**

**Rights in works of fine art, §10-1-510.**

**Work of fine art defined.**

Rights in works of fine art, §10-1-510.

**GREASE.**

**Petroleum products sales.**

Substitution or misbranding, §§10-1-162,  
10-1-163.

**Trademarks and service marks.**

Registration of marks.  
Classification of goods and services for  
purposes of registration,  
§10-1-443.

**GREEN-WEIGHT BASIS.**

**Tobacco.**

Carry-over storage and sale.  
Maximum charges and expenses,  
§10-4-145.



**GUARANTY.**

**Suretyship generally**, §§10-7-1 to 10-7-57.

**GUARDIANS.**

**Accounts.**

Required, §10-6-30.

**Conveyances by attorneys in fact**, §10-6-4.

**Signatures.**

Liability of persons signing instrument as fiduciary, §10-6-86.

**GUARDS.**

**Geo. L. Smith II Georgia World Congress Center.**

Security guards, §10-9-15.

**GUNS.**

**Business records.**

Generally, §§10-11-1 to 10-11-3.

**GYMS.**

**Health spa.**

Defined, §10-1-392.

**H**

**HANDICAPPED PERSONS.**

**Assistive technology warranties**, §§10-1-870 to 10-1-875.

**Unfair or deceptive trade practices**, §§10-1-850 to 10-1-857.

**Wheelchairs.**

Motorized wheelchair warranties, §§10-1-390 to 10-1-394.

**HEALTH.**

**Common day of rest act of 1974.**

Practice of healing arts exempt from article, §10-1-574.

**HEALTH INSURANCE.**

**Unfair and deceptive practices.**

Health benefit plans, §10-1-393.

**HEALTH SPAS.**

**Fair business practices act of 1975.**

Cancellation of contracts, §10-1-393.2.

Cessation of operation and failing to offer alternate location.

Equal monthly installments, §10-1-393.2.

Contract requirements, §10-1-393.2.

Criminal penalties for violations of sections, §10-1-393.2.

Death during membership term, §10-1-393.2.

Deceptive practices in consumer transactions, §10-1-393.

Defined, §10-1-392.

**HEALTH SPAS —Cont'd**

**Fair business practices act of 1975**

—Cont'd

Disability during membership, §10-1-393.2.

Fully operational and available for use, §10-1-393.2.

General provisions, §§10-1-390 to 10-1-407.

Noncomplying contracts void and unenforceable, §10-1-393.2.

Notice of right to cancel contract, §10-1-393.2.

Notice to buyer choosing to pay in advance, §10-1-393.2.

Refunds upon cancellation, §10-1-393.2.

Requirements generally, §10-1-393.2.

Violations of section, §10-1-393.2.

**HEARINGS.**

**Buying clubs or services.**

Imposition of civil penalty, §10-1-604.

Licenses.

Revocation, suspension or nonrenewal, §10-1-595.

**Certified public weighers.**

Imposition of administrative penalty, §10-2-53.

Revocation of license, §10-2-43.

**Commodities and commodity contracts and options.**

Administrative proceeding, §10-5A-28.

Investigations, §10-5A-20.

**Gasoline marketing practices.**

Notice of termination prior to expiration, §10-1-237.

**Liquefied petroleum gas.**

Sale and storage.

Suspension or revocation of license, §10-1-269.

**Motor vehicle franchises.**

Administrative review of alleged violations, §10-1-667.

**Tobacco.**

Leaf tobacco sales and storage.

Administrative review of objections to rules and regulations, §10-4-121.

Revocation or suspension proceeding, §10-4-118.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Cease and desist orders, §10-1-398.

Powers of administrator, §10-1-404.

**Warehouses.**

State licensed and bonded warehouses.

Breach of bond, §10-4-14.

**HEARINGS** —Cont'd

**Warehouses** —Cont'd

State licensed and bonded warehouses

—Cont'd

Repeal or revision of rules, §10-4-6.

Suspension or revocation of license for violation, §10-4-30.

**Weighers.**

Certified public weighers.

Imposition of administrative penalty, §10-2-53.

Revocation of license, §10-2-43.

**Weights and measures.**

Imposition of administrative penalty, §10-2-21.

**HEATING AND AIR CONDITIONING CONTRACTORS.**

**Telemarketing deception, fraud or abuse,** §10-5B-5.

Required and prohibited telephone conduct and activities, §10-5B-4.

**HEATING FUELS.**

**Petroleum products sales.**

General provisions, §§10-1-140 to 10-1-169.

**HEAVY EQUIPMENT.**

**Multiline dealers,** §§10-1-730 to 10-1-740.

Actions for recovery of losses and damages.

Amendment, cancellation, termination, etc., §10-1-739.

Consent to transfer of business, §10-1-739.

Amendment, cancellation, termination, refusal to renew agreement, §10-1-732.

Actions for recovery of losses and damages, §10-1-739.

Contract for transfer during notice period, §10-1-733.

Good cause, §10-1-732.

Immediate termination, amendment, etc., without notice, §10-1-733.

Notice of intent, §10-1-733.

Notice of transfer of business during notice period, §10-1-733.

Periods during which supplier may not cancel, terminate, etc., §10-1-739.

Time within which dealer may rectify condition, §10-1-733.

Unilateral amendment, cancellation, etc., §10-1-732.

Applicability of article, §10-1-740.

Assumption of transferor's obligations and rights, §10-1-734.

**HEAVY EQUIPMENT** —Cont'd

**Multiline dealers** —Cont'd

Burden of proof.

Justification for denying consent to transfer business, §10-1-734.

Change in dealer's management or personnel, §10-1-736.

Consent to transfer of dealer's business, §10-1-734.

Actions for recovery of losses and damages, §10-1-739.

Declaratory judgments, §10-1-739.

Definitions, §10-1-731.

Effective date of article, §10-1-740.

Equitable relief, §10-1-739.

Fair dealing.

Requirements, §10-1-738.

Georgia multiline heavy equipment dealer act.

Short title, §10-1-730.

Good cause.

Unilateral amendment, cancellation, termination, etc., of agreement, §10-1-732.

Good faith.

Requirements, §10-1-738.

Settlement of disputes, §10-1-737.

Incorporation of article into agreements, §10-1-737.

Injunctions, §10-1-739.

Interpretation of agreements.

Reasonableness, §10-1-738.

Mailing of notices required by article, §10-1-735.

Management.

Change, §10-1-736.

Notice of intent to amend, terminate, cancel, etc., §10-1-733.

Notice of contract for transfer of business during period, §10-1-733.

Notice of withholding of consent to transfer business, §10-1-734.

Personnel.

Change, §10-1-736.

Reasonableness.

Requirements, §10-1-738.

Resignation from agreement for good cause, §10-1-732.

Settlement of disputes.

Good faith, §10-1-737.

Short title.

Georgia multiline heavy equipment dealer act, §10-1-730.

Transfer of business.

Consent, §10-1-734.

Actions for recovery of losses and damages, §10-1-739.

## INDEX

### **HEAVY EQUIPMENT —Cont'd**

#### **Multiline dealers —Cont'd**

Transfer of business —Cont'd

Notice of intent to amend, terminate, cancel, etc.

Contract for transfer during notice period, §10-1-733.

Venue to hear and determine causes and controversies, §10-1-739.

Waiver of compliance not required, §10-1-737.

#### **Remanufactured or rebuilt items.**

Labels and labeling, §§10-1-80 to 10-1-83.

### **HISTORICAL RECORDS.**

#### **Property on loan to museums and archives repositories.**

Georgia museums property act, §§10-1-529.1 to 10-1-529.7.

### **HISTORIC PRESERVATION.**

#### **Property on loaned to museums and archives repositories.**

Georgia museum property act, §§10-1-529.1 to 10-1-529.7.

### **HOLIDAYS AND OBSERVANCES.**

#### **Deceptive trade practices in consumer transactions.**

Representing person as winner, §10-1-393.

### **HOME REPAIR OR HOME IMPROVEMENT WORK.**

#### **Unfair or deceptive trade practices.**

Prohibited activities, criminal penalty, investigations, §10-1-393.5.

### **HOME SOLICITATION SALES.**

#### **Buyer's right to cancel, §10-1-6.**

#### **Retail installment contracts or revolving accounts.**

Generally, §§10-1-1 to 10-1-16.

#### **Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

Actions.

Right of action for violations, §10-5B-6.

Applicability of provisions, §10-5B-5.

Construction of provisions, §10-5B-7.

Defined terms, §10-5B-2.

Exclusivity of provisions, §10-5B-7.

Legislative findings and intent, §10-5B-1.

Offers to sell or buy made in state.

Determinations as to, §10-5B-8.

Penalties for violations, §10-5B-6.

### **HOME SOLICITATION SALES —Cont'd**

#### **Telemarketing deception, fraud or abuse —Cont'd**

Rules promulgation, §10-5B-3.

### **HORSES.**

#### **Auctions.**

Liability of auctioneer for sale of stolen horse, §10-1-530.

#### **Stolen horses.**

Liability of auctioneer for sale of stolen horse, §10-1-530.

### **HOSPITALS.**

#### **Billing requirements.**

Itemized statement of charges.

Failure to deliver as deceptive trade practice, §10-1-393.

#### **Deceptive trade practices.**

Failure to deliver itemized statement of charges, §10-1-393.

#### **Unfair or deceptive trade practices.**

Failure to deliver itemized statement of charges, §10-1-393.

### **HOURS OF LABOR.**

#### **Common day of rest.**

General provisions, §§10-1-570 to 10-1-576.

#### **HUMANE ORGANIZATIONS, §§10-1-470 to 10-1-472.**

#### **Emblem or name.**

Imitation, §10-1-470.

Injunction against infringement, §10-1-471.

Priority of right to use name, §10-1-470.

Unauthorized use, §10-1-472.

#### **False claim of membership, §10-1-472.**

## I

### **IDENTIFICATION CARDS.**

#### **Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

### **IDENTIFICATION NUMBERS.**

#### **Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

### **IDENTIFYING INFORMATION.**

#### **Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.



**IDENTITY FRAUD.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**IDENTITY THEFT, §§10-1-910 to 10-1-915.**

**Breach of security regarding personal information.**

Notification required, §10-1-912.

**Consumer reporting agencies.**

Notification upon breach of security regarding personal information, §10-1-912.

**Credit report security freezes, §§10-1-913 to 10-1-915.**

Definitions, §10-1-913.

Duties of reporting agency on request, §10-1-914.

Entities exempt from provisions, §10-1-914.

Fees, §10-1-914.

Notice of rights to consumer, §10-1-915.

Procedures, §10-1-914.

Removal, §10-1-914.

Temporary lifting of freeze, §10-1-914.

**Data collector defined, §10-1-911.**

**Definitions, §10-1-911.**

**Information broker defined, §10-1-911.**

**Legislative declaration, §10-1-910.**

**Notice.**

Breach of security regarding personal information, §10-1-912.

Defined, methods of giving, §10-1-911.

**Personal information defined, §10-1-911.**

**Purpose, §10-1-910.**

**Substitute notice.**

Defined, manner of giving, §10-1-911.

**ILLUMINATING FUELS.**

**Petroleum products sales generally, §§10-1-140 to 10-1-169.**

**IMMUNITY.**

**Cemeteries.**

Secretary of State, §10-14-26.

**Clerks of superior courts.**

Social security numbers appearing on documents filed or publicly posted or displayed, §10-1-393.8.

**Lemon law.**

Motor vehicles.

Arbitration panels.

Immunity of arbitrators and administrators, §10-1-789.

**IMMUNITY —Cont'd**

**Museums or archives repositories.**

Conservation measures applied to property on loan.

Injury or loss to property resulting, §10-1-529.6.

**Securities.**

Fingerprinting and criminal background check.

Agents, broker-dealers, investment advisers and investment adviser representatives.

Immunity of commissioner and crime information center, §10-5-35.

**Superior court clerks' cooperative authority.**

Social security numbers appearing on documents filed or publicly posted or displayed, §10-1-393.8.

**Warehouses.**

State licensed and bonded warehouses.

Sureties for criminal penalties, §10-4-32.

**IMPERSONATION.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**Certified public weigher, §10-2-54.**

**IMPOUNDMENT.**

**Warehouses.**

State licensed and bonded warehouses.

Records and commodities pending investigation, §10-4-29.

Unused receipts upon suspension or revocation of license, §10-4-30.

**IN CAMERA.**

**Trade secrets.**

Protection during action.

Holding in camera hearings, §10-1-765.

**INCAPACITATED OR INCOMPETENT PERSONS.**

**Agency, incompetency or incapacity of principal, §10-6-36.**

**Powers of attorney, incompetency or incapacity of principal, §10-6-36.**

**INCOME TAXES.**

**Confidentiality of information.**

Business records.

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**INCOME TAXES —Cont'd**

**Disclosure of information.**

- Business records.
- Disposal of business records
  - containing personal information, §§10-15-1 to 10-15-7.

**INDEMNIFICATION.**

**Lemon law.**

- Motor vehicles.
  - Arbitration to compel replacement or repurchase of vehicle.
  - Dealers, §10-1-792.

**INDOOR SWAP MEET VENDORS'**

**RECORD-KEEPING, §10-1-360.**

**Exemptions, §10-1-361.**

**Local ordinances or regulations, §10-1-362.**

**INDORSEMENTS.**

**Actions by indorsers for payment of debt past due, §10-7-41.**

**Attachment against principal.**

- Right of indorser, §10-7-40.

**Executions.**

- Indorser's right to control judgment on debt and executions, §10-7-54.

**Indorsers.**

- Foreclosure by, §10-7-44.

**Judgments.**

- Indorser's right to control judgment on debt, §10-7-54.

**Mortgages and deeds of trust.**

- Foreclosure by indorser, §10-7-44.

**Notes.**

- Indorser sued with maker, drawer or acceptor, §10-3-2.

**Patent rights, copyrights or proprietary rights.**

- Consideration to be stated for purchase or sale, §10-3-3.
- Penalty for violation, §10-3-5.
- Purchaser takes subject to equities, §10-3-4.

**Securities.**

- Enforcement by indorsers of security given by principal, §10-7-44.

**Tobacco.**

- Leaf tobacco.
  - Sales and storage.
  - Indorsement of insurance, §10-4-103.

**Warehouses.**

- Obligation of warehousemen to deliver.
  - Demand accompanied by indorsements, §10-4-21.

**INDUSTRIAL DESIGNS.**

**Rights in works of fine art, §10-1-510.**

**INDUSTRIAL RELATIONS.**

**Common day of rest.**

- General provisions, §§10-1-570 to 10-1-576.

**Trade secrets.**

- General provisions, §§10-1-760 to 10-1-767.

**INFLAMMABLES.**

**Landlord and tenant, §10-4-213.**

**INFORMATION BROKERS.**

**Identity theft.**

- Breach of security regarding personal information.
- Notification requirements, §10-1-912.
- Defined, §10-1-911.
- Generally, §§10-1-910 to 10-1-915.

**INJUNCTIONS.**

**Advertising.**

- False advertising, §10-1-423.

**Antifreeze.**

- Violations of part or rules and regulations, §10-1-211.

**Art.**

- Limited edition art reproductions, §10-1-436.

**Benevolent organizations.**

- Emblem or name.
- Infringement, §10-1-471.

**Buying clubs or services, §10-1-603.**

**Cemeteries.**

- Enforcement powers of Secretary of State, §10-14-19.

**Charities.**

- Emblem or name.
- Infringement, §10-1-471.

**Commodities and commodity contracts and options, §§10-5A-21, 10-5A-22.**

**Deceptive trade practices.**

- Fair business practices act of 1975.
- Civil penalties for violations, §10-1-405.
- Remedies by individuals, §10-1-399.
- Uniform deceptive trade practices act, §10-1-373.

**Emblems.**

- Benevolent organizations, charities, fraternal organizations, etc.
- Infringement, §10-1-471.

**False advertising, §10-1-423.**

**Fraternal organizations.**

- Emblem or name.
- Infringement, §10-1-471.

**Gasoline below cost sales.**

- Violations of article, §10-1-255.

**INJUNCTIONS —Cont'd**

**Gasoline marketing practices.**

Notice of termination prior to expiration, §10-1-237.

Violations by distributors, §10-1-235.

**Heavy equipment multiline dealers,**  
§10-1-739.

**Humane organizations.**

Emblem or name.

Infringement, §10-1-471.

**Motion pictures.**

Bidding by exhibitors.

Enforcement of article, §10-1-294.

**Motor vehicle franchises.**

Violations of article, §10-1-623.

**Motor vehicle sales finance act.**

Subleasing vehicles subject to retail installment contract, §10-1-41.

**Names.**

Benevolent organizations, charities, fraternal organizations, etc.

Infringement, §10-1-472.

**Paint.**

Timber-marking paint sale and labeling requirement violations, §10-1-126.

**Petroleum products sales.**

Marketing in violation of part, specifications or rules and regulations, §10-1-156.

Sale of used or reclaimed lubricating oils or lubricants, §10-1-162.

**Recreational vehicle dealers.**

Remedies for violations, §10-1-679.11.

Temporary injunction.

Violations deemed irreparable injuries for purpose of, §10-1-679.12.

**Securities.**

Cease and desist orders, §10-5-73.

Denial, suspension or revocation of registration.

Security is subject of injunction, §10-5-25.

Injunction of violations, §10-5-72.

Powers of commissioner, §10-5-71.

**Social organizations.**

Emblem or name.

Infringement, §10-1-471.

**Solicitations.**

Unsolicited merchandise sent or unordered merchandise sent after membership terminated.

Enjoining payment request, §§10-1-50, 10-1-51.

**Timber-marking paint sale and labeling requirement violations,** §10-1-126.

**INJUNCTIONS —Cont'd**

**Tobacco.**

Carry-over storage and sale, §10-4-154.

Leaf tobacco sales and storage, §10-4-120.

**Tobacco master settlement agreement enhancements.**

Remedies for noncompliance, §10-13A-8.

**Trademarks and service marks.**

Infringement of registered mark, §10-1-451.

**Trade secrets,** §10-1-762.

Attorney fees, §10-1-764.

Protection of secret during action, §10-1-765.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-397.

Civil penalties for violations, §10-1-405.

Remedies by individuals, §10-1-399.

Uniform deceptive trade practices act, §10-1-373.

**Unsolicited merchandise sent or unordered merchandise sent after membership terminated.**

Enjoining payment request, §§10-1-50, 10-1-51.

**Weights and measures,** §10-2-20.

**INSIDER TRADING.**

**Securities.**

Commissioner, §10-5-70.

**INSPECTIONS.**

**Antifreeze samples,** §10-1-203.

Certificate of analysis as evidence, §10-1-208.

Right of inspections, §10-1-204.

**Brake fluid samples,** §10-1-185.

Certified analysis as evidence, §10-1-188.

Right, §10-1-186.

**Gasoline.**

Gasoline subject to petroleum products sales part, §10-1-149.

No fee, §10-1-161.

Marketing practices, §§10-1-235, 10-1-237.

**Grain moisture testing equipment,**  
§10-2-15.

**Kerosene.**

Kerosene subject to petroleum products sales part, §10-1-149.

No fee, §10-1-161.

**Petroleum product sales.**

Gasoline or kerosene.

No fee, §10-1-161.

Subject to inspection, §10-1-149.



**INSPECTIONS —Cont'd**

**Petroleum product sales —Cont'd**

- Right to inspect premises, §10-1-148.
- Self-measuring pumps, §10-1-159.
- Substitutes or improvers, §10-1-150.

**Scales used in intrastate shipments,**  
§10-2-17.

**Secondary metals recyclers.**

- Law enforcement officers.
- Powers, §10-1-352.

**Tobacco.**

- Carry-over storage and sale, §10-4-152.
- Leaf tobacco sales and storage.
- Premises, §10-4-116.

**Warehouses.**

- State licensed and bonded warehouses,  
§10-4-15.
- Inspector's and examiner's bond,  
§10-4-16.
- Records, §10-4-24.

**Weights and measures.**

- Grain moisture testing equipment,  
§10-2-15.
- Power of commissioner, §10-2-6.
- Scales used in intrastate shipments,  
§10-2-17.

**INSTALLMENT SALES.**

**Retail installment sales, §§10-1-1 to 10-1-16.**

**INSURANCE.**

**Lease-purchase agreements, §10-1-685.**

**Liquefied petroleum gas.**

- Sale and storage.
- Requirements for license or permit  
holders, §10-1-267.

**Motor vehicle sales finance act, §10-1-32.**

**Retail installment contracts, §10-1-3.**

- Motor vehicle sales finance act, §10-1-32.

**Tobacco.**

- Carry-over tobacco storage and sale.
- Fire and extended coverage, §10-4-143.
- Leaf tobacco sales and storage,  
§10-4-103.

**Warehouses.**

- State licensed and bonded warehouses,  
§10-4-25.
- State warehouse commissioner.
- Fire insurance on property, §10-4-57.

**INSURANCE COMPANIES.**

**Commodities.**

- Exempt transactions and contracts,  
§10-5A-4.

**INTEREST.**

**Art.**

- Limited edition art reproductions.
- Art dealer's liability, §10-1-435.

**INTEREST —Cont'd**

**Geo. L. Smith II Georgia World Congress  
Center.**

- Revenue bonds, §10-9-44.

**Indorser's payment of debt past due.**

- Action for money paid, §10-7-41.

**Retail installment sales and revolving  
accounts.**

- Interest statutes not affected by article,  
§10-1-11.

**Suretyship.**

- Action by surety for payment of debt  
past due, §10-7-41.
- Recovery of usury paid by surety,  
§10-7-43.
- Sum recovered as contribution, §10-7-51.

**Usurious interest.**

- Suretyship, §§10-7-41, 10-7-43, 10-7-51.

**INTERFERENCE WITH AGENT'S  
POSSESSION.**

**Right of action, §10-6-83.**

**INTERNET.**

**Credit report security freezes.**

- Internet-based method of requesting,  
§10-1-914.

**Social security numbers.**

- Protection from disclosure, §10-1-393.8.

**Tobacco master settlement agreement  
enhancements.**

- Directory.
- Availability on the internet, §10-13A-4.

**Unfair or deceptive trade practices.**

- Prohibited activities, criminal penalty,  
investigations, §10-1-393.5.

**INTERPRETATION AND  
CONSTRUCTION.**

**Commodities and commodity contracts and  
options, §10-5A-9.**

- Applicability of securities law, §10-5A-8.
- Cooperation to encourage uniform  
application and interpretation,  
§10-5A-25.

**Convenience warehousing act.**

- Exemption of state licensed or bonded  
warehouses, §10-4-191.

**Deceptive trade practices.**

- Fair business practices act of 1975,  
§10-1-391.
- Uniform deceptive trade practices act,  
§10-1-375.

**Electronic transactions act, §10-12-6.**

**Gasoline below cost sales.**

- Prohibited acts.
- Declaration of legislative intent in  
construing section, §10-1-256.

**INTERPRETATION AND**

**CONSTRUCTION —Cont'd**

**Geo. L. Smith II Georgia World Congress Center Act**, §10-9-18.

Revenue bonds, §§10-9-57, 10-9-59.

**Heavy equipment multiline dealers.**

Agreements interpreted as reasonable, §10-1-738.

Applicability of chapter, §10-1-740.

**Motor vehicle franchises.**

Applicability of article, §10-1-623.

Warranty service and repair of predelivery transportation damages.

Applicability of part, §10-1-644.

**Motor vehicle sales finance act**, §10-1-31.

**Retail installment and home solicitation sales act**, §10-1-2.

**Self-service storage facilities.**

Rental agreements entered into before July 1, 1982 not effected, §10-4-215.

Rights under article additional, §10-4-214.

**Trade secrets.**

Applicability of article, §10-1-767.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-391.

Uniform deceptive trade practices act, §10-1-375.

**Warehouses.**

State licensed and bonded warehouses. Existing interstate regulations not affected, §10-4-8.

Uniform application of orders, fees, rules and regulations, §10-4-7.

**INTERROGATORIES.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Cease and desist orders, §10-1-398.

**INTERSTATE COMMERCE.**

**Rifles and shotguns.**

Interstate purchases, §§10-1-100, 10-1-101.

**Warehouses.**

State licensed and bonded warehouses. Existing interstate commerce regulations not affected, §10-4-8.

**Weapons.**

Interstate purchases of rifles and shotguns, §§10-1-100, 10-1-101.

**INTERVENTION.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Administrator, §10-1-397.1.

**INVESTIGATIONS.**

**Cemeteries.**

Secretary of State, §10-14-15.

**Commodities and commodity contracts and options**, §10-5A-20.

**Cotton storage.**

Adverse liens and titles, §10-4-76.

**Deceptive trade practices.**

Fair business practices act of 1975, §10-1-403.

**Securities.**

Commissioner's powers, §10-5-71.

**Tobacco.**

Leaf tobacco sales and storage.

Suspension or revocation of license pending investigation, §10-4-119.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-403.

**Warehouses.**

State licensed and bonded warehouses.

Impoundment of records and commodities pending investigation, §10-4-29.

Suspension of license pending investigation, §10-4-29.

**INVESTMENTS.**

**Geo. L. Smith II Georgia World Congress Center.**

Revenue bonds.

Bond securities for investment and deposit purposes, §10-9-56.

**Seed capital fund.**

Generally, §§10-10-1 to 10-10-7.

**ITINERANT VENDORS.**

**Flea market vendors' record-keeping**, §10-1-360.

Exemptions, §10-1-361.

Local ordinances or regulations, §10-1-362.

**J**

**JEWELRY.**

**Marks.**

Registration.

Classes of goods, §10-1-443.

**JOBBERS.**

**Petroleum products.**

Jobbers desiring to sell products.

Filing of declaration or statement with commissioner, §10-1-149.

Jobbers shipping into state.

Notice and sample of product, §10-1-153.

**JOINT AND SEVERAL LIABILITY.**

**Securities.**

Persons controlling other persons,  
§10-5-58.

**JUDGMENTS.**

**Art.**

Limited edition art reproductions.  
Final judgments admissible as evidence  
of specific finding, §10-1-436.

**Buying clubs or services.**

Judgment on final order imposing civil  
penalty, §10-1-604.

**Deceptive trade practices.**

Fair business practices act of 1975.  
Final judgments obtained by  
administrator admissible as  
evidence, §10-1-397.

**Indorser's right to control judgment on  
debt, §10-7-54.**

**Motor vehicle franchises.**

Administrative review of alleged  
violations, §10-1-667.

**Suretyship.**

Action for money paid, interest and  
costs.

Effect of judgment against surety,  
§10-7-42.

Bona fide purchasers protected when  
surety controls judgment, §10-7-55.

Compelling contribution.

Controlling judgments, §10-7-53.

Control of judgment by surety, §10-7-47.

When sued separately, §10-7-48.

Indorser's right to control judgment,  
§10-7-54.

Judgment against principal and surety at  
same time, §10-7-29.

Payment of debt pending action by  
surety.

Judgment for plaintiff for use of  
surety, §10-7-49.

Process sued out and judgment entered  
against sureties, §10-7-28.

Proof after judgment, §10-7-46.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Administrative resolution.

Collection of judgments, §10-1-381.

Fees, §10-1-382.

Final judgments obtained by  
administrator admissible as  
evidence of specific findings,  
§10-1-397.

**JUNK DEALERS.**

**Records, §10-1-351.**

**JURISDICTION.**

**Geo. L. Smith II Georgia World Congress  
Center.**

Actions against authority under chapter,  
§10-9-11.

Revenue bonds.

Actions to protect or enforce rights,  
§10-9-60.

**Long-arm statute.**

Wholesale distribution by out-of-state  
principal.

Principal declared to be doing  
business in state for purposes of  
personal jurisdiction, §10-1-704.

**Nonresidents.**

Wholesale distribution by out-of-state  
principal.

Principal declared to be doing  
business in state for purposes of  
personal jurisdiction, §10-1-704.

**Wholesale distribution by out-of-state  
principal.**

Principal declared to be doing business  
in state for purposes of personal  
jurisdiction, §10-1-704.

**K**

**KEGS.**

**Flaxseed or linseed oil.**

Labeling of containers, §10-1-124.

**KEROSENE.**

**Defined, §10-1-140.**

**Petroleum product sales.**

General provisions, §§10-1-140 to  
10-1-169.

**Petroleum products retail dealers,**

§§10-1-720, 10-1-721.

**State oil chemist.**

Duties, §10-1-142.

**L**

**LABELS.**

**Brake fluid.**

When deemed misbranded, §10-1-182.

**Flaxseed oil.**

Possession of improperly labeled article.

Prima-facie evidence of violation,  
§10-1-125.

Tank cars, tanks, barrels, etc., §10-1-124.

**Gasoline.**

Containers subject to petroleum  
products sales part, §10-1-152.



**LABELS —Cont'd**

**Kerosene.**

Containers subject to petroleum products sales part, §10-1-152.

**Linseed oil.**

Possession of improperly labeled article.  
Prima-facie evidence of violation, §10-1-125.

Tank cars, tanks, barrels, etc., §10-1-124.

**Paint.**

Enforcement of article and rules and regulations, §10-1-121.

Possession of improperly labeled article.  
Prima-facie evidence of violation, §10-1-125.

Requirements for paint containers, §10-1-122.

Sale of deceptively labeled paint, §10-1-127.

Timber-marking paint, §10-1-126.

**Petroleum products sales.**

Gasoline and kerosene containers, §10-1-152.

Misbranding of petroleum products, §10-1-162.

Substitutes or improvers, §§10-1-150, 10-1-162.

**Remanufactured or rebuilt items, §§10-1-80 to 10-1-83.**

**Rebuilt.**

Defined, §10-1-80.

**Remanufactured.**

Defined, §10-1-80.

Required for rebuilt item sold at retail, §10-1-82.

Required for remanufactured item sold at retail, §10-1-81.

Violation of article, §10-1-83.

**Timber-marking paint.**

Requirements, §10-1-126.

**LABOR AND INDUSTRIAL RELATIONS.**

**Common day of rest.**

General provisions, §§10-1-570 to 10-1-576.

**Hours of labor.**

Common day of rest.

General provisions, §§10-1-570 to 10-1-576.

**Overseers, §§10-6-120, 10-6-121.**

Duties, §10-6-120.

Parol contracts between employer and overseer, §10-6-121.

Powers, §10-6-120.

**Trade secrets.**

Generally, §§10-1-760 to 10-1-767.

**LAW ENFORCEMENT OFFICERS.**

**Computer or computer network.**

Persons engaged in activities involving.  
Unfair or deceptive trade practices.

Certified peace officers employed to investigate, powers, §10-1-393.5.

**Georgia World Congress Center police, §10-9-15.**

**Home repair or home improvement work.**

Persons engaged in activities involving.  
Unfair or deceptive trade practices.

Certified peace officers employed to investigate, powers, §10-1-393.5.

**Telemarketing.**

Persons engaged in activities involving.  
Unfair or deceptive trade practices.

Certified peace officers employed to investigate, powers, §10-1-393.5.

**LEAF TOBACCO.**

**Sales and storage.**

General provisions, §§10-4-100 to 10-4-155.

**LEASE-PURCHASE AGREEMENT ACT.**

General provisions, §§10-1-680 to 10-1-689.

Short title, §10-1-680.

**LEASE-PURCHASE AGREEMENTS,**

§§10-1-680 to 10-1-689.

**Actions for violations of article, §10-1-687.**

Limitation of actions, §10-1-688.

**Advertising, §10-1-683.**

**Corrections of violations of article, §10-1-687.**

**Definitions, §10-1-681.**

**Early termination penalty, §10-1-685.**

**Failure to make timely payments.**

Reinstatement of agreement by lessee, §10-1-686.

**Forms, §10-1-689.**

**Garnishment of wages provision prohibited, §10-1-684.**

**In-home collection of payment fees, §10-1-685.**

**Insurance.**

Required to be purchased by lessee, §10-1-685.

**Late payment fees, §10-1-685.**

**Lease-purchase agreement act.**

Short title, §10-1-680.

**Limitation of actions, §10-1-688.**

**Picking up rental property fee, §10-1-685.**

**Prohibited agreement provisions, §10-1-684.**

**Reinstatement of agreement by lessee failing to make timely payments, §10-1-686.**

**LEASE-PURCHASE AGREEMENTS**

—Cont'd

**Repossession provisions prohibited,**  
§10-1-684.

**Requirements,** §10-1-682.

**Return of items penalty,** §10-1-685.

**Short title.**

Lease-purchase agreement act, §10-1-680.

**Substitute items of comparable quality.**

Reinstatement of agreement by lessee  
failing to make timely payments,  
§10-1-686.

**Violations of article,** §10-1-687.

**Written statement,** §10-1-682.

**LEASES.**

**Convenience warehousing.**

General provisions, §§10-4-190 to  
10-4-193.

**Geo. L. Smith II Georgia World Congress  
Center,** §10-9-49.

**Motor vehicle leases.**

Subleasing vehicles, §§10-1-39 to 10-1-41.

**Personal property.**

Lease-purchase agreements.

General provisions, §§10-1-680 to  
10-1-689.

**Self-service storage facilities.**

General provisions, §§10-4-210 to  
10-4-215.

**Subleases.**

Franchisors, §§10-1-651, 10-1-653.

Geo. L. Smith II Georgia World  
Congress Center Authority.

Power, §§10-9-4, 10-9-14, 10-9-49.

Motor vehicle subleasing, §§10-1-39 to  
10-1-41.

**LEMON LAW.**

**Farm tractors,** §§10-1-810 to 10-1-819.

Action for nonconforming farm tractor,  
§10-1-814.

Action for violating informal dispute  
settlement procedures, §10-1-816.

Compromise and settlement.

Informal dispute settlement  
procedures, §10-1-816.

Conformity to express written warranties.

Opportunity to make repairs,  
§10-1-813.

Dealers.

Limitation of liability for  
nonconforming tractor, §10-1-814.

Defenses under article.

Affirmative defenses, §10-1-817.

Definitions, §10-1-811.

**LEMON LAW —Cont'd**

**Farm tractors —Cont'd**

Distributors.

Limitation of liability for  
nonconforming tractor, §10-1-814.

Farm tractor warranty act.

Short title, §10-1-810.

Informal dispute settlement procedures,  
§10-1-816.

Limitation of actions, §10-1-818.

Nonconformity.

Defined, §10-1-811.

Extension of period for reporting,  
§10-1-815.

Opportunity to make repairs,  
§10-1-813.

Replacement or refund, §10-1-814.

Notice of nonconforming farm tractor,  
§10-1-814.

Notice of warranty supplied by  
manufacturer, §10-1-812.

Other remedies and rights not limited,  
§10-1-819.

Pursuit of other remedies and rights,  
§10-1-819.

Refund for nonconforming tractor,  
§10-1-814.

Repair period.

Extension of thirty day period,  
§10-1-815.

Repairs to conform to express written  
warranties.

Opportunity to make, §10-1-813.

Replacement for nonconforming tractor,  
§10-1-814.

Short title.

Farm tractor warranty act, §10-1-810.

Thirty day repair period.

Extension, §10-1-815.

**Motor vehicles,** §§10-1-780 to 10-1-797.

Actions.

Exhaustion of remedies required,  
§10-1-788.

Administrative staff, §10-1-794.

Agreement constituting waiver of rights.  
Unenforceable, §10-1-797.

Arbitration to compel replacement or  
repurchase of vehicle, §10-1-785.

Appeal of decision, §10-1-787.

Appeal of ineligibility determination,  
§10-1-786.

Conduct, §10-1-786.

Dealer not to be made party by  
manufacturer, §10-1-792.

Decision of arbitrator, §10-1-786.

Finality, §10-1-787.

**LEMON LAW —Cont'd**

**Motor vehicles —Cont'd**

- Arbitration to compel replacement or repurchase of vehicle —Cont'd
  - Franchise agreements not affected, §10-1-792.
  - Manufacturer failure to comply with decision, §10-1-787.
  - New motor vehicle arbitration panels.
    - Compensation, §10-1-789.
    - Establishment, §10-1-789.
    - Immunity of arbitrators and administrators, §10-1-789.
  - Procedures, §10-1-786.
  - Request, §10-1-786.
  - Time limit for requesting, §10-1-786.
- Certification of informal dispute settlement mechanism, §10-1-785.
- Collateral charges and costs.
  - Dealer or manufacturer not liable, §10-1-792.
- Consumer fees to implement provisions, §10-1-791.
- Costs paid to consumer, §10-1-784.
- Definitions, §10-1-782.
- Effect of provisions on other rights and remedies, §§10-1-792, 10-1-793.
- Enforcement powers of administrator, §10-1-791.
- Exhaustion of remedies required prior to civil action, §10-1-788.
- Extension of lemon law rights period, §10-1-784.
- Fees to implement provisions, §10-1-791.
- Final attempt of manufacturer to repair or correct nonconformity, §10-1-784.
- Informal dispute settlement mechanism, §10-1-785.
- Inspection and test information.
  - Provided to consumer upon request, §10-1-783.
- Invalid provisions.
  - Severability of provisions, §10-1-796.
- Itemized repair statement or order.
  - Provision to customer, §10-1-783.
- Legislative intent, §10-1-781.
- Lessee election to accept replacement vehicle or repurchase, §10-1-784.
- Notice of reacquired vehicles, §10-1-790.
- Notice to manufacturer of inability to repair or correct nonconformity, §10-1-784.
- Owners manual.
  - Provision to consumer and information to be included, §10-1-783.

**LEMON LAW —Cont'd**

**Motor vehicles —Cont'd**

- Promulgation of rules and regulations, §10-1-795.
- Purposes, §10-1-781.
- Reacquired vehicles.
  - Notice of proposed sale for scrap, §10-1-790.
  - Transfer by manufacturer or dealer, §10-1-790.
- Reasonable attempts to repair or correct nonconformity, §10-1-784.
- Refusal to diagnose or repair, prohibited, §10-1-784.
- Replacement of vehicles, §10-1-784.
  - Compelling through arbitration, §10-1-785.
- Repurchase of new motor vehicle, §10-1-784.
  - Compelling through arbitration, §10-1-785.
- Rules and regulations, §10-1-795.
- Severability of provisions, §10-1-796.
- Short title.
  - Georgia lemon law, §10-1-780.
- Staff of administrator, §10-1-794.
- Statement of consumer's rights to be provided, §10-1-783.
- Time for consumer to deliver vehicle to repair facility, §10-1-784.
- Violations of article.
  - Unfair and deceptive acts or practices, §10-1-793.
- Waiver of rights by consumer prohibited, §10-1-797.

**LIABILITY.**

**Agriculture.**

- Farm tractor warranty act.
  - Replacement of or refund for non-conforming farm tractor.
    - Limitation of liability, §10-1-814.

**Commodities.**

- Contracts and options.
  - Acts or omissions of employees, officers or agents, §10-5A-7.

**Fair business practices.**

- Manufacturers and suppliers.
  - Liability to retailers, §10-1-399.

**Securities.**

- Liability exemptions, §10-5-59.
- Liability to customers or clients, §10-5-58.

**LICENSES.**

**Antifreeze.**

- Sales, §10-1-203.



**LICENSES —Cont'd**

**Auction tobacco dealers,** §10-4-114.

**Brake fluid.**

Sales, §10-1-185.

**Buying clubs or services.**

Application, §10-1-594.

Conditions, §10-1-593.

Renewal, §10-1-594.

Required, §10-1-592.

Revocation, suspension and nonrenewal, §10-1-595.

**Liquefied petroleum gas.**

Sale and storage.

Insurance or bond requirements, §10-1-267.

Issuance, §10-1-266.

Suspension or revocation, §10-1-269.

**Nonauction tobacco dealers,** §10-4-115.

**State licensed and bonded warehouses.**

General provisions, §§10-4-1 to 10-4-33.

**Warehouses.**

State licensed and bonded warehouses.

General provisions, §§10-4-1 to 10-4-33.

**LIENS.**

**Art received as consignment not subject to liens,** §10-1-525.

**Cotton storage.**

Failure to give notice of lien, §10-4-77.

False affidavit as to lien, §10-4-78.

Investigation of adverse liens, §10-4-76.

**Museums or archives repositories.**

Conservation measures applied to property on loan.

Costs incurred, §10-1-529.6.

**Self-service storage facilities.**

Owner's lien upon property located at facility, §10-4-212.

Enforcement, §10-4-213.

**LIMITATION OF ACTIONS.**

**Art.**

Limited edition art reproductions, §10-1-435.

**Cemeteries.**

Purchaser's remedy for violations, §10-14-21.

**Deceptive trade practices.**

Fair business practices act of 1975, §10-1-401.

**Fair business practices act of 1975,** §10-1-401.

**Farm tractor warranty act,** §10-1-818.

**Gasoline below cost sales,** §10-1-255.

**Gasoline marketing practices,** §10-1-239.

**Lease-purchase agreements,** §10-1-688.

**LIMITATION OF ACTIONS —Cont'd**

**Lemon law.**

Farm tractors, §10-1-818.

Motor vehicles.

Requesting arbitration to compel replacement or repurchase of vehicle, §10-1-786.

**Motor vehicle franchises,** §10-1-625.

**Retail installment and home solicitation sales act,** §10-1-14.

**Securities.**

Civil enforcement of violations, §10-5-58.

Predecessor provisions, actions under, §10-5-90.

**Trade secrets,** §10-1-766.

**Trade or deceptive trade practices.**

Fair business practices act of 1975, §10-1-401.

**Warehouses.**

State licensed and bonded warehouses.

Actions on bonds, §10-4-14.

**LIMITED EDITION ART**

**REPRODUCTIONS,** §§10-1-430 to 10-1-437.

**LIMITED LIABILITY COMPANIES.**

**Trade name registration.**

Exemptions, §10-1-492.

**LIMITED PARTNERSHIPS.**

**Trade name registration.**

Exemption, §10-1-492.

**LINSEED OIL.**

**Sales.**

Boiled linseed oil.

Purity requirements, §10-1-123.

Enforcement of article and rules and regulations, §10-1-121.

Labeling tankcars, tanks, barrels, etc., §10-1-124.

Possession of improperly labeled article.

Prima-facie evidence of violation, §10-1-125.

Purity requirements, §10-1-123.

Sold under true name, §10-1-124.

**LINT COTTON,** §§10-4-53, 10-4-71.

**LIQUEFIED PETROLEUM GAS.**

**Petroleum products.**

Not to include, §10-1-141.

**Sale and storage,** §§10-1-260 to 10-1-272.

**Bonds.**

Requirements for license or permit holders, §10-1-267.

Capacity of storage facilities.

Minimum requirements, §10-1-268.

**LIQUEFIED PETROLEUM GAS —Cont'd**

**Sale and storage —Cont'd**

Conflicting local ordinances or regulations prohibited, §10-1-270.

Defined, §10-1-262.

Enforcement of article.

State fire marshal, §10-1-263.

Equipment.

Rules and regulations.

Setting standards for, §10-1-265.

Fees.

Licenses or permits, §10-1-266.

Findings of general assembly, §10-1-261.

Hearings on suspension or revocation of license, §10-1-269.

Insurance.

Requirements for license or permit holders, §10-1-267.

Legislative findings, §10-1-261.

Licenses or permits.

Insurance or bond requirements, §10-1-267.

Issuance, §10-1-266.

Suspension or revocation, §10-1-269.

Liquefied petroleum safety act of Georgia.

Short title, §10-1-260.

Minimum storage facilities.

Required, §10-1-268.

Notice of suspension or revocation of license, §10-1-269.

Ordinances or regulations in conflict with article, §10-1-270.

Penalties in lieu of suspension or revocation of license, §10-1-269.

Reciprocal agreements with other states, §10-1-271.

Rules and regulations, §10-1-265.

Violations, §10-1-272.

Short title.

Liquefied petroleum safety act of Georgia, §10-1-260.

Standards for equipment.

Rules and regulations, §10-1-265.

State fire marshal.

Assistants, §10-1-264.

Employees, §10-1-264.

Enforcement of article, §10-1-263.

Issuance of licenses or permits, §10-1-266.

Reciprocal agreements with other states, §10-1-271.

Requiring insurance or bond for license or permit holders, §10-1-267.

**LIQUEFIED PETROLEUM GAS —Cont'd**

**Sale and storage —Cont'd**

State fire marshal —Cont'd

Rules and regulations.

Setting standards for equipment, §10-1-265.

Suspension or revocation of licenses, §10-1-269.

Storage capacity of facilities.

Minimum requirements, §10-1-268.

Violation of article or rules and regulations, §10-1-272.

**LIQUEFIED PETROLEUM SAFETY ACT OF GEORGIA.**

**General provisions**, §§10-1-260 to 10-1-272.

**Short title**, §10-1-260.

**LIQUIDATION.**

**Advertising liquidation sales.**

Misrepresenting ownership, §§10-1-425, 10-1-426.

**Warehouses.**

State licensed and bonded warehouses.

Suspension or revocation of license for violation, §10-4-30.

**LITHOGRAPHS.**

**Limited edition art reproductions.**

Generally, §§10-1-430 to 10-1-437.

**Rights in works of fine art**, §10-1-510.

**LIVESTOCK.**

**Auctions.**

Commissioner of agriculture.

Regulation of livestock auction barns, §10-2-52.

Regulation of livestock auction barns.

Commissioner of agriculture, §10-2-52.

Weighing of livestock by certified public weighers, §10-2-50.

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**Weighing.**

By certified public weighers, §10-2-50.

**LOANS.**

**Advertising.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Cotton storage.**

Loans on receipts, §10-4-73.

**LOANS —Cont'd**

**Deceptive trade practices in consumer transactions.**

Loans on property used as dwelling place by debtor, §10-1-393.

**Installment contracts.**

Retail installment contracts.

General provisions, §§10-1-1 to 10-1-16.

Motor vehicles, §§10-1-30 to 10-1-42.

**Misrepresentation.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Motor vehicles.**

Retail installment contracts, §§10-1-30 to 10-1-42.

**Real property.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Retail installment contracts or revolving accounts.**

General provisions, §§10-1-1 to 10-1-16.

Motor vehicles.

Retail installment contracts, §§10-1-30 to 10-1-42.

**Revolving accounts.**

General provisions, §§10-1-1 to 10-1-16.

**Seed capital fund.**

Transfer from fund to make loans, §10-10-5.

**Unfair or deceptive trade practices.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**LOCAL GOVERNMENT.**

**Common day of rest act of 1974.**

Exemption of governmental departments, agencies and employees, §10-1-576.

**Identity theft.**

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**Liquefied petroleum gas.**

Sale and storage.

Conflicting local ordinances or regulations prohibited, §10-1-270.

**LOCAL GOVERNMENT —Cont'd**

**Personal information.**

Identity theft.

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**LONG-TERM HEALTH CARE.**

**Billing by facilities.**

Itemized statement of charges.

Failure to deliver as deceptive trade practice, §10-1-393.

**Deceptive trade practices.**

Failure of facility to deliver itemized statement of charges, §10-1-393.

**Statement of charges.**

Failure of facility to deliver itemized statement.

As deceptive trade practice, §10-1-393.

**Unfair or deceptive trade practices.**

Failure of facility to deliver itemized statement of charges, §10-1-393.

**LOTTERIES.**

**Promotional giveaways or contests.**

Noncomplying promotion involving element of chance unlawful lottery, §10-1-393.

**LUBRICATING OILS.**

Defined, §10-1-140.

**Petroleum product sales.**

General provisions, §§10-1-140 to 10-1-169.

**Petroleum products retail dealers,**

§§10-1-720, 10-1-721.

**Sale of used or reclaimed lubricating oils or lubricants, §§10-1-162, 10-1-163.**

**M**

**MACHINERY.**

**Multiline dealers.**

General provisions, §§10-1-730 to 10-1-740.

**Remanufactured or rebuilt items.**

Labels and labeling, §§10-1-80 to 10-1-83.

**MAGAZINES.**

**Advertising.**

False or fraudulent statements in advertising.

Publishers excepted when acting in good faith, §10-1-421.



**MAGAZINES —Cont'd**

**Advertising —Cont'd**

- Liquidation, auction or going-out-of-business sales.
- Misrepresenting ownership.
  - Publishers excepted when acting in good faith, §10-1-426.
- Misrepresenting nature of business.
  - Publishers excepted when acting in good faith, §10-1-426.

**Sales.**

- Tie-in sales, §§10-1-330, 10-1-331.

**MAGNETIC TAPE.**

**Business records.**

- Defined as including, §10-11-1.

**MAIL.**

**Credit report security freezes.**

- Request by consumer, §10-1-914.

**Unordered merchandise after membership termination, §10-1-51.**

**Unsolicited merchandise, §10-1-50.**

**MAIL ORDER SALES.**

**Retail installment contracts negotiated and entered into by mail, §10-1-5.**

**MAKER.**

**Notes.**

- Endorser sued with maker, drawer or acceptor, §10-3-2.

**MALFEASANCE.**

**Certified public weighers.**

- Revocation of license permit, §10-2-43.

**MANDAMUS.**

**Commodities and commodity contracts and options, §10-5A-22.**

**MANUFACTURERS.**

**Tobacco products manufacturers.**

- Financial responsibility for burdens imposed on state from smoking, §§10-13-1 to 10-13-4.
- Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.

**Wholesale distribution by out-of-state principal.**

- General provisions, §§10-1-700 to 10-1-704.

**MARINAS.**

**Marine membership facilities.**

- Fair business practices act of 1975, §§10-1-392, 10-1-393.

**MARINE MANUFACTURERS, §§10-1-675 to 10-1-678.**

**Applicability of provisions, §10-1-678.**

**Contracts.**

- Termination of contractual relationship between dealer and manufacturer, §10-1-676.

**Definitions, §10-1-676.**

**Findings of legislature, §10-1-675.**

**Franchises.**

- Termination of contractual relationship between dealer and manufacturer, §10-1-677.

**Legislative declaration, §10-1-675.**

**Scope of provisions, §10-1-678.**

**Termination of contractual relationship between dealer and manufacturer, §10-1-677.**

**Unlawful acts, §10-1-677.**

**MARINE MEMBERSHIP FACILITIES.**

**Cancellation rights, §10-1-393.**

**Contract requirements, §10-1-393.**

**Deceptive trade practices in consumer transactions, §10-1-393.**

**Defined, §10-1-392.**

**Fair business practices act of 1975, §§10-1-390 to 10-1-407.**

**Membership.**

- Defined, §10-1-392.

**Notice to the buyer, §10-1-393.**

**Requirements, §10-1-393.**

**MARKETING.**

**Business opportunity sales.**

- General provisions, §§10-1-410 to 10-1-417.

**Gasoline.**

- Marketing practices.

- General provisions, §§10-1-230 to 10-1-241.

**MARKETS.**

**Flea market vendors' record-keeping, §10-1-360.**

- Exemptions, §10-1-361.

- Local ordinances or regulations, §10-1-362.

**MARKS AND BRANDS.**

**Service marks.**

- General provisions, §§10-1-440 to 10-1-454.

**Trademarks.**

- General provisions, §§10-1-440 to 10-1-454.

**MASTER SETTLEMENT AGREEMENT.**

**Tobacco products manufacturers.**

Financial responsibility for burdens imposed on state from smoking, §§10-13-1 to 10-13-4.

Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.

**MEASURING STANDARDS AND DEVICES.**

**Generally,** §§10-2-1 to 10-2-23.

**MEDICAL RECORDS.**

**Confidential or privileged matter.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**Destruction.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**MENTAL HEALTH.**

**Agents.**

Effect of incompetency of principal on power of attorney, §10-6-36.

**Powers of attorney.**

Effect on pledge of stock with power of attorney, §10-6-34.

**MERCHANTS.**

**Commodity merchants.**

Conditions for acting as, §10-5A-5.  
Applicability of provisions, §10-5A-27.  
Defined, §10-5A-1.

**Credit cards.**

Deceptive trade practices.  
Prohibited use of credit card information by merchant, §10-1-393.3.

**METAL DEALERS.**

**Records,** §10-1-351.

**Secondary metals recyclers,** §§10-1-350 to 10-1-358.

**METALS.**

**Secondary metals recyclers,** §§10-1-350 to 10-1-358.

**METERS.**

**Petroleum products.**

Calibration of meters, §10-1-160.

**METRIC SYSTEM.**

**Recognized system of weights and measures,** §10-2-2.

**Weights and measures generally,** §§10-2-1 to 10-2-54.

**MILITARY AFFAIRS.**

**Agents.**

Effect of death on power of attorney by member of armed forces, seamen or persons in war service, §10-6-35.

**Powers of attorney.**

Effect of death on power by member of armed forces, seamen or person in war service, §10-6-35.

**MINORS.**

**Agents.**

Principals bound by acts of infant agents, §10-6-3.

**MISBRANDING.**

**Antifreeze,** §10-1-202.

**Brake fluid,** §10-1-182.

Condemnation of fluid, §10-1-186.

Sales prohibited, §10-1-183.

**Petroleum products sales,** §10-1-162.

Violations, §10-1-163.

**MISDEMEANORS.**

**Advertising.**

False advertising.

Advertising without intending to sell on stated terms, §10-1-420.

Doctor or Dr.

Degree to be designated in advertisements.

Violations, §10-1-422.

Legal services.

Violation of cease and desist order, §10-1-427.

Liquidation, auction or going-out-of-business sales.

Misrepresenting ownership, §10-1-426.

Misrepresenting nature of business, §10-1-426.

**Agents in business of receiving cash for payment to third persons.**

Failure to post bond, §10-6-102.

**Antifreeze sales.**

Violations of part or rules and regulations, §10-1-211.

**Attorneys.**

False advertising of legal services.

Violation of cease and desist order, §10-1-427.

**Auctions.**

Advertising.

Misrepresenting ownership in advertising auction sales, §10-1-426.

**Beauty pageants.**

Violations of provisions, §10-1-836.

**MISDEMEANORS —Cont'd**

**Benevolent organizations.**

- False claim of membership, §10-1-472.
- Unauthorized use of emblem or name, §10-1-472.

**Books.**

- Tie-in sales, §10-1-331.

**Business opportunity sales.**

- Violations of part, §10-1-417.

**Buying clubs or services.**

- Violations of article, §10-1-605.

**Cemeteries.**

- Criminal penalties for violations, §10-14-20.

**Certified public weighers.**

- Violations, §10-2-54.

**Charities.**

- False claim of membership, §10-1-472.
- Unauthorized use of emblem or name, §10-1-472.

**Coal or coke itinerant dealers.**

- Sale without having weight certified, §10-2-51.

**Convenience warehousing, §10-4-193.**

**Cotton storage.**

- Failure to give notice of lien, §10-4-77.

**Emblems.**

- Benevolent organizations, charities, fraternal organizations, etc.
- Unauthorized use, §10-1-472.

**Flea market vendors' record-keeping, §10-1-360.**

**Fraternal organizations.**

- False claim of membership, §10-1-472.
- Unauthorized use of emblem or name, §10-1-472.

**Gasoline.**

- Operating condemned self-measuring gasoline pumps, §10-1-167.
- Operating short-measure gasoline pumps, §10-1-168.
- Retail motor fuel advertising requirements violations, §10-1-164.
- Self-service gasoline price for drivers holding special disability permit. Violations, §10-1-164.1.
- State oil chemist or inspector having interest in sale or manufacture, §10-1-166.

**Geo. L. Smith II Georgia World Congress Center.**

- Activity prohibition violation, §10-9-14.

**Going-out-of-business sales.**

- Misrepresenting ownership, §10-1-426.

**Health spas, §10-1-393.2.**

**MISDEMEANORS —Cont'd**

**High and aggravated nature.**

- Business opportunities sales violations, §10-1-417.
- Motor vehicle subleasing violations, §10-1-40.

**Humane organizations.**

- Unauthorized use of emblem or name, §10-1-472.

**Labeling remanufactured or rebuilt items.**

- Violations of article, §10-1-83.

**Lease-purchase agreements.**

- Violations of article, §10-1-687.

**Liquefied petroleum gas.**

- Sale and storage.
- Violation of article or rules and regulations, §10-1-272.

**Liquidation sales.**

- Misrepresenting ownership in advertising, §10-1-426.

**Magazines.**

- Tie-in sales, §10-1-331.

**Motor fuels.**

- Advertising requirements violations, §10-1-164.
- Operating condemned self-measuring gasoline pumps, §10-1-167.
- Operating short-measure gasoline pumps, §10-1-168.
- Self-service gasoline price for drivers holding special disability permit. Violations, §10-1-164.1.

**Motor vehicle sales finance act, §10-1-38.**

- Subleasing vehicles subject to retail installment contract, §10-1-40.

**Names.**

- Benevolent organizations, charities, fraternal organizations, etc.
- Unauthorized use, §10-1-472.

**Newspapers.**

- Tie-in sales, §10-1-331.

**Paint.**

- Sale of deceptively labeled paint, §10-1-127.
- Timber-marking paint sale and labeling requirement violations, §10-1-126.

**Patent rights, copyrights or proprietary rights.**

- Consideration to be stated on notes or contracts for purchase or sale.
- Violation, §10-3-5.

**Petroleum products sales, §§10-1-155 to 10-1-169.**

- Deception, substitution and misbranding, §10-1-163.



**MISDEMEANORS —Cont'd**

**Petroleum products sales —Cont'd**

- Operating condemned self-measuring gasoline pumps, §10-1-167.
- Operating short-measure gasoline pumps, §10-1-168.
- Regulations or specifications for petroleum products.
- Violations, §10-1-169.
- Retail motor fuel advertising requirements violations, §10-1-164.
- Self-service gasoline price for drivers holding special disability permit.
- Violations, §10-1-164.1.
- State oil chemist or inspector having interest in sale or manufacture of gasoline, §10-1-166.
- Violations of part, §10-1-169.
- Violations of regulations or specifications for petroleum products, §10-1-155.

**Recreational vehicle dealers, §10-1-679.15.**

**Referral sales.**

- Furnishing names of prospective purchasers.
- Sales contract failing to state consideration, §10-1-70.

**Remanufactured or rebuilt items.**

- Labeling requirements.
- Violations of article, §10-1-83.

**Retail installment and home solicitation sales act, §10-1-15.**

**Sales.**

- Referral sales.
- Furnishing names of prospective purchasers.
- Sales contract failing to state consideration, §10-1-70.

**Social organizations.**

- False claim of membership, §10-1-472.
- Unauthorized use of emblem or name, §10-1-472.

**Tie-in sales.**

- Books, magazines, periodicals or newspapers, §10-1-331.

**Timber-marking paint sale and labeling.**

- Violations of requirements, §10-1-126.

**Tobacco.**

- Carry-over storage and sale, §10-4-155.
- Leaf tobacco sales and storage, §10-4-123.

**Tobacco master settlement agreement enhancements.**

- Unlawful sale or distribution of noncomplying cigarettes, §10-13A-8.

**MISDEMEANORS —Cont'd**

**Trademarks and service marks.**

- Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.
- Unauthorized and deceitful use of name or seal, §10-1-453.

**Trade name registration.**

- Failing to register, §10-1-493.

**Warehouses.**

- State licensed and bonded warehouses, §10-4-32.

**Weighers.**

- Certified public weighers.
- Violations, §10-2-54.

**Weights and measures.**

- Coal or coke itinerant dealers.
- Sale without having weight certified, §10-2-51.
- Violation of article or rules and regulations, §10-2-22.

**MISREPRESENTATION.**

**Agents.**

- Representations of agent binding principal, §10-6-56.

**Child support collectors, private.**

- False impression of affiliation with governmental entity, §10-1-393.10.

**Deceptive trade practices.**

- Elderly or disabled persons, §§10-1-850 to 10-1-857.
- Fair business practices act of 1975.
- Deceptive practices in consumer transactions generally, §10-1-393.
- General provisions, §§10-1-390 to 10-1-407.
- Uniform deceptive trade practices act.
- Deceptive practices generally, §10-1-372.
- General provisions, §§10-1-370 to 10-1-375.

**False advertising.**

- General provisions, §§10-1-420 to 10-1-427.

**Heavy equipment multiline dealers.**

- Immediate termination, amendment, cancellation, etc., of agreements without notice, §10-1-733.

**Loans.**

- Deceptive trade practices in consumer transactions.
- Loans on property used as dwelling place by debtor, §10-1-393.

**MISREPRESENTATION —Cont'd**

**Marine manufacturers.**

Termination of contractual relationship  
between dealer and manufacturer,  
§10-1-677.

**Office supply transactions.**

Unfair or deceptive acts or practices,  
§10-1-393.1.

**Real property.**

Deceptive trade practices in consumer  
transactions.

Loans on property used as dwelling  
place by debtor, §10-1-393.

**Trademarks and service marks.**

False representations in registering,  
§10-1-449.

**Unfair or deceptive trade practices.**

Elderly or disabled persons, §§10-1-850  
to 10-1-857.

Fair business practices act of 1975.

Deceptive practices in consumer  
transactions generally,  
§10-1-393.

General provisions, §§10-1-390 to  
10-1-407.

Uniform deceptive trade practices act.

Deceptive practices generally,  
§10-1-372.

General provisions, §§10-1-370 to  
10-1-375.

**Weights and measures.**

Pricing by weight, measure or count,  
§10-2-8.

Quantity in selling or buying, §10-2-7.

**MISTAKE.**

**Agents.**

Money paid by mistake to agent,  
§10-6-63.

Recovery of money paid to or by agent,  
§10-6-81.

**Suretyship.**

Promise to pay in ignorance of  
discharge, §10-7-26.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Actions for damages.

Limitation on recovery in case of  
bona fide error, §10-1-400.

**MONEY.**

**Commodities and commodity contracts and  
options.**

General provisions, §§10-5A-1 to  
10-5A-31.

**MONOPOLIES.**

**Gasoline.**

Below cost sales.

Lessening competition or tending to  
create monopoly, §10-1-254.

Declaration of legislative intent in  
construing section, §10-1-256.

**Motion pictures.**

Bidding by exhibitors, §§10-1-290 to  
10-1-294.

**MORTGAGES.**

**Foreclosures.**

Indorsers.

Right to proceed, §10-7-44.

Suretyship.

Right to proceed, §10-7-44.

**Notes.**

Transfer of notes secured by, §10-3-1.

**Retail installment sales and revolving  
accounts.**

Second mortgage statute not affected by  
article, §10-1-11.

**Second mortgage statute.**

Retail installment sales and revolving  
accounts.

Statute not affected by article,  
§10-1-11.

**Suretyship.**

Compelling cosurety to transfer  
mortgage, §10-7-52.

Foreclosure, §10-7-44.

**MOTION PICTURE FAIR**

**COMPETITION ACT.**

**General provisions.**

Bidding by exhibitors, §§10-1-290 to  
10-1-294.

**Short title.**

Georgia motion picture fair competition  
act, §10-1-290.

**MOTION PICTURES.**

**Bidding by exhibitors, §§10-1-290 to  
10-1-294.**

Action to enforce article, §10-1-294.

Blind bidding prohibited, §10-1-293.

Definitions, §10-1-292.

Georgia motion picture fair competition  
act.

Short title, §10-1-290.

Injunctions, §10-1-294.

Intent of article, §10-1-291.

Legislative intent, §10-1-291.

Notice of trade screening, §10-1-293.

Short title.

Georgia motion picture fair  
competition act, §10-1-290.

**MOTION PICTURES —Cont'd**

**Bidding by exhibitors —Cont'd**

Trade screening required, §10-1-293.

Waiver of prohibition against blind bidding void and unenforceable, §10-1-293.

**Rights in works of fine art, §10-1-510.**

**MOTOR FUELS.**

**Advertising retail motor fuels.**

Advertising free gifts or services, §10-1-164.

Requirements for signs, §10-1-164.

**Below cost sales.**

General provisions, §§10-1-250 to 10-1-256.

**Gasoline marketing practices, §§10-1-230 to 10-1-241.**

**Self-service gasoline price for drivers holding special disability permit, §10-1-164.1.**

**MOTORIZED WHEELCHAIR**

**WARRANTIES, §§10-1-890 to 10-1-894.**

**MOTORS.**

**Labeling remanufactured or rebuilt items, §§10-1-80 to 10-1-83.**

**MOTOR VEHICLE DEALERS.**

**Dealer's day in court act, §§10-1-630, 10-1-631.**

**Franchises generally, §§10-1-620 to 10-1-670.**

**Lemon law, §§10-1-780 to 10-1-797.**

**Recreational vehicle dealers, §§10-1-679 to 10-1-679.15.**

**Registration, §10-1-668.**

**Warranty service and repair of predelivery transportation damages.**

General provisions, §§10-1-640 to 10-1-645.

**MOTOR VEHICLE DEALERS' ASSOCIATIONS.**

**Motor vehicle franchise practices act.**

Generally, §§10-1-620 to 10-1-670.

Standing of corporation comprising dealers and representing dealers, §10-1-623.

**MOTOR VEHICLE DEALER'S DAY IN COURT ACT.**

**General provisions, §§10-1-630, 10-1-631.**

**Short title.**

Georgia motor vehicle dealer's day in court act, §10-1-630.

**MOTOR VEHICLE FAIR PRACTICES ACT.**

**General provisions, §§10-1-660 to 10-1-664.1.**

**Short title, §10-1-660.**

**MOTOR VEHICLE FINANCING, §§10-1-30 to 10-1-42.**

**Advancement of money to satisfy lease, lien or security interest on trade-in vehicle, §10-1-33.1.**

Cash sales price or time sales price may include amount advanced or paid, §10-1-31.

Lessor or entity selling vehicle to lessor, §10-1-42.

Gross capitalization costs, inclusion of amount advanced, §10-1-42.

**Anticipation of payment credits, §10-1-34.**

**Assignment of contact, §10-1-33.**

**Attorneys' fees.**

Contract referred for collection, §10-1-32.

**Cash payments, receipt, §10-1-32.**

**Cash sales price, §10-1-31.**

**Construction of article, §10-1-31.**

**Court costs.**

Contract referred for collection, §10-1-32.

**Credit on anticipation of payment, §10-1-34.**

**Criminal and civil penalties, §10-1-38.**

**Deferred payment, §10-1-35.**

**Deficiency claim recovery, §10-1-36.**

**Definitions, §10-1-31.**

Subleasing vehicles, §10-1-39.

**Delinquency charges, §10-1-32.**

**Finance charge limitations, §10-1-33.**

**Finance charges, §10-1-31.**

**Gross capitalization costs.**

Lessor advancing money to lessee to satisfy lien, lease or security interest. Inclusion of amount advanced, §10-1-42.

**Insurance, §10-1-32.**

**Lessor advancing money to lessee to satisfy lien, lease or security interest, §10-1-42.**

Inclusion of amount in gross capitalized costs, §10-1-42.

**Motor vehicle sales finance act, §10-1-30.**

**Notice of rights.**

Buyer notified, §10-1-32.

Demand for public sale of repossessed vehicle, §10-1-36.



**MOTOR VEHICLE FINANCING —Cont'd**

**Notice of rights —Cont'd**

Intention to pursue deficiency claim,  
§10-1-36.

Redemption rights, §10-1-36.

**Prepayment of debt**, §10-1-34.

**Public sale of repossessed vehicle**,  
§10-1-36.

**Purchase or acquisition of agreement by  
sales finance company**, §10-1-33.

**Receipt for cash payments**, §10-1-32.

**Refinancing**, §10-1-35.

**Refund credit, anticipation of payment**,  
§10-1-34.

**Repossession after default, disposition**,  
§10-1-36.

**Requirements for contracts**, §10-1-32.

**Satisfaction of lease, lien or security  
interest on trade-in vehicle.**

Advancement or payment of money,  
§10-1-33.1.

Cash sales price or time sales price  
may include amount advanced or  
paid, §10-1-31.

Lessor or entity selling vehicle to  
lessor, §10-1-42.

Gross capitalization costs, inclusion  
of amount advanced, §10-1-42.

**Subleasing**, §§10-1-39 to 10-1-41.

Action by person suffering damage,  
§10-1-41.

Definitions, §10-1-39.

Remedies, §10-1-41.

Unlawful inducement of buyer or lessee  
under contract, §10-1-40.

Unlawful offering of vehicle for hire by  
sublessee, §10-1-40.

**Time sale price**, §10-1-31.

**Unpaid time balance renewal or  
restatement**, §10-1-35.

**Violation to be asserted in individual  
action only**, §10-1-36.1.

**Waiver of article void and unenforceable**,  
§10-1-37.

**MOTOR VEHICLE FRANCHISE  
CONTINUATION AND  
SUCCESSION ACT.**

**General provisions**, §§10-1-650 to 10-1-653.

**Short title**, §10-1-650.

**MOTOR VEHICLE FRANCHISE  
PRACTICES ACT.**

**General provisions**, §§10-1-620 to 10-1-628.

**Short title**, §10-1-620.

**MOTOR VEHICLE FRANCHISES**,  
§§10-1-620 to 10-1-670.

**Action for violation of article**, §10-1-623.

**Actions to enforce article.**

Attorneys' fees, §10-1-628.

**Applicability of article**, §10-1-624.

**Applicability of provisions impairing  
agreement**, §10-1-670.

**Attorneys' fees in action to enforce article**,  
§10-1-628.

**Cancellation**, §10-1-651.

**Choice of law clause and agreement.**

Applicability of article not affected,  
§10-1-624.

**Continuation and succession**, §§10-1-650 to  
10-1-653.

Burden of proving good cause for refusal  
to honor succession, §10-1-653.

Cancellation of franchise, §10-1-651.

Change in management or ownership.

Notice, §10-1-653.

Termination, cancellation or  
nonrenewal, §10-1-651.

Death of owner.

Succession to franchise, §10-1-652.

Termination, cancellation or  
nonrenewal, §10-1-651.

Disability of owner.

Succession to franchise, §10-1-652.

Termination, cancellation or  
nonrenewal, §10-1-651.

Good cause for termination, cancellation  
or nonrenewal, §10-1-651.

Motor vehicle franchise continuation  
and succession act, §10-1-650.

Nonrenewal of franchise, §10-1-651.

Notice of intention to succeed to  
ownership, §10-1-652.

Notice of proposed change in  
management or sale of dealership,  
§10-1-653.

Notice of refusal to honor succession,  
§10-1-652.

Notification of termination, cancellation  
or nonrenewal, §10-1-651.

Refusal to honor succession to  
ownership, §10-1-652.

Reimbursement of costs to rent or lease  
facilities or location.

Termination, cancellation or  
nonrenewal, §10-1-651.

Repurchase of new and unused motor  
vehicles.

Termination, cancellation or  
nonrenewal, §10-1-651.

**MOTOR VEHICLE FRANCHISES**

—Cont'd

**Continuation and succession —Cont'd**

- Sale of dealership, §10-1-653.
- Notice to franchisor, §10-1-653.
- Refusal to honor succession, §10-1-653.
- Short title.
- Motor vehicle franchise continuation and succession act, §10-1-650.
- Succession to franchise.
- Incapacity or death of franchisee, §10-1-652.
- Termination of franchise, §10-1-651.

**Corporation or association comprised of dealers and representing dealers.**

- Standing to file petition or action for violation, §10-1-623.

**Dealer's day in court, §§10-1-630, 10-1-631.**

- Evidence of violations, §10-1-631.
- Motor vehicle dealer's day in court act.
- Short title, §10-1-630.
- Practices in violation of existing law, §10-1-631.
- Short title.
- Motor vehicle dealer's day in court act, §10-1-630.
- Unconscionable business practices.
- In violation of existing law, §10-1-631.

**Definitions, §10-1-622.**

**Enforcement of article, §§10-1-665 to 10-1-668.**

- Administrative review of alleged violations, §10-1-667.
- Alternative to and in addition to civil or criminal enforcement, §10-1-666.
- Commissioner, department, defined, §10-1-665.
- Definitions, §10-1-665.
- Fee for annual registration, §10-1-668.
- Generally, §10-1-666.
- Registration of dealers, §10-1-668.

**Equitable relief for violations of article, §10-1-623.**

**Exclusivity of remedies in article, §10-1-626.**

**Fair practices.**

- Acquiring or adding another line make.
- Refusal to allow, limiting or restricting, §10-1-662.
- Acquisition of other lines of motor vehicles, §10-1-661.
- Advertised products.
- Failure to deliver, §10-1-662.
- Advertising campaigns, §10-1-663.

**MOTOR VEHICLE FRANCHISES**

—Cont'd

**Fair practices —Cont'd**

- Audit, inquiry or investigation as to dealer's activity, transaction or conduct.
- Notice of amount owned franchisor as result, §10-1-662.
- Time limitation, §10-1-662.
- Change in market area, §10-1-663.
- Changes in capital structure or ownership, §10-1-663.
- Changes in franchise agreement without notice to dealer, §10-1-662.
- Delivery of motor vehicles, §10-1-661.
- Denial, delay, restriction or bill back of dealer's claim, §10-1-662.
- Discrimination against dealer, §10-1-662.
- Discrimination unfairly among dealers, §10-1-663.
- Failure to deliver advertised products, §10-1-662.
- False advertising, §10-1-662.
- False or deceptive statements, §10-1-662.
- First refusal.
- Right of first refusal, §10-1-663.1.
- Franchisor engaging in business of dealer, §10-1-662.
- Free association, §10-1-662.
- Good faith dealings, §10-1-662.
- Increase of prices, §10-1-663.
- Manner of distribution, §10-1-663.
- Modification of facilities, §10-1-661.
- Motor vehicle fair practices act.
- Short title, §10-1-660.
- New dealerships.
- Establishing, §10-1-664.
- Manufacturer, or franchisor owning or operating, §10-1-664.1.
- Obtaining benefits not constituting compensation, §10-1-662.
- Predatory practices, §10-1-662.
- Release from liability, §10-1-662.
- Releasing information as to dealer's business, §10-1-662.
- Relocating existing dealerships, §10-1-664.
- Right of first refusal, §10-1-663.1.
- Short title.
- Motor vehicle fair practices act, §10-1-660.
- Unreasonable restrictions on changes, §10-1-663.
- Warranties or other services for account of franchisor, §10-1-661.

**MOTOR VEHICLE FRANCHISES**

—Cont'd

**Fair practices act**, §§10-1-660 to 10-1-664.1.

**Franchisor owning or operating new dealership, restrictions**, §10-1-664.1.

**Impairing agreement.**

Applicability of provisions impairing,  
§10-1-670.

**Injunctions.**

Violations of article, §10-1-623.

**Legislative findings**, §10-1-621.

**Lemon law**, §§10-1-780 to 10-1-797.

**Limitation of actions**, §10-1-625.

**Manufacturer owning or operating new dealership, restrictions**, §10-1-664.1.

**Motor vehicle franchise practices act.**

Short title, §10-1-620.

**New dealership established.**

Manufacturer or franchisor owning or  
operating, §10-1-664.1.

Within relevant market area of existing  
dealership, §10-1-664.

Relevant market area defined,  
§10-1-622.

**Nonrenewal**, §10-1-651.

**Persons subject to article**, §10-1-624.

**Predelivery preparation obligations**,  
§10-1-641.

**Predelivery transportation damages.**

Risk of loss for vehicle in transit,  
§10-1-642.

**Purposes of article**, §10-1-621.

**Recall work obligations**, §10-1-641.

**Registration of dealers annually**, §10-1-668.

**Releases.**

Voluntary releases valid, §10-1-627.

**Relevant market area of existing dealership.**

Establishing new dealership or relocating  
dealership within, §10-1-664.

Relevant market area defined, §10-1-622.

**Relocating dealership.**

Within relevant market area of existing  
dealership, §10-1-664.

Relevant market area defined,  
§10-1-622.

**Remedies not exclusive**, §10-1-626.

**Short title.**

Motor vehicle franchise practices act,  
§10-1-620.

**Subsidiaries used to accomplish illegal act**,  
§10-1-624.

**Termination**, §10-1-651.

**Venue of action brought against corporate  
manufacturer, franchisor or  
distributor**, §10-1-623.

**MOTOR VEHICLE FRANCHISES**

—Cont'd

**Violations of article.**

Actions, §10-1-623.

Enforcement of article generally,  
§§10-1-665 to 10-1-668.

Written instruments violating article  
void, §10-1-624.

**Waiver of article void**, §10-1-627.

**Warranty service and repair of predelivery  
transportation damages**, §§10-1-640 to  
10-1-645.

Actions against dealers.

Payment of attorneys' fees by  
manufacturer, distributor or  
warrantor, §10-1-643.

Attorneys' fees.

Payment by manufacturer, distributor  
or warrantor, §10-1-643.

Contracts among dealers.

Uniform reimbursement policy,  
§10-1-645.

Effective date of part, §10-1-644.

Exemptions from part, §10-1-644.

Motor vehicle warranty practices act.

Short title, §10-1-640.

Notice of action against dealers,  
§10-1-643.

Notice of factory recalls to new motor  
vehicles, §10-1-641.

Predelivery preparation, §10-1-641.

Predelivery transportation damages.

Risk of loss, §10-1-642.

Recall.

Work obligations to be provided in  
writing, §10-1-641.

Risk of loss for vehicle in transit,  
§10-1-642.

Short title.

Motor vehicle warranty practices act,  
§10-1-640.

Uniform reimbursement policy among  
dealers, §10-1-645.

Warranty services, §10-1-641.

**Written instruments violating article void**,  
§10-1-624.

**MOTOR VEHICLE LEASES.**

**Definitions.**

Subleasing vehicles, §10-1-39.

**Gross capitalization costs.**

Lessor advancing money to lessee to  
satisfy lien, lease or security interest.

Inclusion of amount advanced,  
§10-1-42.



**MOTOR VEHICLE LEASES —Cont'd**

**Lessor advancing money to lessee to satisfy lien, lease or security interest,**  
§10-1-42.

Inclusion of amount in gross capitalized costs, §10-1-42.

**Subleasing vehicle subject to retail installment contract,** §§10-1-39 to 10-1-41.

Actions brought by persons suffering damage, §10-1-41.

Definitions, §10-1-39.

Remedies generally, §10-1-41.

Unlawful inducement of buyer or lessee under contract, §10-1-40.

Unlawful offering of vehicle for hire by sublessee, §10-1-40.

**MOTOR VEHICLE PURCHASE PRICES.**

**Motor vehicle sales finance act,** §10-1-31.

**MOTOR VEHICLE RETAIL**

**INSTALLMENT CONTRACTS.**

**General provisions,** §§10-1-30 to 10-1-42.

**MOTOR VEHICLES.**

**Antifreeze.**

General provisions, §§10-1-200 to 10-1-211.

**Brake fluid.**

General provisions, §§10-1-180 to 10-1-189.

**Certificates of title.**

Secondary metals recycler.

Seller to provide title or cancellation of title, §10-1-351.

**Consumer protection.**

Retail installment sales contracts.

General provisions, §§10-1-30 to 10-1-42.

**Dealers.**

Franchises generally, §§10-1-620 to 10-1-670.

Lemon law, §§10-1-780 to 10-1-797.

Recreational vehicle dealers, §§10-1-679 to 10-1-679.15.

Warranty service and repair of predelivery transportation damages.

General provisions, §§10-1-640 to 10-1-645.

**Dealer's day in court act,** §§10-1-630, 10-1-631.

**Deceptive trade practices.**

Odometer accuracy requirements.

Violations of federal statutes as deceptive practice in consumer transactions, §10-1-393.

**MOTOR VEHICLES —Cont'd**

**Definitions.**

Subleasing vehicles, §10-1-39.

**Farm tractors.**

Warranty act.

General provisions, §§10-1-810 to 10-1-819.

**Fees.**

Dealers.

Registration, §10-1-668.

**Financing,** §§10-1-30 to 10-1-42.

**Franchises.**

General provisions, §§10-1-620 to 10-1-670.

**Lemon law.**

Farm tractors, §§10-1-810 to 10-1-819.

General provisions, §§10-1-780 to 10-1-797.

**Loans.**

Retail installment contracts, §§10-1-30 to 10-1-42.

**Motor vehicle sales finance act,** §§10-1-30 to 10-1-42.

**New motor vehicles.**

Lemon law, §§10-1-780 to 10-1-797.

Motor vehicle franchises.

Generally, §§10-1-620 to 10-1-670.

**Odometers.**

Deceptive trade practices in consumer transactions.

Violation of federal odometer accuracy requirements, §10-1-393.

**Rebuilt vehicles.**

Labeling requirements, §§10-1-80 to 10-1-83.

**Recall of new motor vehicles.**

Work obligations, §10-1-641.

**Recreational vehicles.**

Dealers, §§10-1-679 to 10-1-679.15.

**Retail installment contracts.**

General provisions, §§10-1-30 to 10-1-42.

Subleasing vehicles subject to retail installment contract, §§10-1-39 to 10-1-41.

**Sales.**

Lemon law, §§10-1-780 to 10-1-797.

Retail installment contracts.

General provisions, §§10-1-30 to 10-1-42.

Warranties.

Lemon law, §§10-1-780 to 10-1-797.

**Sales financing,** §§10-1-30 to 10-1-42.

**Subleasing vehicles subject to retail installment contract,** §§10-1-39 to 10-1-41.

**MOTOR VEHICLES —Cont'd**

**Tractors.**

- Farm tractors.
- Lemon law.

Farm tractor warranty act,  
§§10-1-810 to 10-1-819.

**Unfair or deceptive trade practices.**

- Odometer accuracy requirements.
- Violations of federal statutes as  
deceptive practice in consumer  
transactions, §10-1-393.

**Warranties.**

Farm tractor warranty act, §§10-1-810 to  
10-1-819.

General provisions, §§10-1-780 to  
10-1-797.

Motor vehicle fair practices act,  
§10-1-661.

Motor vehicle franchises.

Fair practices act, §10-1-661.

Warranty service and repair of  
predelivery transportation  
damages.

General provisions, §§10-1-640 to  
10-1-645.

Recreational vehicle dealers.

Warranty work and service,  
§10-1-679.10.

**MOTOR VEHICLE SALES FINANCE  
ACT.**

**General provisions,** §§10-1-30 to 10-1-42.

**Short title,** §10-1-30.

**MOTOR VEHICLE SALES FINANCING,  
§§10-1-30 to 10-1-42.**

**Advancement of money to satisfy lease,  
lien or security interest on trade-in  
vehicle,** §10-1-33.1.

Cash sales price or time sales price may  
include amount advanced or paid,  
§10-1-31.

Lessor or entity selling vehicle to lessor,  
§10-1-42.

Gross capitalization costs, inclusion of  
amount advanced, §10-1-42.

**Anticipation of payment credits,** §10-1-34.

**Assignment of contact,** §10-1-33.

**Attorneys' fees.**

Contract referred for collection,  
§10-1-32.

**Cash payments, receipt,** §10-1-32.

**Cash sales price,** §10-1-31.

**Construction of article,** §10-1-31.

**Court costs.**

Contract referred for collection,  
§10-1-32.

**MOTOR VEHICLE SALES FINANCING  
—Cont'd**

**Credit on anticipation of payment,**  
§10-1-34.

**Criminal and civil penalties,** §10-1-38.

**Deferred payment,** §10-1-35.

**Deficiency claim recovery,** §10-1-36.

**Definitions,** §10-1-31.

Subleasing vehicles, §10-1-39.

**Delinquency charges,** §10-1-32.

**Finance charge limitations,** §10-1-33.

**Finance charges,** §10-1-31.

**Gross capitalization costs.**

Lessor advancing money to lessee to  
satisfy lien, lease or security interest.

Inclusion of amount advanced,  
§10-1-42.

**Insurance,** §10-1-32.

**Lessor advancing money to lessee to satisfy  
lien, lease or security interest,**  
§10-1-42.

Inclusion of amount in gross capitalized  
costs, §10-1-42.

**Motor vehicle sales finance act,** §10-1-30.

**Notice of rights.**

Buyer notified, §10-1-32.

Demand for public sale of repossessed  
vehicle, §10-1-36.

Intention to pursue deficiency claim,  
§10-1-36.

Redemption rights, §10-1-36.

**Prepayment of debt,** §10-1-34.

**Public sale of repossessed vehicle,**  
§10-1-36.

**Purchase or acquisition of agreement by  
sales finance company,** §10-1-33.

**Receipt for cash payments,** §10-1-32.

**Refinancing,** §10-1-35.

**Refund credit, anticipation of payment,**  
§10-1-34.

**Repossession after default, disposition,**  
§10-1-36.

**Requirements for contracts,** §10-1-32.

**Satisfaction of lease, lien or security  
interest on trade-in vehicle.**

Advancement or payment of money,  
§10-1-33.1.

Cash sales price or time sales price  
may include amount advanced or  
paid, §10-1-31.

Lessor or entity selling vehicle to  
lessor, §10-1-42.

Gross capitalization costs, inclusion  
of amount advanced, §10-1-42.

**Subleasing,** §§10-1-39 to 10-1-41.

Action by person suffering damage,  
§10-1-41.

**MOTOR VEHICLE SALES FINANCING**

—Cont'd

**Subleasing** —Cont'd

Definitions, §10-1-39.

Remedies, §10-1-41.

Unlawful inducement of buyer or lessee under contract, §10-1-40.

Unlawful offering of vehicle for hire by sublessee, §10-1-40.

**Time sale price**, §10-1-31.

**Unpaid time balance renewal or restatement**, §10-1-35.

**Violation to be asserted in individual action only**, §10-1-36.1.

**Waiver of article void and unenforceable**, §10-1-37.

**MOTOR VEHICLE WARRANTY PRACTICES ACT.**

**General provisions.**

Warranty service and repair of predelivery transportation damages, §§10-1-640 to 10-1-645.

**Short title**, §10-1-640.

**MULES.**

**Auctions.**

Liability of auctioneer for sale of stolen mule, §10-1-530.

**Stolen mules.**

Liability of auctioneer for sale of stolen mule, §10-1-530.

**MULTILEVEL DISTRIBUTION COMPANIES.**

**Business opportunity sales generally**, §§10-1-410 to 10-1-417.

**MULTILINE HEAVY EQUIPMENT DEALER ACT.**

**General provisions**, §§10-1-730 to 10-1-740.

**Short title.**

Georgia multiline heavy equipment dealer act, §10-1-730.

**MUNICIPAL CORPORATIONS.**

**Common day of rest act of 1974.**

Exemption of governmental departments, agencies and employees, §10-1-576.

**Identity theft.**

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**Liquefied petroleum gas.**

Sale and storage.

Conflicting local ordinances or regulations prohibited, §10-1-270.

**MUNICIPAL CORPORATIONS** —Cont'd

**Personal information.**

Identity theft.

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**MUSEUM PROPERTY ACT.**

**Georgia museum property act.**

General provisions, §§10-1-529.1 to 10-1-529.7.

Short title, §10-1-529.1.

**MUSEUMS.**

**Georgia museum property act.**

Property on loan to museums and archives repositories, §§10-1-529.1 to 10-1-529.7.

**Museum property act.**

Property on loan to museums and archives repositories, §§10-1-529.1 to 10-1-529.7.

**Property on loan to museums and archives repositories**, §§10-1-529.1 to 10-1-529.7.

Abandonment of loaned property by owners, §10-1-529.4.

Accurate records as loaned property.

Duty to keep, §10-1-529.3.

Acquisition of title by museum or repository.

Abandoned property, §10-1-529.4.

Acquisition of undocumented property, §10-1-529.5.

American Indian human remains and burial objects.

Inapplicability of article, §10-1-529.7.

Change in ownership of property.

New owner informed of article, §10-1-529.3.

Change of address or dissolution of museum or repository.

Notification to owners, §10-1-529.3.

Changes by owners.

Notification to museum or repository, §10-1-529.3.

Claim for property.

Person other than person who loaned property to museum or repository, §10-1-529.4.

Conservation measures.

Application by museum or repository to loaned property, §10-1-529.6.

Copy of article.

Given owner at time of loan, §10-1-529.3.



## INDEX

### **MUSEUMS —Cont'd**

#### **Property on loan to museums and archives**

##### **repositories —Cont'd**

Definitions, §10-1-529.2.

Forms.

Notice to owners.

Intent to acquire title to abandoned  
loaned property, §10-1-529.4.

Georgia museum property act.

Short title, §10-1-529.1.

Inapplicability of article.

American Indian human remains and  
burial objects, §10-1-529.7.

Lien for costs incurred.

Application of conservation measures  
to loaned property, §10-1-529.6.

Notice to owners.

Intent to acquire title to abandoned  
loaned property, §10-1-529.4.

Not liable for injury or loss to property.

Application of conservation measures  
to loaned property,  
§10-1-529.6.

Publication.

Notice to owners.

Intent to acquire title to abandoned  
loaned property, §10-1-529.4.

Recordkeeping requirements as to  
loaned property, §10-1-529.3.

Return of abandoned loaned property.

Person claiming property,  
§10-1-529.4.

Short title.

Georgia museum property act,  
§10-1-529.1.

Undocumented property.

Acquisition by museum or repository,  
§10-1-529.5.

### **MUTILATION.**

#### **Geo. L. Smith II Georgia World Congress Center.**

Revenue bonds.

Replacement of mutilated bonds,  
§10-9-47.

## N

### **NAMES.**

#### **Assumed business names.**

Trade name registration, §§10-1-490 to  
10-1-493.

**Benevolent organizations,** §§10-1-470 to  
10-1-472.

### **NAMES —Cont'd**

#### **Change of name.**

Securities.

Broker-dealers and investment  
advisers.

Change of name or control,  
§10-5-36.

**Charities,** §§10-1-470 to 10-1-472.

#### **Fictitious business names.**

Trade name registration, §§10-1-490 to  
10-1-493.

**Fraternal organizations,** §§10-1-470 to  
10-1-472.

**Humane organizations,** §§10-1-470 to  
10-1-472.

#### **Limited partnerships.**

Trade name registration.

Exemption, §10-1-492.

**Social organizations,** §§10-1-470 to  
10-1-472.

**Trade names,** §§10-1-490 to 10-1-493.

### **NAPHTHA.**

#### **Gasoline.**

Defined as including, §10-1-140.

### **NATURAL GAS.**

#### **Compressed natural gas.**

Manner of display of measurement on  
dispensing devices, §10-2-19.

### **NEGLIGENCE.**

#### **Agents.**

Liability for negligence of underservants,  
§10-6-85.

Liability of principal for injuries by other  
agents, §10-6-39.

Principal bound for neglect, §10-6-60.

### **NEWSPAPERS.**

#### **Advertising.**

False advertising of legal services.

Exemption of publishers acting in  
good faith, §10-1-427.

False or fraudulent statements in  
advertising.

Publishers excepted when acting in  
good faith, §10-1-421.

Liquidation, auction or  
going-out-of-business sales.

Misrepresenting ownership.

Publishers excepted when acting in  
good faith, §10-1-426.

Misrepresenting nature of business.

Publishers excepted when acting in  
good faith, §10-1-426.

#### **Sales.**

Tie-in sales, §§10-1-330, 10-1-331.

**NEWSPAPERS —Cont'd**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Exemptions from part, §10-1-396.

**Uniform deceptive trade practices act.**

Exemption of publishers, broadcasters, printers, etc., from part, §10-1-374.

**900 NUMBERS**, §§10-1-393, 10-1-397.

**NONCOMPETITION COVENANTS.**

**Motor vehicle fair practices act.**

Prohibited acts by franchisor.

Unreasonable restrictions on dealer relative to noncompetition covenants, §10-1-663.

**NONDURABLE ITEMS.**

**Retail installment contracts.**

Security interests.

Not taken in certain nondurable items, §10-1-8.

**NONFEASANCE.**

**Agents.**

Rights and liabilities as to third persons.

Individual liability of agent by undertaking.

Generally, §10-6-85.

**NONFERROUS METALS.**

**Defined**, §10-1-350.

**NONMETALLIC TIRES.**

**Marks.**

Registration.

Classes of goods and services, §10-1-443.

**NONPROFIT CORPORATIONS.**

**Names.**

Trade name registration.

Exemption, §10-1-492.

**Trade name registration.**

Exemption, §10-1-492.

**NONRESIDENTS.**

**Jurisdiction.**

Wholesale distribution by out-of-state principal.

Principal declared to be doing business in state for purposes of personal jurisdiction, §10-1-704.

**Rifles.**

Purchase in Georgia, §10-1-101.

**Shotguns.**

Purchase in Georgia, §10-1-101.

**Weapons.**

Purchase of rifles and shotguns in Georgia, §10-1-101.

**NONRESIDENTS —Cont'd**

**Wholesale distribution by out-of-state principal**, §§10-1-700 to 10-1-704.

**NOTES**, §§10-3-1 to 10-3-5.

**Endorser sued with maker, drawer or acceptor**, §10-3-2.

**Mortgages and deeds of trust.**

Transfer of notes secured by, §10-3-1.

**Secured notes.**

Transfer carries security, §10-3-1.

**Transfer of secured note carries security**, §10-3-1.

**NOTICE.**

**Agents.**

Notice to agent.

Notice to principal, §10-6-58.

**Brake fluid sales.**

Cancellation of license or permit, §10-1-185.

**Business opportunity sales.**

Intent to void contract, §10-1-417.

Multilevel distribution company.

Required notice regarding disclosures, §10-1-413.

**Buying clubs or services.**

Contracts.

Cancellation, §§10-1-597, 10-1-598.

Duration, §10-1-599.

Licenses.

Revocation, suspension and nonrenewal, §10-1-595.

**Campground membership or marine membership facilities.**

Notice to the buyer, §10-1-393.

**Cemeteries.**

Administrative appeal from order of secretary of state.

Notice of opportunity for hearing, §10-14-23.

Judicial appeal from order of secretary of state, §10-14-22.

Prohibition of certain persons from employment, §10-14-8.

**Certified public weighers.**

Revocation of license, §10-2-43.

**Commodities and commodity contracts and options.**

Intent or summary order, §10-5A-28.

**Credit report security freezes.**

Notice of rights to consumer, §10-1-915.

**Farm tractor warranty act.**

Enforcement of obligation for nonconforming farm tractor, §10-1-814.

**NOTICE —Cont'd**

**Farm tractor warranty act —Cont'd**

Warranty supplied by manufacturer and presented by dealer to consumer, §10-1-812.

**Gasoline.**

Gasoline subject to petroleum products sales part.

Manufacturers, refiners or jobbers shipping into state, §10-1-153.

**Gasoline marketing practices.**

Notice of cancellation or termination of agreement, §10-1-233.

Proceedings upon notice prior to expiration, §10-1-237.

**Health spas.**

Notice to buyers making advance payments, §10-1-393.2.

Right to cancel contract, §10-1-393.2.

**Heavy equipment multiline dealers.**

Intent to amend, terminate, cancel or decline to renew agreement, §10-1-733.

Transfer of business during notice period, §10-1-733.

Mailing of notice required by article, §10-1-735.

Withholding of consent to transfer business, §10-1-734.

**Home solicitation sales.**

Buyer's right to cancel, §10-1-6.

**Identity theft.**

Breach of security regarding personal information, §10-1-912.

Defined, methods of giving, §10-1-911.

**Kerosene.**

Kerosene subject to petroleum products sales part.

Manufacturers, refiners or jobbers shipping into state, §10-1-153.

**Lemon law.**

Farm tractors.

Enforcement of obligation for nonconforming farm tractor, §10-1-814.

Warranty supplied by manufacturer and presented by dealer to consumer, §10-1-812.

Motor vehicles.

Arbitration to compel replacement or repurchase of vehicle.

Eligibility determination, §10-1-786.

Notice to manufacturer of inability to repair or correct nonconformity, §10-1-784.

**NOTICE —Cont'd**

**Lemon law —Cont'd**

Motor vehicles —Cont'd

Reacquired vehicles.

Notice of proposed sale for scrap, §10-1-790.

Revocation of certification of informal dispute settlement mechanism, §10-1-785.

**Liquefied petroleum gas.**

Sale and storage.

Notice of intent to suspend or revoke license, §10-1-269.

**Marine manufacturers.**

Termination of contractual relationship between dealer and manufacturer, §10-1-677.

**Motion pictures.**

Bidding by exhibitors.

Notice of trade screening, §10-1-293.

**Motor vehicle franchises.**

Intention to succeed to ownership, §10-1-652.

Refusal to honor succession, §10-1-653.

Sale of dealership, §10-1-653.

Termination, cancellation or nonrenewal, §10-1-651.

**Motor vehicles.**

Lemon law.

Arbitration to compel replacement or repurchase of vehicle.

Eligibility determination, §10-1-786.

Notice to manufacturer of inability to repair or correct nonconformity, §10-1-784.

Reacquired vehicles.

Notice of proposed sale for scrap, §10-1-790.

Revocation of certification of informal dispute settlement mechanism, §10-1-785.

**Motor vehicle sales finance act.**

Notice to the buyer, §10-1-32.

Redemption rights of buyer, §10-1-36.

Right to demand public sale of repossessed vehicle, §10-1-36.

Seller's or holder's intention to pursue deficiency claim, §10-1-36.

**Museums or archives repositories.**

Property loaned to.

Loan terminated, property abandoned, intent to acquire title, §10-1-529.4.

**Petroleum products sales.**

Inaccurate purchases, §10-1-159.



## INDEX

### **NOTICE —Cont'd**

#### **Petroleum products sales —Cont'd**

Manufacturers, refiners or jobbers  
shipping into state, §10-1-153.

#### **Promotional giveaways or contests,** §10-1-393.

#### **Real property.**

Purchase of property used as dwelling  
place by defaulting debtor.

Defaulting debtor remaining in  
possession.

Right of cancellation by seller,  
§10-1-393.

#### **Recreational vehicle dealers.**

Sale or transfer of ownership or change  
in management of dealership,  
§10-1-679.8.

Termination or substantial change of  
dealership agreements, §10-1-679.5.

#### **Retail installment contracts.**

Motor vehicle sales finance act.

Notice to the buyer, §10-1-32.

Redemption rights of buyer, §10-1-36.

Right to demand public sale of  
repossessed vehicle, §10-1-36.

Seller's or holder's intention to pursue  
deficiency claim, §10-1-36.

Notice to the buyer, §10-1-3.

Redemption rights of buyer, §10-1-10.

Right to demand public sale of  
repossessed goods, §10-1-10.

Seller's or holder's intention to pursue  
deficiency claims, §10-1-10.

#### **Revolving accounts.**

Notice to the buyer, §10-1-4.

Redemption rights of buyers, §10-1-10.

Right to demand public sale of  
repossessed goods, §10-1-10.

Seller's or holder's intention to pursue  
deficiency claims, §10-1-10.

#### **Sale of occupant's property.**

Enforcement of owner's lien, §10-4-213.

#### **Secondary metals recyclers.**

Hold on regulated metal property  
believed to be stolen, §10-1-353.

#### **Securities.**

Cease and desist orders, §10-5-73.

Coordination, registration by.

Notice of statement becoming  
effective, §10-5-22.

Denial, suspension or revocation of  
registration, §10-5-25.

Federal covered investment advisers.

Notice and consent to service of  
process, §10-5-34.

### **NOTICE —Cont'd**

#### **Securities —Cont'd**

Registration of securities.

Notice filings, §10-5-21.

Termination of employment or  
association, §10-5-37.

#### **Self-service storage facilities.**

Enforcement of owner's lien, §10-4-213.

#### **Suretyship.**

Parties claiming protection under a  
payment bond or security deposit.

Action prerequisites, §10-7-31.

Refusal to sue principal after notice by  
surety.

Discharge of surety, §10-7-24.

#### **Tobacco.**

Leaf tobacco sales and storage.

Notice of detention of tobacco,  
§10-4-117.1.

Revocation or suspension proceeding,  
§10-4-118.

#### **Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Notice of intention by administrator to  
initiate judicial proceedings,  
§10-1-397.

#### **Warehouses.**

State licensed and bonded warehouses.

Breach of bond, §10-4-14.

#### **Weighers.**

Certified public weighers.

Revocation of license, §10-2-43.

### **NOTICE OF APPEAL.**

#### **Fair business practices.**

Order of administrator, §10-1-398.1.

### **NOVATION.**

#### **Defined,** §10-7-21.

#### **Effect on surety's liability,** §10-7-21.

## O

### **OATHS.**

#### **False swearing.**

Convenience warehousing, §10-4-193.

#### **Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Authority of administrator to  
administer, §10-1-398.

### **OATS.**

#### **Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

### **OCTANE RATED FUELS.**

**Below cost sales,** §§10-1-250 to 10-1-256.

**OCTANE RATED FUELS —Cont'd**  
**Gasoline marketing practices**, §§10-1-230 to 10-1-241.

**ODOMETERS.**

**Consumer transaction deceptive trade practices.**  
 Federal odometer accuracy violations, §10-1-393.

**OFFICE SUPPLIERS.**

**Fair business practices act of 1975.**  
 Defined, §10-1-392.  
 General provisions, §§10-1-390 to 10-1-407.  
 Transactions.  
 Defined, §10-1-392.  
 Illustration of transactions considered unfair or deceptive acts, §10-1-393.1.

**OIL.**

**Chemist.**  
 State oil chemist.  
 Brake fluid sales.  
 General provisions, §§10-1-180 to 10-1-189.

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

**Dealers.**

Petroleum products retail dealers, §§10-1-720, 10-1-721.

**Franchises.**

Petroleum products retail dealers, §§10-1-720, 10-1-721.

**Lubricating oils.**

Petroleum products sales generally, §§10-1-140 to 10-1-169.

**Petroleum products retail dealers,**

§§10-1-720, 10-1-721.

**State oil chemist.**

Brake fluid sales.  
 General provisions, §§10-1-180 to 10-1-189.

**OPTIONS.**

**Commodities generally**, §§10-5A-1 to 10-5A-31.

**Tobacco.**

Leaf tobacco sales and storage.  
 Carry-over storage and sale, §§10-4-140 to 10-4-155.

**ORAL CONTRACTS**, §10-6-121.

**ORDERS.**

**Antifreeze.**

Stop-sale orders, §10-1-204.

**ORDERS —Cont'd**

**Brake fluid.**

Stop-sale orders, §10-1-186.

**Cemeteries.**

Appeals from orders of secretary of state.  
 Administrative appeal, §10-14-23.  
 Judicial appeal, §10-14-22.  
 Enforcement powers of secretary of state, §10-14-19.  
 Prohibition of certain persons from employment.  
 Emergency orders, §10-14-8.  
 Stop order suspending or revoking registration, §10-14-11.

**Commodities and commodity contracts and options.**

Judicial review, §10-5A-29.  
 Notice of intent or summary order, §10-5A-28.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.  
 Appeals from orders of administrators, §10-1-398.1.  
 Cease and desist orders, §10-1-397.

**Warehouses.**

State licensed and bonded warehouses.  
 Uniform application, §10-4-7.

**Weights and measures.**

Power of commissioner, §10-2-6.

**ORDINANCES.**

**Geo. L. Smith II Georgia World Congress Center.**

Authority, §§10-9-4.1, 10-9-14.1.

**Liquefied petroleum gas.**

Sale and storage.  
 Conflicting local ordinances prohibited, §10-1-270.

**OVERSEERS**, §§10-6-120, 10-6-121.

**Duties**, §10-6-120.

**Parol contracts between employer and overseer**, §10-6-121.

**Powers**, §10-6-120.

**P**

**PACKAGES.**

**Advertisement of packaged commodities to state quantity with retail price**, §10-2-13.

**Information required on**, §10-2-11.

**Unit price required on packages with random weight**, §10-2-12.

**Weights and measures.**

General provisions, §§10-2-1 to 10-2-23.

## INDEX

**PAINT, §§10-1-120 to 10-1-127.**

**Defined, §10-1-120.**

**Labels.**

Enforcement of article, rules and regulations, §10-1-121.

Possession of improperly labeled article.

Prima-facie evidence of violation,  
§10-1-125.

Requirements for paint containers,  
§10-1-122.

Sale of deceptively labeled paint,  
§10-1-127.

Timber-marking paint, §10-1-126.

**PAINTINGS.**

**Rights in works of fine art, §10-1-510.**

**PALLADIUM.**

**Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to  
10-5A-31.

**PANHANDLING.**

**George L. Smith II Georgia world congress center, §10-9-14.**

**Prohibited, §10-9-14.**

**PAROL CONTRACTS, §10-6-121.**

**PAROL EVIDENCE.**

**Suretyship.**

Proof of suretyship, §10-7-45.

**PARTIES.**

**Indorser of notes.**

Sued with maker, drawer or acceptor,  
§10-3-2.

**Notes.**

Endorser sued with maker, drawer or  
acceptor, §10-3-2.

**PARTNERSHIPS.**

**Assumed business names.**

Trade name registration, §§10-1-490 to  
10-1-493.

**Business opportunity sales.**

Liability of partners for violations of  
part, §10-1-417.

**Business records, §§10-11-1 to 10-11-3.**

Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**Commodities.**

Liability for acts or omissions of  
employees, officers or agents,  
§10-5A-7.

**Fictitious business names.**

Trade name registration, §§10-1-490 to  
10-1-493.

**PARTNERSHIPS —Cont'd**

**Petroleum products sales.**

Deception, substitution and  
misbranding.

Director, officer, agent, etc.,  
participating in act or acts,  
§10-1-163.

**Records.**

Business records, §§10-11-1 to 10-11-3.

**Telemarketing violations.**

Criminal penalties, §10-1-393.6.

**Trademarks and service marks.**

General provisions, §§10-1-440 to  
10-1-454.

**Trade name registration, §§10-1-490 to  
10-1-493.**

**PASSPORTS.**

**Business records.**

Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**PAST DUE ACCOUNTS.**

**Suretyships.**

Payments by surety, §10-7-41.

**PATENTS.**

**Notes or contracts for purchase or sale.**

Consideration to be stated, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities,  
§10-3-4.

**PAYMENT IN FULL.**

**Department of economic development.**

Development bonds, §10-9-5.

**PEDDLERS AND ITINERANT TRADERS.**

**Patent rights, copyrights or proprietary  
rights.**

Consideration to be stated on notes or  
contracts of sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities,  
§10-3-4.

**PENALTIES.**

**Art.**

Limited edition art reproductions,  
§10-1-436.

**Buying clubs or services, §10-1-604.**

**Certified public weighers.**

Administrative penalty, §10-2-53.

**Commodities and commodity contracts and  
options.**

Violations of chapter, rule or order,  
§§10-5A-21, 10-5A-22.



**PENALTIES —Cont'd**

**Deceptive trade practices.**

- Fair business practices act of 1975,  
§§10-1-397, 10-1-405.
- Right to set off penalties, §10-1-401.

**Liquefied petroleum gas.**

- Sale and storage.
- Imposition in lieu of suspension or  
revocation of license, §10-1-269.

**Motor vehicle sales finance act, §10-1-38.**

**Petroleum products sales.**

- Violations of part, §10-1-165.

**Retail installment and home solicitation  
sales act, §10-1-15.**

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975,  
§§10-1-397, 10-1-405.
- Right to setoff penalties, §10-1-401.

**Weighers.**

- Certified public weighers.
- Administrative penalty, §10-2-53.

**Weights and measures, §10-2-21.**

**PERJURY.**

**Convenience warehousing.**

- False swearing, §10-4-193.

**PERMITS.**

**Antifreeze.**

- Sales, §10-1-203.

**Brake fluid.**

- Sales, §10-1-185.

**Grain moisture testing equipment  
operators, §10-2-16.**

**Liquefied petroleum gas.**

- Sale and storage.
- Insurance or bond requirements,  
§§10-1-266, 10-1-267.
- Suspension or revocation, §10-1-269.

**PERSONAL INFORMATION.**

**Identity theft, §§10-1-910 to 10-1-915.**

**PERSONAL PROPERTY.**

**Leases.**

- Lease-purchase agreements.
- General provisions, §§10-1-680 to  
10-1-689.

**Museums or archives repositories.**

- Property loaned to.
- Georgia museum property act,  
§§10-1-529.1 to 10-1-529.7.

**PERSONS WITH DISABILITIES.**

**Assistive technology warranties, §§10-1-870  
to 10-1-875.**

- Actions for damages, §10-1-875.
- Citation of article, §10-1-870.

**PERSONS WITH DISABILITIES —Cont'd**

**Assistive technology warranties —Cont'd**

- Definitions, §10-1-871.
- Express written warranties.
- Duration, §10-1-872.
- Nonconforming devices.
- Repairs, §10-1-873.
- Refund or replacement of devices,  
§10-1-873.
- Repairs.
- Nonconforming devices, §10-1-873.
- Return privileges.
- Thirty-day return privileges, §10-1-874.
- Rights and remedies under laws of  
contracts, §10-1-875.
- Sale or lease of returned device,  
§10-1-873.
- Short title, §10-1-870.
- Thirty-day return privileges, §10-1-874.
- Waivers void, §10-1-875.

**Gasoline.**

- Self-service gasoline price.
- Drivers holding special disability  
permit, §10-1-164.1.

**Health spas.**

- Total and permanent disability during  
membership, §10-1-393.2.

**Motor fuels.**

- Self-service gasoline price.
- Drivers holding special disability  
permit, §10-1-164.1.

**Petroleum products sales.**

- Self-service gasoline price.
- Drivers holding special disability  
permit, §10-1-164.1.

**Unfair or deceptive trade practices,  
§§10-1-850 to 10-1-857.**

**Wheelchairs.**

- Motorized wheelchair warranties,  
§§10-1-390 to 10-1-394.

**PESTICIDES.**

**Tobacco.**

- Leaf tobacco sales and storage.
- Detention and condemnation of  
tobacco treated with unregistered  
pesticide, §10-4-117.1.

**PETITIONS.**

**Commodities and commodity contracts and  
options.**

- Judicial review of commissioner's orders,  
§10-5A-29.

**Motor vehicle franchises.**

- Administrative review of alleged  
violations, §10-1-667.

## INDEX

### **PETITIONS —Cont'd**

#### **Secondary metals recyclers.**

Actions contesting identification or ownership of regulated metal property, §10-1-354.

#### **Tobacco.**

Leaf tobacco sales and storage.

Administrative review of objections to rules and regulations, §10-4-121.

#### **Warehouses.**

State licensed and bonded warehouses.

Receivership and liquidation upon suspension or revocation of license, §10-4-30.

### **PETROLEUM PRODUCTS, §§10-1-140 to 10-1-169.**

#### **Analysis of gasoline and kerosene, §10-1-149.**

How purchaser to obtain, §10-1-154.

#### **Analysis of samples as evidence, §10-1-157.**

#### **Antifreeze sales, §§10-1-200 to 10-1-211.**

#### **Attorney general.**

##### **Misbranding.**

Authority to bring action to enjoin misbranding, §10-1-162.

#### **Biodiesel fuel.**

Production and sale.

Specifications and standards required to meet, §10-1-151.1.

#### **Brake fluid sales, §§10-1-180 to 10-1-189.**

#### **Bulk sales and bulk deliveries.**

Delivery tickets, §10-2-10.

#### **Calibration of measures, §10-1-160.**

#### **Civil penalty for violations of part, §10-1-165.**

#### **Cleaning kerosene containers of gasoline, §10-1-152.**

#### **Collecting samples of petroleum products, §10-1-157.**

#### **Commissioner of agriculture.**

Analysis of gasoline or illuminating or heating oils, §10-1-154.

Appointment of state oil chemist, §10-1-142.

Bonding of state oil chemist and state oil inspectors, §10-1-146.

Chief oil inspector, §10-1-144.

Collecting and testing samples, §10-1-157.

Confiscation and destruction of substandard gasoline and kerosene, §10-1-151.

Employment of oil inspectors, §10-1-143.

Rules and regulations, §10-1-155.

### **PETROLEUM PRODUCTS —Cont'd**

#### **Commissioner of agriculture —Cont'd**

Specifications for petroleum products, §10-1-155.

Submission of substitutes or improvers for examination and inspection, §10-1-150.

Vacancies in offices of state oil chemist and inspectors.

Filling, §10-1-147.

#### **Commodities and commodity contracts and options.**

General provisions, §§10-5A-1 to 10-5A-31.

#### **Condemnation of inaccurate measures, §10-1-160.**

#### **Condemnation of inaccurate pumps, §10-1-159.**

#### **Condemned self-measuring gasoline pumps.**

Operating, §10-1-167.

#### **Confiscation of inaccurate measures, §10-1-160.**

#### **Confiscation of inaccurate pumps, §10-1-159.**

#### **Confiscation of substandard gasoline and kerosene, §10-1-151.**

#### **Dealers.**

Retail dealers, §§10-1-720, 10-1-721.

Definitions, §10-1-720.

Successor to deceased retail dealer, §10-1-721.

#### **Declaration of desire to sell products.**

Filing with commissioner, §10-1-149.

#### **Definitions, §10-1-140.**

Liquefied petroleum gas not included, §10-1-141.

#### **Destruction of substandard gasoline and kerosene, §10-1-151.**

#### **Disguising or camouflaging equipment, §10-1-162.**

#### **Evidence of violation of part.**

Refusal of admission to inspect premises, §10-1-148.

#### **Examination of substitutes or improvers, §10-1-150.**

#### **Forfeiture of inaccurate measures, §10-1-160.**

#### **Forfeiture of inaccurate pumps, §10-1-159.**

#### **Franchises.**

Petroleum products retail dealers, §§10-1-720, 10-1-721.

Retail petroleum products dealers. Definitions, §10-1-720.

Successor to deceased retail dealer, §10-1-721.

**PETROLEUM PRODUCTS —Cont'd**

- Gasoline dealer registration**, §10-1-158.
- Gasoline marketing practices**, §§10-1-230 to 10-1-241.
- Hearing on condemnation of inaccurate pumps**, §10-1-159.
- Improvers.**
  - Approval, §10-1-150.
- Injunctions.**
  - Marketing in violation of part, specification or rules and regulations, §10-1-156.
  - Sales of used or reclaimed lubricating oils or lubricants, §10-1-162.
- Inspection of gasoline or kerosene**, §10-1-149.
  - No fee, §10-1-161.
- Inspection of premises.**
  - Oil inspectors, §§10-1-143 to 10-1-147.
  - Right of commissioner or duly authorized agents, §10-1-148.
- Inspection of self-measuring pumps**, §10-1-159.
- Inspection of substitutes or improvers**, §10-1-150.
- Jobbers desiring to sell products.**
  - Filing of declaration or statement with commissioner, §10-1-149.
- Jobbers shipping into state.**
  - Notice and sample of product, §10-1-153.
- Labeling gasoline and kerosene containers**, §10-1-152.
- Labeling of substitutes or improvers**, §§10-1-150, 10-1-162.
- Liquefied petroleum gas.**
  - Sale and storage.
    - General provisions, §§10-1-260 to 10-1-272.
- Liquefied petroleum gas not included in term petroleum products**, §10-1-141.
- Manufacturers.**
  - Filing of declaration or statement with commissioner, §10-1-149.
  - Shipping into state.
    - Notice and sample of product, §10-1-153.
- Measures.**
  - Calibration, §10-1-160.
  - Condemnation of inaccurate measures, §10-1-160.
- Misbranding of petroleum products**, §10-1-162.
  - Violations, §10-1-163.
- Mixing, blending or compounding liquid fuels**, §10-1-162.

**PETROLEUM PRODUCTS —Cont'd**

- Notice of petroleum products shipped into state**, §10-1-153.
- Notice to make adjustments to inaccurate pumps**, §10-1-159.
- Notice to sell inaccurate pumps**, §10-1-159.
- Oil inspectors.**
  - Affidavit that pump operated contrary to law, §10-1-159.
  - Bond, §10-1-146.
  - Chief inspector commissioner of agriculture, §10-1-144.
  - Compensation.
    - Payment, §10-1-145.
  - Employment by commissioner of agriculture, §10-1-143.
  - Expenses, §10-1-143.
    - Additional expenses, §10-1-144.
    - Payment, §10-1-145.
  - Interest in sale or manufacture of gasoline, §10-1-166.
  - Vacancies in office, §10-1-147.
- Products shipped into state**, §10-1-153.
- Pumps.**
  - Condemnation of inaccurate pumps, §10-1-159.
  - Condemned self-measuring gasoline pumps.
    - Operating, §10-1-167.
  - Inspection of self-measuring pumps, §10-1-159.
  - Installing or operating device to give short measure, §10-1-159.
  - Notice to make adjustments to inaccurate pumps, §10-1-159.
  - Notice to sell inaccurate pumps, §10-1-159.
  - Operating short-measure gasoline pump, §10-1-168.
  - Report of pumps condemned and rendered inoperable, §10-1-159.
  - Sealing accurate pumps, §10-1-159.
- Reclaimed lubricating oils or lubricants**, §10-1-162.
  - Violations, §10-1-163.
- Reconditioned lubricating oils or lubricants**, §10-1-162.
  - Violations, §10-1-163.
- Refiners desiring to sell products.**
  - Filing of declaration or statement with commissioner, §10-1-149.
- Refiners shipping into state.**
  - Notice and sample of product, §10-1-153.
- Registration of gasoline dealers**, §10-1-158.
- Report of pumps condemned or rendered inoperable**, §10-1-159.



**PETROLEUM PRODUCTS —Cont'd**

**Retail dealers, §§10-1-720, 10-1-721.**

Definitions, §10-1-720.

Successor to deceased retail dealer,  
§10-1-721.

**Rules and regulations, §10-1-155.**

Violations, §10-1-169.

Enjoining, §10-1-156.

**Sales.**

Advertising retail motor fuels.

Advertising free gifts or services,  
§10-1-164.

Requirements for signs, §10-1-164.

Definitions.

Person, §10-1-162.

Disability permit holders.

Self-service gasoline price for drivers,  
§10-1-164.1.

Self-service gasoline price.

Drivers holding special disability  
permit, §10-1-164.1.

**Samples of petroleum products.**

Analysis of gasoline or illuminating or  
heating oils, §10-1-154.

Collecting and testing, §10-1-157.

**Sealing accurate pumps, §10-1-159.**

**Search warrant for inspection of premises,  
§10-1-148.**

**Self-measuring pumps.**

Inspection, §10-1-159.

Installing or operating in manner to give  
short measure, §10-1-159.

Operating condemned gasoline pump,  
§10-1-167.

Operating short-measure gasoline  
pumps, §10-1-168.

**Shipping products into state.**

Notice and samples of, §10-1-153.

**Short-measure gasoline pumps.**

Operating, §10-1-168.

**Specifications for petroleum products,  
§10-1-155.**

Violations, §10-1-155.

Enjoining, §10-1-156.

**Statement of desire to sell products.**

Filing with commissioner, §10-1-149.

**State oil chemist, §§10-1-142 to 10-1-166.**

Analysis of gasoline or illuminating or  
heating oils, §10-1-154.

Analysis of samples collected and tested,  
§10-1-157.

Appointment by commissioner of  
agriculture, §10-1-142.

Approval of substitutes or improvers,  
§10-1-150.

**PETROLEUM PRODUCTS —Cont'd**

**State oil chemist —Cont'd**

Bond, §10-1-146.

Compensation.

Payment, §10-1-145.

Duties, §10-1-142.

Expenses.

Payment, §10-1-145.

Interest in sale or manufacture of  
gasoline, §10-1-166.

Vacancies in office, §10-1-147.

**Substandard gasoline and kerosene sales,  
§10-1-151.**

**Substitutes, §10-1-162.**

Approval, §10-1-150.

Violations, §10-1-163.

**Testing samples of petroleum products,  
§10-1-157.**

**Used lubricating oils or lubricants,  
§10-1-162.**

Violations, §10-1-163.

**Violations of part, §10-1-169.**

Civil penalty, §10-1-165.

Enjoining marketing practices, §10-1-156.

Refusal of admission to inspect premises.  
Prima-facie evidence, §10-1-148.

**Violations of rules and regulations or  
specifications, §10-1-155.**

Enjoining marketing practices, §10-1-156.

**Wholesalers desiring to sell products.**

Filing of declaration or statement with  
commissioner, §10-1-149.

**PHONE SOLICITATION SALES.**

**Telemarketing deception, fraud or abuse.**

Required and prohibited telephone  
conduct and activities, §10-5B-4.

**PHOTOGRAPHS.**

**Business records.**

Disposal of business records containing  
personal information, §§10-15-1 to  
10-15-7.

**Fine art.**

Rights in works of fine art, §10-1-510.

**Rights in works of fine art, §10-1-510.**

**Work of fine art.**

Defined, §10-1-510.

**PHOTOSTAT.**

**Business records.**

Defined, §10-11-1.

**PLATINUM.**

**Commodities and commodity contracts and  
options.**

General provisions, §§10-5A-1 to  
10-5A-31.

**PLEADINGS.**

**Counterclaims.**

- Lease-purchase agreements.
- Prohibited provisions, §10-1-684.

**PLEDGES.**

**Agents.**

- Effect of death or disability on pledge of stock with power of attorney, §10-6-34.

**Powers of attorney.**

- Effect of death or disability on pledge of stock, §10-6-34.

**Retail installment contracts or revolving accounts, §10-1-9.**

**Stock with power of attorney.**

- Effect of death or disability, §10-6-34.

**PLUMBERS.**

**Telemarketing deception, fraud or abuse, §10-5B-5.**

- Required and prohibited telephone conduct and activities, §10-5B-4.

**POISONS.**

**Business records, §§10-11-1 to 10-11-3.**

**Records.**

- Business records, §§10-11-1 to 10-11-3.

**POLITICAL SUBDIVISIONS.**

**Common day of rest act of 1974.**

- Exemption of governmental departments, agencies and employees, §10-1-576.

**Liquefied petroleum gas.**

- Sale and storage.
- Conflicting local ordinances or regulations prohibited, §10-1-270.

**PONZI SCHEMES.**

**Business opportunity sales.**

- General provisions, §§10-1-410 to 10-1-417.

**POSSESSION OF PRINCIPAL'S PROPERTY BY AGENT.**

**Interference with, right of action, §10-6-83.**

**POWERS OF ATTORNEY.**

**Armed forces members.**

- Effect of death on power by, §10-6-35.

**Conditional power of attorney, §10-6-6.**

**Death.**

- Effect on pledge of stock with power of attorney, §10-6-34.
- Effect on power by members of armed forces, seamen or persons on war service, §10-6-35.

**Financial power of attorney.**

- Explanation for principals, §10-6-141.

**POWERS OF ATTORNEY —Cont'd**

**Financial power of attorney —Cont'd**

- Statutory form, §10-6-142.
- Not exclusive method of creating, §10-6-140.

**Incompetency or incapacity of principal.**

- Power not revoked until guardian or receiver appointed, §10-6-36.

**Limited liability companies.**

- Effect on pledge of stock with power of attorney, §10-6-34.

**Military affairs.**

- Effect of death on power by member of armed forces, seamen or person in war service, §10-6-35.

**Pledges of stock with power of attorney.**

- Effect of death or disability, §10-6-34.

**Seamen.**

- Effect of death on power by, §10-6-35.

**Stock with power of attorney.**

- Effect of death or disability on pledge, §10-6-34.

**PRECIOUS METAL AND GEM DEALERS.**

**Commodities and commodity contracts and options.**

- General provisions, §§10-5A-1 to 10-5A-31.

**PREFIX.**

**Telephone numbers 900 or 976, §10-1-397.**

**PREPAYMENT.**

**Motor vehicle sales financing.**

- Prepayment of debt, §10-1-34.

**Retail sales.**

- Prepayment of balance, §10-1-3.

**PRESUMPTIONS.**

**Warehouses.**

- State licensed and bonded warehouses.
- Presumption of delivery for storage, §10-4-18.

**Weight, measure or weighing or measuring device used in business, §10-2-18.**

**PRICE FIXING.**

**Tobacco warehousemen's associations, §10-4-177.**

**PRINCIPALS AND AGENTS.**

**General provisions, §§10-6-1 to 10-6-142.**

**Suretyship generally, §§10-7-1 to 10-7-57.**

**PRINTERS.**

**Advertising.**

- False advertising of legal services.
- Exemption when acting in good faith, §10-1-427.

**PRINTERS —Cont'd**

**Advertising —Cont'd**

- False or fraudulent statements in advertising.
  - Excepted when acting in good faith, §10-1-421.
- Liquidation, auction or going-out-of-business sales.
- Misrepresenting ownership.
  - Excepted when acting in good faith, §10-1-426.
- Misrepresenting nature of business.
  - Excepted when acting in good faith, §10-1-426.

**Contracts.**

- Duplication of work of fine art, §10-1-510.

**Duplication of work of fine art, §10-1-510.**

**Unfair or deceptive trade practices.**

- Uniform deceptive trade practices act.
- Exemptions from part, §10-1-374.

**PRIORITIES.**

**Benevolent organizations.**

- Right to use name, §10-1-470.

**Charities.**

- Right to use name, §10-1-470.

**Cotton storage.**

- Adverse claims of receipt holders, §10-4-76.

**Fraternal organizations.**

- Right to use name, §10-1-470.

**Humane organizations.**

- Right to use name, §10-1-470.

**Names.**

- Benevolent organizations, charities, fraternal organizations, etc.
- Right to use name, §10-1-470.

**Self-service storage facilities.**

- Lien of owner, §10-4-212.

**Social organizations.**

- Right to use name, §10-1-470.

**Suretyship.**

- Subrogation to rights of creditor.
- Claims, §10-7-56.

**PRISON TERMS.**

**Advertisements.**

- False or fraudulent statements in advertising, §10-1-421.

**Agents in business of receiving cash for payment to third persons.**

- Failure to post bond, §10-6-102.

**Business records.**

- Disposal of business records containing personal information, §10-15-7.

**PRISON TERMS —Cont'd**

**Commodities and commodity contracts and options, §10-5A-31.**

**Cotton storage.**

- Delivering cotton without production of receipt or failing to cancel, §10-4-79.
- False affidavit as to lien, §10-4-78.
- Issuing receipt for cotton not in warehouse, §10-4-80.

**Credit cards.**

- Personal information protection, §10-15-7.

**Geo. L. Smith II Georgia World Congress Center.**

- Ordinances of authority, §10-9-4.1.

**Paint.**

- Sale of deceptively labeled paint, §10-1-127.

**Secondary metals recyclers.**

- Violations of provisions, §10-1-357.

**Trademarks and service marks.**

- Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.

**Warehouses.**

- State licensed and bonded warehousemen, §10-4-32.

**PRIZES.**

**Promotional giveaways or contests,**

- §§10-1-392, 10-1-393.

**PROBATE COURTS.**

**Petroleum products sales.**

- Forfeiture and confiscation of inaccurate pumps, §10-1-159.

**PROFESSIONS AND BUSINESSES.**

**Business records, §§10-11-1 to 10-11-3.**

**Trademarks and service marks.**

- General provisions, §§10-1-440 to 10-1-454.

**Trade names.**

- General provisions, §§10-1-490 to 10-1-493.

**PROHIBITION.**

**Commodities and commodity contracts and options, §10-5A-22.**

**PROMISSORY NOTES.**

**Notes generally, §§10-3-1 to 10-3-5.**

**PROMOTIONAL GIVEAWAYS OR CONTESTS.**

**Fair business practices act of 1975.**

- Deceptive trade practices in consumer transactions, §10-1-393.
- Definition of promotion, §10-1-392.



**PROPANE.**

**Liquefied petroleum gas.**

Sale and storage generally, §§10-1-260 to 10-1-272.

**PROPERTY.**

**Agents.**

Owner's right to sell property placed with broker, §10-6-32.

**Brokers.**

Owner's right to sell property placed with broker, §10-6-32.

**Museums or archives repositories.**

Property loaned to.  
Georgia museum property act, §§10-1-529.1 to 10-1-529.7.

**PROPERTY TAXES.**

**Exemptions.**

Geo. L. Smith II Georgia World Congress Center, §10-9-10.

**Geo. L. Smith II Georgia World Congress Center.**

Exemption from taxation, §10-9-10.

**PROPRIETARY RIGHTS.**

**Notes or contracts for purchase or sale.**

Consideration to be stated, §10-3-3.  
Penalty for violations, §10-3-5.  
Purchaser takes subject to equities, §10-3-4.

**PROPYLENE.**

**Liquefied petroleum gas.**

Sale and storage generally, §§10-1-260 to 10-1-272.

**PRUDENT PERSON RULE.**

**Warehouses.**

Obligation of warehouseman to deliver agricultural product, §10-4-21.

**PUBLICATION.**

**Complaints against state licensed and bonded warehouses.**

Solicitation for additional complaints regarding breaches of bond, §10-4-14.

**Museums or archives repositories.**

Property loaned to.  
Notice, loan terminated, property abandoned, intent to acquire title, §10-1-529.4.

**Self-service storage facilities.**

Sale of occupant's property.  
Enforcement of owner's lien, §10-4-213.

**PUBLIC CONTRACTS.**

**Agents.**

Liability of public agents on, §10-6-88.

**PUBLIC OFFICERS AND EMPLOYEES.**

**Common day of rest act of 1974.**

Exemptions from article, §10-1-576.

**PUBLIC SAFETY.**

**Liquefied petroleum safety act of Georgia.**

General provisions, §§10-1-260 to 10-1-272.

**PUBLIC WEIGHERS.**

**Certified public weighers generally,**

§§10-2-40 to 10-2-54.

**PUBLISHERS.**

**Advertising.**

False or fraudulent statements in advertising.  
Excepted when acting in good faith, §10-1-421.  
Legal services, §10-1-427.  
Liquidation, auction or going-out-of-business sales.  
Misrepresenting ownership.  
Excepted when acting in good faith, §10-1-426.  
Misrepresenting nature of business.  
Excepted when acting in good faith, §10-1-426.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.  
Exemptions from part, §10-1-396.  
Uniform deceptive trade practices act.  
Exemptions from part, §10-1-374.

**PULPWOOD.**

**Measurements, §10-2-23.**

**PYRAMID DISTRIBUTION PLANS.**

**General provisions, §§10-1-410 to 10-1-417.**

**Q**

**QUANTUM MERUIT, §10-6-37.**

**R**

**RADIO.**

**Advertising.**

False or fraudulent statements in advertising.  
Broadcasters excepted when acting in good faith, §10-1-421.  
Legal services advertising, §10-1-427.  
Liquidation, auction or going-out-of-business sales.  
Misrepresenting ownership.  
Broadcasters excepted when acting in good faith, §10-1-426.

**RADIO —Cont'd**

**Advertising —Cont'd**

- Misrepresenting nature of business.
- Broadcasters excepted when acting in good faith, §10-1-426.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Exemption of broadcasters from part, §10-1-396.
- Uniform deceptive trade practices act.
- Exemption of broadcasters from part, §10-1-374.

**RAILROADS.**

**Depots.**

- Petroleum products.
- Inspection of premises, §10-1-148.

**RATIFICATION OF ACTS BY PRINCIPALS.**

**Principals and agents.**

- General provisions, §§10-6-1 to 10-6-142.

**REAL ESTATE BROKERS AND SALESPERSONS.**

**Brokerage relationships.**

- Broker acting as dual agent, §10-6A-12.
- Broker engaged by buyer, §10-6A-7.
- Broker engaged by landlord, §10-6A-6.
- Broker engaged by seller, §10-6A-5.
- Broker engaged by tenant, §10-6A-8.
- Chapter as basis for private rights of action, §10-6A-2.

- Citation of chapter, §10-6A-1.

**Clients.**

- Duty of broker prior to entering into relationships, §10-6A-10.

- Common source information company, §10-6A-15.

- Affiliation with, §10-6A-13.

**Compensation.**

- Creation of relationship not determined by payment or promise of, §10-6A-11.

**Creation of relationship.**

- Not determined by payment or promise of compensation, §10-6A-11.

- Definitions, §10-6A-3.

- Designated agents, §10-6A-13.

- Defined, §10-6A-3.

**Dual agent.**

- Broker acting as, §10-6A-12.

- Duration, §10-6A-9.

**Duties.**

- Broker engaged by buyer, §10-6A-7.
- Broker engaged by landlord, §10-6A-6.

**REAL ESTATE BROKERS AND SALESPERSONS —Cont'd**

**Brokerage relationships —Cont'd**

**Duties —Cont'd**

- Broker engaged by seller, §10-6A-5.
- Broker engaged by tenant, §10-6A-8.

- Exclusive representation, §10-6A-13.

- Legal relationship to customers or clients, §10-6A-4.

- Legislative findings, §10-6A-2.

- Limited agents, §10-6A-4.

- Ministerial acts, §10-6A-14.

- Multiple listing services, §10-6A-15.

- Prior to entering into brokerage engagement relationships, §10-6A-10.

- Rules and regulations, §10-6A-16.

- Short title, §10-6A-1.

- Term, §10-6A-9.

- Transaction brokers.

- Defined, §10-6A-3.

- Required actions, §10-6A-14.

**Rules and regulations.**

- Brokerage relationships, §10-6A-16.

**REAL PROPERTY.**

**Advertising.**

- Deceptive trade practices in consumer transactions.

- Loans on property used as dwelling place by debtor, §10-1-393.

**Contracts.**

- Deceptive trade practices in consumer transactions.

- Purchase of property used as dwelling by defaulting debtor.

- Debtor remaining in possession of property, §10-1-393.

**Deceptive trade practices in consumer transactions.**

- Loans on property used as dwelling place by debtor, §10-1-393.

**Gasoline marketing practices.**

- Sale or transfer of real property not affected, §10-1-241.

**Geo. L. Smith II Georgia World Congress Center.**

- Disposition of real property not required, §10-9-16.2.

**Loans.**

- Deceptive trade practices in consumer transactions.

- Loans on property used as dwelling place by debtor, §10-1-393.

**REAL PROPERTY —Cont'd**

**Misrepresentation.**

Deceptive trade practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**Notice.**

Purchase of property used as dwelling place by defaulting debtor.

Defaulting debtor remaining in possession.

Right of cancellation by seller, §10-1-393.

**Unfair or deceptive trade practices.**

Deceptive practices in consumer transactions.

Loans on property used as dwelling place by debtor, §10-1-393.

**REBUILT ITEMS.**

**Labels and labeling,** §§10-1-80 to 10-1-83.

**RECEIVERS.**

**Accounts.**

Required to keep, §10-6-30.

**Commodities and commodity contracts and options.**

Appointment if chapter, rule or order violated, §§10-5A-21, 10-5A-22.

**Heavy equipment multiline dealers.**

**Receivership.**

Good cause for immediate termination, amendment, etc., of agreements without notice, §10-1-733.

Good cause for unilateral amendment, cancellation, etc., of agreement, §10-1-732.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975, §10-1-397.

**Warehouses.**

State licensed and bonded warehouses.

Receivership upon suspension or revocation of license, §10-4-30.

**RECIPROCITY.**

**Liquefied petroleum gas.**

Sale and storage.

Reciprocal agreements with other states, §10-1-271.

**RECORDATION.**

**Trademarks and service marks.**

Assignment of registration, §10-1-446.

**RECORDS.**

**Business records,** §§10-11-1 to 10-11-3.

Definitions, §10-11-1.

**RECORDS —Cont'd**

**Business records —Cont'd**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

Retention.

Reproductions, §10-11-3.

Time period, §10-11-2.

**Buying clubs or services,** §10-1-600.

**Copper purchases by junk or metal dealers,** §10-1-351.

**Electronic transactions,** §§10-12-1 to 10-12-20.

**Flea market vendors' record-keeping,** §10-1-360.

Exemptions, §10-1-361.

Local ordinances or regulations, §10-1-362.

**Junk dealers,** §10-1-351.

**Metal dealers,** §10-1-351.

Secondary metals recyclers.

Inspection of records by law enforcement officers, §10-1-352.

Transactions, §10-1-351.

**Secondary metals recyclers.**

Transactions, §10-1-351.

Inspection of records by law enforcement officers, §10-1-352.

**Securities.**

Commissioner, maintenance of applications, registrations, etc., §10-5-75.

Confidential records, §10-5-76.

Coordination, registration by.

Required records to accompany statement, §10-5-22.

Federal covered securities.

Filing of records, §10-5-21.

Financial requirements for

broker-dealers and investment advisers, §10-5-40.

Immunity for defamation contained in required record, §10-5-56.

Intergovernmental cooperation and sharing of records, §10-5-77.

Public record status, §10-5-76.

Qualification, registration by.

Required records to accompany statement, §10-5-23.

Registration statement, incorporation of records by reference, §10-5-24.

**Tobacco.**

Carry-over tobacco storage and sale, §10-4-148.

Recordkeeping and publication duties of commissioner, §10-4-149.



**RECORDS —Cont'd**

**Tobacco —Cont'd**

- Leaf tobacco sales and storage,  
§10-4-108.
- Auction tobacco dealers, §10-4-114.
- Commissioner to keep and publish,  
§10-4-109.
- Inspection, §10-4-116.
- Nonauction tobacco dealers, §10-4-115.

**Trademarks and service marks.**

- Registrations and renewals, §10-1-447.

**Trade secrets.**

- General provisions, §§10-1-760 to  
10-1-767.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975.
- Hearings on cease and desist orders,  
§10-1-398.

**Warehouses.**

- State licensed and bonded warehouses,  
§10-4-23.
- Impoundment pending investigation,  
§10-4-29.
- Inspection, §10-4-24.
- Preservation when license terminated,  
§10-4-24.

**RECREATIONAL VEHICLE DEALERS,**

- §§10-1-679 to 10-1-679.15.

**Areas of sales responsibility.**

- Designation, §10-1-679.2.

**Burden of proof.**

- Termination or change of dealership  
agreements.

- Good cause, §10-1-679.4.

**Change of dealership agreements.**

- Good cause required, §10-1-679.4.
- Notice of substantial change, §10-1-679.5.

**Coercive practices by grantor.**

- Unlawful practices, §10-1-679.7.

**Damages.**

- Remedies for violations, §10-1-679.11.

**Definitions, §10-1-679.**

**Delivery of new recreational vehicles to dealer.**

- Damages to new vehicles delivered,  
§10-1-679.10.

**Establishment of new dealership.**

- Requirements, §10-1-679.13.

**Franchises.**

- Requirement of franchise agreement,  
§10-1-679.14.

**Good cause.**

- Areas of sales responsibility.
- New dealer.
- Good cause for addition required,  
§10-1-679.2.

**RECREATIONAL VEHICLE DEALERS**

**—Cont'd**

**Good cause —Cont'd**

- Change of dealership agreements.
- Good cause required, §10-1-679.4.
- Determination by trier of fact, §10-1-679.

**Injunctions.**

- Remedies for violations, §10-1-679.11.
- Temporary injunction.
- Violations deemed irreparable injuries  
for purpose of, §10-1-679.12.

**Legislative declaration, §10-1-679.1.**

**Misdemeanors.**

- Violations to constitute, §10-1-679.15.

**New dealership.**

- Requirements for establishment by  
grantor, §10-1-679.13.

**Notice.**

- Sale or transfer of ownership or change  
in management of dealership,  
§10-1-679.8.
- Termination or substantial change of  
dealership agreements, §10-1-679.5.

**Published prices, charges and terms of sale.**

- Sales to be in accordance with,  
§10-1-679.3.

**Purpose of provisions, §10-1-679.1.**

**Sales.**

- Published prices, charges and terms of  
sale.
- Sales to be in accordance with,  
§10-1-679.3.

**Succession to dealership.**

- Designation of successor by dealer,  
§10-1-679.9.

**Termination of dealership agreements.**

- Good cause required, §10-1-679.4.
- Notice, §10-1-679.5.
- Reimbursement by manufacturer for  
accessories and parts returned,  
§10-1-679.6.
- Repurchase of inventory, equipment,  
accessories and signage by grantor,  
§10-1-679.6.

**Unlawful practices.**

- Coercive practices by grantor,  
§10-1-679.7.
- Sale or transfer of ownership or change  
in management of dealership,  
§10-1-679.8.
- Succession to dealership.
- Prevention or refusal to honor  
succession by family member of  
dealer, §10-1-679.9.

**RECREATIONAL VEHICLE DEALERS**

—Cont'd

Warranty work and service, §10-1-679.10.

**RECYCLING.**

**Antifreeze.**

Recycled, reclaimed, or reprocessed antifreeze, §10-1-208.1.

Junk or metal dealers records, §10-1-351.

**Metals.**

Secondary metals recyclers, §§10-1-350 to 10-1-358.

Secondary metals recyclers, §§10-1-350 to 10-1-358.

**REFERRAL SALES.**

**Business opportunity sales.**

General provisions, §§10-1-410 to 10-1-417.

**Furnishing names of prospective purchasers.**

Sales contract required to state consideration, §10-1-70.

**REFINANCING.**

Retail installment contracts, §10-1-35.

**REFUNDS.**

**Child support collectors, private.**

Improper retention or charging of fees, §10-1-393.10.

**REGISTRATION.**

**Brands and marks.**

Trademarks and service marks generally, §§10-1-440 to 10-1-454.

**Gasoline dealers.**

Dealers subject to petroleum products sales part, §10-1-158.

Motor vehicle dealers, §10-1-668.

**Petroleum products sales.**

Gasoline dealers, §10-1-158.

**Securities.**

Uniform securities act of 2008.

Registration of broker-dealers, agents and investment advisers, §§10-5-30 to 10-5-41.

Trademarks and service marks, §§10-1-440 to 10-1-454.

Trade names, §§10-1-490 to 10-1-493.

**RELATION BACK.**

**Principal's rights and liabilities.**

Ratification, §10-6-52.

**RELEASES.**

**Motor vehicle franchises.**

Voluntary releases valid, §10-1-627.

**Suretyship.**

Discharge of surety by increase of risk, §10-7-22.

**RELEASES —Cont'd**

**Suretyship —Cont'd**

Effect of release of or compounding with surety, §10-7-20.

Promise to pay in ignorance of discharge, §10-7-26.

Refusal to sue principal after notice by surety.

Discharge of surety, §10-7-24.

**RELIGION.**

**Common day of rest.**

General provisions, §§10-1-570 to 10-1-576.

Religious activities exempt, §10-1-575.

**REMANUFACTURED OR REBUILT ITEMS.**

**Labeling requirements.**

Rebuilt items sold at retail, §10-1-82.

Rebuilt.

Defined, §10-1-80.

Remanufactured items sold at retail, §10-1-81.

Remanufactured defined, §10-1-80.

Violations of article, §10-1-83.

**RENT.**

**Convenience warehousing.**

General provisions, §§10-4-190 to 10-4-193.

**Self-service storage facilities.**

General provisions, §§10-4-210 to 10-4-215.

**REPORTS.**

**Advancement technology development center.**

Seed capital fund, §10-10-7.

**Cemeteries.**

Perpetual care trust funds.

Quarterly financial report, §10-14-12.

Preneed escrow accounts.

Quarterly financial report, §10-14-12.

**Securities.**

Financial requirements for broker-dealers and investment advisers, §10-5-40.

Seed capital fund, §10-10-7.

State warehouse commissioner, §10-4-58.

**Tobacco.**

Carry-over tobacco storage and sale, §10-4-148.

Leaf tobacco sales and storage, §10-4-108.

Auction tobacco dealers, §10-4-114.

Nonauction tobacco dealers, §10-4-115.

**REPORTS —Cont'd**

**Warehouses.**

- State licensed and bonded warehouses.
- Annual report, §10-4-5.
- Inspection reports as evidence, §10-4-15.
- State warehouse commissioner, §10-4-58.

**REPOSSESSION.**

**Motor vehicle sales finance act.**

- Disposition of vehicle repossessed after default, §10-1-36.

**Retail installment contracts or revolving accounts.**

- Disposition of goods repossessed after default, §10-1-10.
- Motor vehicle sales finance act.
- Disposition of vehicle repossessed after default, §10-1-36.

**REPUDIATION.**

**Principal and agent, §10-6-80.**

**RES GESTAE.**

**Admissibility of agent's declarations, §10-6-64.**

**REST DAY, §§10-1-570 to 10-1-576.**

**RESTITUTION.**

**Commodities and commodity contracts and options, §10-5A-22.**

**Motor vehicle sales finance act.**

- Subleasing vehicles subject to retail installment contract, §10-1-41.

**Secondary metals recyclers.**

- Recovery of stolen property, §10-1-354.

**Unfair or deceptive trade practices.**

- Fair business practices act of 1975, §10-1-397.

**RESTRAINT OF TRADE.**

**Gasoline.**

- Below cost sales.
- Lessening competition or tending to create monopoly, §10-1-254.
- Declaration of legislative intent in construing section, §10-1-256.

**Motion pictures.**

- Bidding by exhibitors, §§10-1-290 to 10-1-294.

**Tobacco warehousemen's associations.**

- Price fixing or restraint of trade not authorized, §10-4-177.

**RETAILERS.**

**False advertising, §10-1-424.**

**RETAIL INSTALLMENT AND HOMES SOLICITATION SALES ACT.**

**General provisions, §§10-1-1 to 10-1-16.**

**RETAIL INSTALLMENT AND HOMES SOLICITATION SALES ACT**

**—Cont'd**

**Short title, §10-1-1.**

**RETAIL INSTALLMENT SALES AND REVOLVING ACCOUNTS, §§10-1-1 to 10-1-16.**

**Catalog sales.**

- Retail installment contracts negotiated and entered into by mail or telephone, §10-1-5.

**Clerical errors.**

- Exception to liability of seller or holder for violations, §10-1-15.

**Construction of article, §10-1-2.**

**Criminal and civil penalties, §10-1-15.**

**Deficiency against buyer.**

- Right to recovery, §10-1-10.

**Definitions, §10-1-2.**

**Disposition of goods repossessed after default, §§10-1-10, 10-1-36.**

**Educational entities.**

- Inapplicability of article, §10-1-16.

**Home solicitation sales.**

- Buyer's right to cancel, §10-1-6.

**Limitation of actions, §10-1-14.**

**Loan and interest statutes.**

- Not affected, §10-1-11.

**Mail order sales, §10-1-5.**

**Motor vehicle sales financing, §§10-1-30 to 10-1-42.**

- Advancement of money to satisfy lease, lien or security interest on trade-in vehicle, §10-1-33.1.

- Cash sales price or time sales price may include amount advanced or paid, §10-1-31.

- Lessor or entity selling vehicle to lessor, §10-1-42.

- Gross capitalization costs, inclusion of amount advanced, §10-1-42.

- Agreements waiving article unenforceable and void, §10-1-37.

- Anticipation of payments credit, §10-1-34.

- Assertion of violation on loan or contract in individual action only, §10-1-36.1.

- Assignment of contracts, §10-1-33.

- Attorneys' fees for contract referred for collection, §10-1-32.

- Cash sales price, §10-1-31.

- Claim of violation on loan or contract asserted in individual action only, §10-1-36.1.



**RETAIL INSTALLMENT SALES AND REVOLVING ACCOUNTS —Cont'd**

- Motor vehicle sales financing —Cont'd**
  - Construction of article, §10-1-31.
  - Court costs where contract referred for collection, §10-1-32.
  - Credit upon anticipation of payments, §10-1-34.
  - Criminal and civil penalties, §10-1-38.
  - Deferred payments, §10-1-35.
  - Deficiency claim recovery, §10-1-36.
  - Definitions, §10-1-31.
    - Subleasing vehicles, §10-1-39.
  - Delinquency charges, §10-1-32.
  - Disposition of vehicle repossessed after default, §10-1-36.
  - Finance charges, §10-1-31.
    - Limitations, §10-1-33.
  - Gross capitalization costs.
    - Lessor advancing money to lessee to satisfy lien, lease or security interest.
      - Inclusion of amount advanced, §10-1-42.
  - Insurance, §10-1-32.
  - Lessor advancing money to lessee to satisfy lien, lease or security interest, §10-1-42.
    - Inclusion of amount in gross capitalized costs, §10-1-42.
  - Motor vehicle sales finance act.
    - Short title, §10-1-30.
  - Notice of rights.
    - Buyer to be notified, §10-1-32.
    - Demand public sale of repossessed vehicle, §10-1-36.
    - Intention to pursue deficiency claim, §10-1-36.
    - Redemption rights, §10-1-36.
  - Prepayment of debt, §10-1-34.
  - Public sale of repossessed vehicle, §10-1-36.
  - Purchase or acquisition of agreement by sales finance companies, §10-1-33.
  - Receipt for cash payments, §10-1-32.
  - Refinancing retail installment contracts, §10-1-35.
  - Refund credit for anticipation of payments, §10-1-34.
  - Repossession after default.
    - Disposition of vehicle, §10-1-36.
  - Requirements for retail installment contracts, §10-1-32.

**RETAIL INSTALLMENT SALES AND REVOLVING ACCOUNTS —Cont'd**

- Motor vehicle sales financing —Cont'd**
  - Satisfaction of lease, lien or security interest on trade-in vehicle.
    - Advancement or payment of money, §10-1-33.1.
  - Cash sales price or time sales price may include amount advanced or paid, §10-1-31.
  - Lessor or entity selling vehicle to lessor, §10-1-42.
    - Gross capitalization costs, inclusion of amount advanced, §10-1-42.
  - Short title.
    - Motor vehicle sales finance act, §10-1-30.
  - Subleasing vehicles, §§10-1-39 to 10-1-41.
    - Actions brought by persons suffering damages, §10-1-41.
    - Definitions, §10-1-39.
    - Remedies, §10-1-41.
    - Unlawful inducement of buyer or lessee under contract, §10-1-40.
    - Unlawful offering of vehicle for hire by sublessee, §10-1-40.
  - Time sale price, §10-1-31.
  - Unenforceable and void waiver of article, §10-1-37.
  - Unpaid time balance renewal or restatement, §10-1-35.
  - Violation on loan or contract asserted in individual action only, §10-1-36.1.
  - Violations of article.
    - Criminal and civil penalties, §10-1-38.
    - Waiver of article void, §10-1-37.
  - Notice of rights.**
    - Demand public sale of repossessed goods, §10-1-10.
    - Intention to pursue deficiency claim, §10-1-10.
    - Motor vehicle sales financing, §§10-1-32, 10-1-36.
    - Redemption rights, §10-1-10.
  - Public sale of repossessed goods, §10-1-10.**
  - Redemption rights, §10-1-10.**
  - Repossession after default.**
    - Disposition of goods, §10-1-10.
      - Motor vehicle sales finance act, §10-1-36.
  - Retail installment and home solicitation sales act.**
    - Short title, §10-1-1.
  - Retail installment contracts.**
    - Attorneys' fees if referred for collection, §10-1-7.

## INDEX

### **RETAIL INSTALLMENT SALES AND REVOLVING ACCOUNTS —Cont'd**

#### **Retail installment contracts —Cont'd**

- Check, draft or order from money dishonor fees, §10-1-7.
- Construction permit costs.
- Inclusion, §10-1-3.
- Court costs if referred for collection, §10-1-7.
- Defined, §10-1-2.
- Delinquency charges, §10-1-7.
- Insurance, §10-1-3.
- Mail order sales, §10-1-5.
- Notice to the buyer, §10-1-3.
- Prepayment of balance, §10-1-3.
- Prior contracts not affected, §10-1-12.
- Receipt for cash payments, §10-1-3.
- Requirements, §10-1-3.
- Security interests.
  - Not taken in certain nondurable items, §10-1-8.
- Telephone sales, §10-1-5.
- Time price differential.
  - Limitations, §10-1-3.
  - Violation of limitation, §10-1-15.
- Transfer, §10-1-9.
- Violations of provisions, §10-1-15.
- Waiver of article unenforceable and void, §10-1-13.

#### **Revolving accounts.**

- Application of payments to, §10-1-8.
- Attorneys' fees if referred for collection, §10-1-7.
- Check, draft or order from money dishonor fees, §10-1-7.
- Court costs if referred for collection, §10-1-7.
- Defined, §10-1-2.
- Delinquency charges, §10-1-7.
- Notice to the buyer, §10-1-4.
- Prior accounts not affected, §10-1-12.
- Requirements, §10-1-4.
- Security interests.
  - Not taken in certain nondurable items, §10-1-8.
- Time price differential.
  - Limitations, §10-1-4.
  - Violation of limitation, §10-1-15.
- Transfer, §10-1-9.
- Violations of provisions, §10-1-15.
- Waiver of article unenforceable and void, §10-1-13.

#### **Second mortgage statute.**

- Not affected, §10-1-11.

#### **Short title.**

- Retail installment and home solicitation sales act, §10-1-1.

### **RETAIL INSTALLMENT SALES AND REVOLVING ACCOUNTS —Cont'd**

#### **Student loan transactions.**

- Inapplicability of article, §10-1-16.

#### **Telephone sales, §10-1-5.**

#### **Typographical errors.**

- Exception to liability of seller or holder for violations, §10-1-15.

#### **Universities and colleges.**

- Inapplicability of article, §10-1-16.

#### **University system of Georgia.**

- Inapplicability of article, §10-1-16.

#### **Violations of article.**

- Criminal and civil penalties, §10-1-15.

#### **Waiver of article void, §10-1-13.**

### **REVENUE AND TAXATION.**

#### **Exemptions from taxation.**

- Geo. L. Smith II Georgia World Congress Center, §10-9-10.
- Revenue bonds, §10-9-43.

#### **Geo. L. Smith II Georgia World Congress Center.**

- Exemption, §10-9-10.
- Revenue bonds, §10-9-43.

### **REVOLVING ACCOUNTS.**

#### **Retailer installment contracts and revolving accounts.**

- General provisions, §§10-1-1 to 10-1-16.

#### **RICE.**

#### **Warehouses.**

- State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

#### **RIFLES.**

#### **Interstate purchase, §§10-1-100, 10-1-101.**

- Georgia residents, §10-1-100.
- Nonresidents in Georgia, §10-1-101.

#### **RIGHT OF ENTRY.**

#### **Antifreeze inspections, §10-1-204.**

#### **Brake fluid inspections, §10-1-186.**

#### **Petroleum products.**

- Right of commissioner to inspect premises, §10-1-148.

#### **Weights and measures.**

- Power of commissioner to inspect, §10-2-6.

#### **ROADSIDE MARKETS.**

#### **Flea market vendors' record-keeping,**

- §10-1-360.
- Exemptions, §10-1-361.
- Local ordinances or regulations, §10-1-362.

#### **ROYALTIES.**

#### **Trade secret misappropriation actions, §10-1-763.**

**RULES AND REGULATIONS.**

- Antifreeze**, §10-1-209.
- Brake fluid**, §10-1-187.
  - Violations, §10-1-189.
- Buying clubs or services**, §10-1-601.
- Cemeteries**, §10-14-14.
  - Authority of state board of cemetierians, §10-14-3.1.
  - Minimum standards, §10-14-30.
  - Owner of cemetery, §10-14-16.
- Commodities**, §§10-5A-4, 10-5A-26.
- Fair business practices act of 1975**, §10-1-394.
- Geo. L. Smith II Georgia World Congress Center**.
  - Operation and use of project, §10-9-15.
- Lemon law**.
  - Motor vehicles, §10-1-795.
- Liquefied petroleum gas**.
  - Sale and storage.
    - Standards for equipment, §10-1-265.
- Paints and flaxseed or linseed oil sales**, §10-1-121.
- Petroleum products**, §10-1-155.
- Real estate brokers and salespersons**.
  - Brokerage relationships, §10-6A-16.
- Securities**, §§10-5-70, 10-5-74.
- Tobacco**.
  - Carry-over storage and sale, §10-4-152.
  - Leaf tobacco sales and storage.
    - Procedure for adopting or changing, §10-4-121.
  - Warehousemen's associations, §10-4-172.
- Unfair or deceptive trade practices**.
  - Fair business practices act of 1975, §10-1-394.
- Warehouses**.
  - State licensed and bonded warehouses, §10-4-5.
    - Administrative review of objections, §10-4-6.
    - Interstate regulations not affected, §10-4-8.
    - Procedure for adopting or changing, §10-4-6.
    - Uniform application, §10-4-7.
  - State warehouse commissioner, §10-4-52.
- Weighers**.
  - Certified public weighers, §10-2-52.
- Weights and measures**.
  - Criminal penalty for violating, §10-2-22.
- RV SHOWS.**
- Recreational vehicle dealers**.
  - Requirement of franchise agreement.
    - Exceptions for shows and conventions, §10-1-679.14.

**RYE.**

- Warehouses**.
  - State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

**S**

**SAFETY.**

- Liquefied petroleum safety act of Georgia**.
  - General provisions, §§10-1-260 to 10-1-272.

**SALES.**

- Advertising**.
  - False advertising.
    - General provisions, §§10-1-420 to 10-1-427.

**Agents.**

- Buying or selling for self, §10-6-24.

**Antifreeze**, §§10-1-200 to 10-1-211.

**Art.**

- Limited edition art reproductions.
  - Advertising and sale of multiples generally, §10-1-431.
- Rights in works of fine art, §10-1-510.

**Below cost sales.**

- Gasoline, §§10-1-250 to 10-1-256.

**Books.**

- Tie-in sales, §§10-1-330, 10-1-331.

**Brake fluid.**

- General provisions, §§10-1-180 to 10-1-189.

**Business opportunity sales**, §§10-1-410 to 10-1-417.

**Buying clubs or services**, §§10-1-590 to 10-1-605.

**Catalog sales.**

- Retail installment contracts negotiated and entered into by mail or telephone, §10-1-5.

**Cetane rated fuels.**

- Below cost sales, §§10-1-250 to 10-1-256.

**Commodities and commodity contracts and options.**

- General provisions, §§10-5A-1 to 10-5A-31.

**Copyrights.**

- Consideration to be stated on notes or contracts, §10-3-3.
- Penalty for violations, §10-3-5.
- Purchaser takes subject to equities, §10-3-4.

**Cotton storage.**

- Negotiation of sale of stored cotton, §10-4-73.



**SALES —Cont'd**

**Firearms.**

Interstate purchase of rifles or shotguns, §§10-1-100, 10-1-101.

**Flaxseed oil.**

Enforcement of article and rules and regulations, §10-1-121.

Labeling tank cars, tanks, barrels, etc., §10-1-124.

Possession of improperly labeled article.

Prima-facie evidence of violation, §10-1-125.

Purity requirements, §10-1-123.

Sold under true name, §10-1-124.

**Flea market vendors' record-keeping,**

§10-1-360.

Exemptions, §10-1-361.

Local ordinances or regulations, §10-1-362.

**Gas.**

Liquefied petroleum gas.

Sale and storage generally, §§10-1-260 to 10-1-272.

**Gasoline.**

Below cost sales, §§10-1-250 to 10-1-256.

Marketing practices.

General provisions, §§10-1-230 to 10-1-241.

Petroleum products sales generally, §§10-1-140 to 10-1-169.

**Geo. L. Smith II Georgia World Congress Center.**

Revenue bonds, §10-9-44.

**Going-out-of-business sales.**

Fair business practices act of 1975, §§10-1-392, 10-1-393.

**Heating fuels.**

Petroleum products sales generally, §§10-1-140 to 10-1-169.

**Heavy equipment.**

Multiline dealers, §§10-1-730 to 10-1-740.

**Home solicitation sales.**

Buyer's right to cancel, §10-1-6.

Retail installment contracts or revolving accounts generally, §§10-1-1 to 10-1-16.

Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.

**Lease-purchase agreements,** §§10-1-680 to 10-1-689.

**Linseed oil.**

Boiled linseed oil.

Purity requirements, §10-1-123.

Enforcement of article and rules and regulations, §10-1-121.

**SALES —Cont'd**

**Linseed oil —Cont'd**

Labeling tank cars, tanks, barrels, etc., §10-1-124.

Possession of improperly labeled article.

Prima-facie evidence of violation, §10-1-125.

Purity requirements, §10-1-123.

Sold under true name, §10-1-124.

**Liquefied petroleum gas.**

Sale and storage generally, §§10-1-260 to 10-1-272.

**Magazines.**

Tie-in sales, §§10-1-330, 10-1-331.

**Mail order sales.**

Retail installment contracts negotiated and entered into by mail, §10-1-5.

**Motor vehicle franchises,** §10-1-653.

Refusal to honor succession, §10-1-652.

**Motor vehicles.**

Lemon law, §§10-1-780 to 10-1-797.

Retail installment contracts.

General provisions, §§10-1-30 to 10-1-42.

**Multilevel distribution companies.**

Business opportunity sales generally, §§10-1-410 to 10-1-417.

**Newspapers.**

Tie-in sales, §§10-1-330, 10-1-331.

**Octane rated fuels.**

Below cost sales, §§10-1-250 to 10-1-256.  
Gasoline marketing practices, §§10-1-230 to 10-1-241.

**Patents.**

Notes or contracts for sale.

Consideration to be stated, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Petroleum products.**

General provisions, §§10-1-140 to 10-1-169.

**Proprietary rights.**

Consideration to be stated on notes or contracts, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**Pyramid distribution plans.**

Business opportunity sales generally, §§10-1-410 to 10-1-417.

**Referral sales.**

Business opportunity sales.

General provisions, §§10-1-410 to 10-1-417.

**SALES —Cont'd**

**Referral sales —Cont'd**

- Furnishing names of prospective buyers.
- Sales contract required to state consideration, §10-1-70.

**Remanufactured or rebuilt items.**

- Labeling requirements, §§10-1-80 to 10-1-83.

**Representatives.**

- Wholesale distribution by out-of-state principal.
- General provisions, §§10-1-700 to 10-1-704.

**Retail installment sales and revolving accounts.**

- General provisions, §§10-1-1 to 10-1-16.
- Motor vehicle financing, §§10-1-30 to 10-1-42.

**Rifles.**

- Interstate purchase, §§10-1-100, 10-1-101.

**Sales representatives.**

- Wholesale distribution by out-of-state principal.
- General provisions, §§10-1-700 to 10-1-704.

**Securities.**

- Uniform securities act of 2008, §§10-5-1 to 10-5-90.

**Shotguns.**

- Interstate purchase, §§10-1-100, 10-1-101.

**Telephone sales.**

- Retail installment contracts negotiated and entered into by telephones, §10-1-5.
- Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.

**Tie-in sales.**

- Books, magazines and newspapers, §§10-1-330, 10-1-331.

**Tobacco.**

- Leaf tobacco sales and storage.
- Carry-over storage and sale, §§10-4-140 to 10-4-155.
- General provisions, §§10-4-100 to 10-4-123.

**Unsolicited or unordered merchandise.**

- Unordered merchandise sent after membership terminated, §10-1-51.
- Unsolicited merchandise not to be sent, §10-1-50.

**Weapons.**

- Interstate purchase of rifles or shotguns, §§10-1-100, 10-1-101.

**Weights and measures.**

- General provisions, §§10-2-1 to 10-2-23.

**SALES —Cont'd**

**Wholesale distribution by out-of-state principal.**

- General provisions, §§10-1-700 to 10-1-704.

**SALES REPRESENTATIVES.**

**Wholesale distribution by out-of-state principal.**

- General provisions, §§10-1-700 to 10-1-704.

**SATURDAYS.**

**Common day of rest.**

- General provisions, §§10-1-570 to 10-1-576.

**SAWTIMBER.**

**Measurements, §10-2-23.**

**SCALES.**

**Inspection of scales used in intrastate shipments, §10-2-17.**

**Warehouses.**

- State licensed and bonded warehouses.
- Disapproved scales not to be used, §10-4-28.
- Examinations, §10-4-28.
- Provided, §10-4-28.

**Weights and measures.**

- General provisions, §§10-2-1 to 10-2-54.

**SCRAP DEALERS.**

**Junk or metal dealers' records, §10-1-351.**

**SCULPTURES.**

**Rights in works of fine art, §10-1-510.**

**SEALS AND SEALED INSTRUMENTS.**

**Geo. L. Smith II Georgia World Congress Center.**

- Revenue bonds, §10-9-42.

**Tobacco warehousemen.**

- Issuance of certified public weigher's official seal to, §10-2-46.

**Weights and measures.**

- Certified public weighers.
- Cost of seals, §10-2-42.
- Forfeiture, §10-2-54.
- Official seal, §10-2-45.
- Issuance to licensed tobacco warehousemen, §10-2-46.
- Return of seal on termination of duty, §10-2-47.
- Removal of seals, §10-2-14.

**SEARCHES AND SEIZURES.**

**Antifreeze.**

- Seizure of noncomplying antifreeze, §10-1-205.

**SEARCHES AND SEIZURES —Cont'd**

**Petroleum products sales.**

Search warrant on refusal to allow inspection of premises, §10-1-148.

**Search warrants.**

Petroleum products sales.

Refusal to allow inspection of premises, §10-1-148.

**Tobacco master settlement agreement enhancements.**

Seizure of contraband cigarettes.

Remedies for noncompliance, §10-13A-8.

**SECONDARY METALS RECYCLERS,**

§§10-1-350 to 10-1-358.

**Actions.**

Contesting identification or ownership of regulated metal property, §10-1-354.

**Aluminum property.**

Payment by recyclers, §10-1-352.1.

**Applicability of provisions.**

Exempt transactions, §10-1-355.

**Catalytic converters.**

Payment by recyclers, §10-1-352.1.

**Copper property.**

Payment by recyclers, §10-1-352.1.

**Criminal law and procedure.**

Violations of provisions, §10-1-357.

**Definitions,** §10-1-350.

**Exemptions from provisions,** §10-1-355.

**Felonies.**

Violations of provisions, §10-1-357.

**Fines.**

Violations of provisions, §10-1-357.

**Identification or ownership of regulated metal property.**

Contesting, §10-1-354.

**Inspections.**

Law enforcement officers.

Powers, §10-1-352.

**Law enforcement officers.**

Defined, §10-1-350.

Inspections by, §10-1-352.

**Motor vehicles.**

Title or cancellation of certificate of title, seller to provide, §10-1-351.

**Notice.**

Hold on regulated metal property believed to be stolen, §10-1-353.

**Petitions.**

Actions contesting identification or ownership of regulated metal property, §10-1-354.

**Prison terms.**

Violations of provisions, §10-1-357.

**SECONDARY METALS RECYCLERS**

—Cont'd

**Prohibited acts,** §10-1-356.

Penalties, §10-1-357.

**Records.**

Transactions, §10-1-351.

Inspection of records by law enforcement officers, §10-1-352.

**Regulated metal property.**

Contesting identification or ownership, §10-1-354.

Defined, §10-1-350.

Hold on regulated metal property believed to be stolen, §10-1-353.

Recovery of stolen property.

Actions, §10-1-354.

**Restitution.**

Recovery of stolen property, §10-1-354.

**Rules, regulations, codes, ordinances.**

Preempted by article, §10-1-358.

**Stolen property.**

Hold on regulated metal property believed to be stolen, §10-1-353.

Recovery.

Actions, §10-1-354.

Restitution, §10-1-354.

**Superseding nature of article,** §10-1-358.

**Unlawful acts,** §10-1-356.

Penalties, §10-1-357.

**SECRETARY OF STATE.**

**Business opportunity sales.**

Appointment as agent for service of process, §10-1-416.

**Child support collectors.**

Registration of private, §10-1-393.9.

**Commodities and commodity contracts and options.**

Commissioner of securities.

Secretary designated as, §10-5A-24.

General provisions, §§10-5A-1 to 10-5A-31.

**Fees.**

Business opportunity sales.

Filing fees for secretary of state as agent for service of process, §10-1-416.

**Home solicitations.**

Telemarketing deception, fraud or abuse.

Rules promulgation, §10-5B-3.

**Securities.**

Uniform securities act of 2008, §§10-5-1 to 10-5-90.



**SECRETARY OF STATE —Cont'd**

**Service of process.**

Business opportunity sales.

Appointment as agent for process,  
§10-1-416.

**Telemarketing deception, fraud or abuse.**

Rules promulgation, §10-5B-3.

**Trademarks and service marks.**

Registration generally, §§10-1-440 to  
10-1-454.

**SECRETS.**

**Trade secrets.**

General provisions, §§10-1-760 to  
10-1-767.

**SECURED TRANSACTIONS.**

**Notes.**

Transfer of secured note carries security,  
§10-3-1.

**Retail installment contracts or revolving  
accounts.**

Security interests not taken on certain  
nondurable items, §10-1-8.

**SECURITIES, §§10-5-1 to 10-5-90.**

**Administration of provisions.**

Commissioner, §10-5-70.

**Advertising or other sales literature.**

Requirement to file, §10-5-53.

**Agents.**

Application for registration and consent  
to service or process, §10-5-35.

Continuing education, §10-5-40.

Custody of funds, restrictions, §10-5-40.

Denial of or conditional registration,  
§10-5-41.

Effective date of registration, §10-5-35.

Examinations, §10-5-41.

Exemption from registration, §10-5-31.

Fees for registration application and  
renewal, §10-5-39.

Fingerprinting and criminal background  
check, §10-5-35.

Grounds for disciplinary action, §10-5-41.

Liability to customers, §10-5-58.

Not liable for defamation contained in  
required record, §10-5-56.

Registration requirements, §10-5-31.

Revocation or suspension proceedings,  
§10-5-41.

Termination of employment or  
association with broker-dealer,  
§10-5-37.

Withdrawal or registration, §10-5-38.

**Appeal of orders and rules issued,  
§10-5-78.**

**SECURITIES —Cont'd**

**Applicability of provisions, §10-5-79.**

Predecessor provisions, §10-5-90.

**Assistant commissioner, §10-5-70.**

**Broker-dealers.**

Application for registration and consent  
to service or process, §10-5-35.

Bond requirement, §10-5-40.

Canadian or other foreign  
broker-dealers.

Permitted transactions, §10-5-30.

Change of name or control, §10-5-36.

Continuing education, §10-5-40.

Denial of or conditional registration,  
§10-5-41.

Effective date of registration, §10-5-35.

Employment of unregistered agent,  
§10-5-31.

Examinations, §10-5-41.

Exemption from registration, §10-5-30.

Fees for registration application and  
renewal, §10-5-39.

Financial requirements, §10-5-40.

Fingerprinting and criminal background  
check, §10-5-35.

Grounds for disciplinary action, §10-5-41.

Liability to customers, §10-5-58.

Not liable for defamation contained in  
required record, §10-5-56.

Registration requirements, §10-5-30.

Revocation or suspension proceedings,  
§10-5-41.

Termination of employment or  
association with agent, §10-5-37.

Unlawful transactions, §10-5-30.

Withdrawal or registration, §10-5-38.

**Burden of proof in civil and criminal  
proceedings, §10-5-52.**

**Civil enforcement of violations, §10-5-58.**

**Commissioner.**

Authority generally, §10-5-70.

Cease and desist orders, §10-5-73.

Declaratory opinions, §10-5-74.

Definitions, adopting by rule, §10-5-74.

Filings not constituting finding of  
commissioner, §10-5-55.

Financial records of broker-dealers and  
investment advisers, §10-5-40.

Fingerprinting and criminal background  
check.

Agents, broker-dealers, investment  
advisers and investment adviser  
representatives, §10-5-35.

Forms and orders, §10-5-74.

Injunction actions, §10-5-72.

**SECURITIES —Cont'd**

**Commissioner —Cont'd**

- Intergovernmental cooperation and sharing of records, §10-5-77.
- Maintenance of applications, registrations, etc., §10-5-75.
- Modification or waiver of registration requirements, §10-5-26.
- Powers, §10-5-71.
- Review of orders and rules issued, §10-5-78.
- Revocation or suspension proceedings, §10-5-41.
- Rulemaking, §10-5-74.
- Service of process, delivering copy to commissioner, §10-5-80.
- Temporary registration.
- Withdrawal, §10-5-37.
- Transfer of agent or investment adviser representative.
- Prevention of effectiveness, §10-5-37.

**Commissioner of securities.**

- Commodities and commodity contracts and options.
- General provisions, §§10-5A-1 to 10-5A-31.

**Commodities and commodity contracts and options.**

- Applicability of securities law, §10-5A-8.
- General provisions, §§10-5A-1 to 10-5A-31.

**Confidential records, §10-5-76.**

**Consent to service of process.**

- Agents, broker-dealers, investment advisers and investment adviser representatives, §10-5-35.
- Federal covered investment advisers, §10-5-34.
- Signing and filing, §10-5-80.

**Coordination, registration by, §10-5-22.**

**Definitions, §10-5-2.**

**Effective date of statutory provisions.**

- United States agencies or departments.
- References to include successor agency or department, §10-5-4.
- United States Code citations, §10-5-3.

**Electronic filing, records and signatures.**

- Relationship to Electronic Signatures in Global and National Commerce Act, §10-5-5.

**Escrow deposit of security.**

- Conditions of registration, §10-5-24.

**Exemptions.**

- Agent registration, §10-5-31.
- Broker-dealer registration, §10-5-30.

**SECURITIES —Cont'd**

**Exemptions —Cont'd**

- Denial, suspension or revocation, §10-5-13.
- Federal covered investment adviser registration, §10-5-34.
- Investment adviser registration, §10-5-32.
- Federal covered investment advisers, §10-5-34.
- Investment adviser representative registration, §10-5-33.
- Liability exemptions, §10-5-59.
- Rule or order creating exemption, §10-5-12.
- Securities exempt from registration, §10-5-10.
- Transactions, §10-5-11.

**Federal covered investment advisers.**

- Exemption from registration, §10-5-32.
- Investment adviser representatives, §10-5-33.
- Fees for registration application and renewal, §10-5-39.

- Notice and consent to service of process, §10-5-34.

- Registration requirements, §10-5-34.

**Federal covered securities.**

- Denial, suspension or revocation of exemption, §10-5-13.
- Exemptions from registration, §§10-5-10, 10-5-20.
- Filing of records, §10-5-21.

**Filings not constituting finding of commissioner, §10-5-55.**

**Financial statements.**

- Rules of commissioner, §10-5-74.

**Geo. L. Smith II Georgia World Congress Center.**

- Revenue bonds.
- Inapplicability of securities act, §10-9-59.

**Indorsements.**

- Enforcement by indorsers of security given by principal, §10-7-44.

**Intergovernmental cooperation, §10-5-77.**

**Investigations.**

- Powers of commissioner, §10-5-71.

**Investment adviser representatives.**

- Application for registration and consent to service or process, §10-5-35.
- Continuing education, §10-5-40.
- Custody of funds, restrictions, §10-5-40.
- Defined, §10-5-2.
- Denial of or conditional registration, §10-5-41.

**SECURITIES —Cont'd**

**Investment adviser representatives**

—Cont'd

- Effective date of registration, §10-5-35.
- Examinations, §10-5-41.
- Fees for registration application and renewal, §10-5-39.
- Fingerprinting and criminal background check, §10-5-35.
- Fraud or deceit, §10-5-51.
- Grounds for disciplinary action, §10-5-41.
- Liability to clients, §10-5-58.
- Multiple advisers, transactions with permitted, §10-5-33.
- Not liable for defamation contained in required record, §10-5-56.
- Registration.
  - Requirements, §10-5-33.
- Representation of individual with suspended or revoked registration, §10-5-33.
- Revocation or suspension proceedings, §10-5-41.
- Termination of employment or association with investment adviser, §10-5-37.
- Withdrawal or registration, §10-5-38.

**Investment advisers.**

- Application for registration and consent to service or process, §10-5-35.
- Bond requirement, §10-5-40.
- Change of name or control, §10-5-36.
- Continuing education, §10-5-40.
- Defined, §10-5-2.
- Denial of or conditional registration, §10-5-41.
- Effective date of registration, §10-5-35.
- Examinations, §10-5-41.
- Exemption from registration, §10-5-32.
- Fees for registration application and renewal, §10-5-39.
- Financial requirements, §10-5-40.
- Fingerprinting and criminal background check, §10-5-35.
- Fraud or deceit, §10-5-51.
- Grounds for disciplinary action, §10-5-41.
- Liability to clients, §10-5-58.
- Not liable for defamation contained in required record, §10-5-56.
- Registration requirements, §10-5-32.
- Revocation or suspension proceedings, §10-5-41.
- Termination of employment or association with representative, §10-5-37.

**SECURITIES —Cont'd**

**Investment advisers —Cont'd**

- Unlawful employment of other persons, §10-5-32.
- Withdrawal or registration, §10-5-38.
- Investor education initiatives**, §10-5-70.
- Judicial review of orders and rules issued**, §10-5-78.
- Limitation of civil actions**, §10-5-58.
  - Predecessor provisions, actions under, §10-5-90.
- Nonissuer transactions.**
  - Exempt transactions, §10-5-11.
- Notice filings**, §10-5-21.
- Offers to sell.**
  - Applicability of provisions, §10-5-79.
  - Exempt transactions, §10-5-11.
  - Requirement for registration, §10-5-20.
  - Unlawful offer, sale or purchase of security, §10-5-50.
- Predecessor provisions, effectiveness**, §10-5-90.
- Prospectus.**
  - Registration by qualification.
    - Prospectus as condition of registration, §10-5-23.
  - Requirement to file, §10-5-53.
- Qualification, registration by**, §10-5-23.
- Records.**
  - Commissioner, maintenance of applications, registrations, etc., §10-5-75.
  - Coordination, registration by.
    - Required records to accompany statement, §10-5-22.
  - Defamation contained in required record.
    - Immunity of agents, broker-dealers, investment advisers and investment adviser representatives, §10-5-56.
- Federal covered securities.
  - Filing of records, §10-5-21.
- Financial requirements for broker-dealers and investment advisers, §10-5-40.
- Intergovernmental cooperation and sharing of records, §10-5-77.
- Public record status, §10-5-76.
- Qualification, registration by.
  - Required records to accompany statement, §10-5-23.
- Registration statement, incorporation of records by reference, §10-5-24.
- Registration of agents**, §10-5-31.



**SECURITIES —Cont'd**

**Registration of broker-dealers**, §10-5-30.

**Registration of investment adviser representatives**, §10-5-33.

**Registration of investment advisers**, §10-5-32.

Federal covered investment advisers, §10-5-34.

**Registration of securities**, §§10-5-20 to 10-5-26.

Amendment of statement, §10-5-24.

Conditions of registration, §§10-5-23, 10-5-24.

Contents of statement, §10-5-24.

Coordination, registration by, §10-5-22.

Denial, suspension or revocation, §10-5-25.

Effective date of statement, §§10-5-22 to 10-5-24.

Exemptions, §10-5-10.

Filing of records, §10-5-21.

Filings not constituting finding of commissioner, §10-5-55.

Incorporation of records by reference, §10-5-24.

Modification of requirements by commissioner, §10-5-26.

Qualification, registration by, §10-5-23.

Requirement generally, §10-5-20.

Waiver of requirements by commissioner, §10-5-26.

Who may file statement, §10-5-24.

Withdrawal of statement prior to effective date, §10-5-24.

**Reports.**

Financial requirements for broker-dealers and investment advisers, §10-5-40.

**Rule or order creating exemption**, §10-5-12.

**Sale or purchase of security.**

Applicability of provisions, §10-5-79.

Unlawful offer, sale or purchase of security, §10-5-50.

**Short title.**

Georgia uniform securities act of 2008, §10-5-1.

**Stop orders.**

Coordination, registration by.  
Notice statement is effective, failure to provide, §10-5-22.

Denial, suspension or revocation of registration, §10-5-25.

Failure to comply with filing notice or fee requirement, §10-5-21.

**SECURITIES —Cont'd**

**Suretyship.**

Compelling transfer of security from principal, §10-7-52.

Enforcement of security given by principal, §10-7-44.

Subrogation to rights of creditors.

Securities held by creditor, §10-7-57.

**Telemarketing deception, fraud or abuse**, §10-5B-5.

Required and prohibited telephone conduct and activities, §10-5B-4.

**Temporary registration.**

Termination of employment or association followed by new employment or association, §10-5-37.

**United States agencies or departments.**

References to include successor agency or department, §10-5-4.

**United States Code.**

Citations to provisions in effect as of July 1, 2009, §10-5-3.

Electronic filing, records and signatures.

Relationship to Electronic Signatures in Global and National Commerce Act, §10-5-5.

**Violation of provisions.**

Advisers engaging in fraud or deceit, §10-5-51.

Agents, broker-dealers, investment advisers and investment adviser representatives.

Penalties, §10-5-41.

Burden of proof in civil and criminal proceedings, §10-5-52.

Cease and desist orders, §10-5-73.

Civil liability enforcement, §10-5-58.

Denial, suspension or revocation of registration, §10-5-25.

Exemptions to liability, §10-5-59.

False or misleading statements, §10-5-54.

Injunction actions, §10-5-72.

Penalties for willful violations, §10-5-57.

Unlawful offer, sale or purchase of security, §10-5-50.

**SECURITY FREEZE OF CREDIT**

**REPORT**, §§10-1-913 to 10-1-915.

**SEED CAPITAL FUND.**

**General provisions**, §§10-10-1 to 10-10-7.

**SELF-INCRIMINATION.**

**Deceptive trade practices.**

Fair business practices act of 1975, §10-1-404.

**Fair business practices act of 1975,**

§10-1-404.

**SELF-INCRIMINATION —Cont'd**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975,  
§10-1-404.

**SELF-SERVICE STORAGE FACILITIES,**

§§10-4-210 to 10-4-215.

**Citation of act.**

Self-service storage facility act, §10-4-210.

**Convenience warehousing.**

General provisions, §§10-4-190 to  
10-4-193.

**Default of occupant.**

Enforcing lien without judicial  
intervention, §10-4-213.

**Definitions,** §10-4-211.

**Effective date of article,** §10-4-215.

**Lien of owner upon property located at  
facility,** §10-4-212.

Enforcement, §10-4-213.

**Notice to occupant.**

Enforcement of owner's lien, §10-4-213.

**Rental agreement.**

Form for enforcing lien without judicial  
intervention, §10-4-213.

**Rental agreements entered into before July  
1, 1982 not affected,** §10-4-215.

**Rights of parties to create additional  
rights, duties and obligations not  
impaired,** §10-4-214.

**Rights under article additional,** §10-4-214.

**Self-service storage facility act.**

Short title, §10-4-210.

**SELF-SERVICE STORAGE FACILITY  
ACT.**

**General provisions,** §§10-4-210 to 10-4-215.

**Short title,** §10-4-210.

**SERIGRAPHS.**

**Limited edition art reproductions.**

Generally, §§10-1-430 to 10-1-437.

**Rights in work of fine art,** §10-1-510.

**SERVICE MARKS.**

**General provisions,** §§10-1-440 to 10-1-454.

**SERVICE OF PROCESS.**

**Business opportunity sales,** §10-1-416.

**Cemeteries.**

Consent to service.

Effect, §10-14-24.

**Fees.**

Business opportunity sales.

Filing fees for secretary of state as  
agent for service of process,  
§10-1-416.

**SERVICE OF PROCESS —Cont'd**

**Secretary of state.**

Business opportunity sales.

Appointment as agent for process,  
§10-1-416.

**Securities.**

Agents, broker-dealers, investment  
advisers and investment adviser  
representatives, §10-5-35.

Cease and desist orders, §10-5-73.

Federal covered investment advisers,  
§10-5-34.

Signing and filing consent to service,  
§10-5-80.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Actions by individuals.

Service on administrator, §10-1-399.

**SERVICE STATIONS.**

**Petroleum products retail dealers,**

§§10-1-720, 10-1-721.

**SETOFFS.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Right to set off damages or penalties,  
§10-1-401.

**SETTLEMENTS.**

**Fair business practices act.**

Civil penalties, §10-1-405.

**Farm tractor warranty act.**

Informal dispute settlement procedures,  
§10-1-816.

**Gasoline.**

Below cost sales.

Effect of written tender of settlement,  
§10-1-255.

**Heavy equipment multiline dealers.**

Good faith settlement of disputes,  
§10-1-737.

**Lemon law.**

Farm tractors.

Informal dispute settlement  
procedures, §10-1-816.

**Tobacco products manufacturers.**

Financial responsibility for burdens  
imposed on state from smoking,  
§§10-13-1 to 10-13-4.

Master settlement agreement  
enhancements, §§10-13A-1 to  
10-13A-9.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Written tender of settlement,  
§10-1-399.

## INDEX

### **SHOTGUNS.**

- Interstate purchase**, §§10-1-100, 10-1-101.
  - Georgia residents, §10-1-100.
  - Nonresidents in Georgia, §10-1-101.

### **SHOWS.**

#### **Recreational vehicle dealers.**

- Requirement of franchise agreement.
- Exceptions for shows and conventions, §10-1-679.14.

### **SHREDDING.**

#### **Business records.**

- Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

### **SIGNATURES.**

#### **Agents.**

- Liability of person signing instrument as agent, §10-6-86.

#### **Electronic transactions**, §§10-12-1 to 10-12-20.

#### **Executors and administrators.**

- Liability of persons signing instrument as fiduciary, §10-6-86.

#### **Fiduciaries.**

- Liability of persons signing instrument as fiduciaries, §10-6-86.

#### **Geo. L. Smith II Georgia World Congress Center.**

- Revenue bonds, §10-9-42.

#### **Guardian and ward.**

- Liability of persons signing instrument as fiduciary, §10-6-86.

#### **Trusts and trustees.**

- Liability of persons signing instrument as fiduciary, §10-6-86.

### **SIGNS.**

#### **Car washes**, §10-1-164.

#### **Motor fuel**, §10-1-164.

### **SILVER.**

#### **Commodities and commodity contracts and options.**

- General provisions, §§10-5A-1 to 10-5A-31.

### **SMOKING.**

#### **Manufacturers of cigarettes.**

- Financial responsibility for burdens imposed on state from smoking, §§10-13-1 to 10-13-4.
- Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.

#### **SOCIAL ORGANIZATIONS**, §§10-1-470 to 10-1-472.

##### **Emblem or name.**

- Imitation, §10-1-470.
- Injunction against infringements, §10-1-471.
- Priority of right to use name, §10-1-470.
- Unauthorized use, §10-1-472.

##### **False claim of membership**, §10-1-472.

### **SOCIAL SECURITY NUMBERS.**

#### **Clerks of superior courts.**

- Held harmless.
- Filing, publicly posting or displaying document containing number, §10-1-393.8.

#### **Internet.**

- Requiring individual to transmit over.
- Prohibition, §10-1-393.8.

#### **Internet website.**

- Requiring individual to use number to access.
- Prohibition, §10-1-393.8.

#### **Protection from disclosure**, §10-1-393.8.

#### **Publicly posting or publicly displaying.**

- Prohibition, §10-1-393.8.

#### **Superior court clerks cooperative authority.**

- Held harmless.
- Filing, publicly posting or displaying document containing number, §10-1-393.8.

### **SOLE PROPRIETORSHIPS.**

#### **Assumed business names.**

- Trade name registration, §§10-1-490 to 10-1-493.

#### **Business opportunity sales.**

- Liability of owner for violation of part, §10-1-417.

#### **Business records.**

- Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

#### **Fictitious business names.**

- Trade name registration, §§10-1-490 to 10-1-493.

### **SOLICITATION.**

#### **Telephone sales.**

- Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.

#### **Unordered merchandise sent after**

##### **membership terminated**, §10-1-51.

- Deemed gift, §10-1-51.
- Enjoining payment request, §10-1-51.

#### **Unsolicited merchandise not to be sent**, §10-1-50.

- Enjoining payment request, §10-1-50.



**SOLICITATION —Cont'd**

**Unsolicited merchandise not to be sent**

—Cont'd

Treated as gift, §10-1-50.

**SORGHUM.**

**Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

**SOYBEANS.**

**Warehouses.**

State licensed and bonded warehouses,  
§§10-4-1 to 10-4-33.

**SPIRIT OF THE LAW.**

Warehousing regulations, §10-4-52.

**SPORTS.**

**Geo. L. Smith II Georgia World Congress  
Center.**

General provisions, §§10-9-1 to 10-9-61.

**STAMPS.**

**Cigar and cigarette taxes.**

Master settlement agreement  
enhancements.

Affixing tax stamp to manufacturer or  
brand not in directory prohibited,  
§10-13A-5.

**STATE AUDITOR.**

**Geo. L. Smith II Georgia World Congress  
Center authority overview committee.**

Assistance by state auditor.

In discharge of committee's duties,  
§10-9-21.

Cooperation with committee, §10-9-22.

**STATE DEPARTMENTS AND AGENCIES.**

**Common day of rest act of 1974.**

Exemption from article, §10-1-576.

**Identity theft.**

Breach of security regarding personal  
information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**Personal information.**

Identity theft.

Breach of security regarding personal  
information.

Notification requirements,  
§10-1-912.

Data collector defined, §10-1-911.

**STATE FIRE MARSHAL.**

**Liquefied petroleum gas.**

Sale and storage.

General provisions, §§10-1-260 to  
10-1-272.

**STATE OF GEORGIA.**

**Warehouses.**

State warehouse commissioner.

State debt not to be created by article,  
§10-4-60.

**STATE OIL CHEMIST.**

**Antifreeze.**

Certified analysis, §10-1-208.

Inspection of samples, §10-1-203.

**Brake fluid sales.**

Certified analysis as evidence, §10-1-188.

Defined, §10-1-180.

Inspection of samples, §10-1-185.

**STATE WAREHOUSE ACT.**

**General provisions,** §§10-4-1 to 10-4-33.

**Short title,** §10-4-1.

**STATE WAREHOUSE SYSTEM.**

**State licensed and bonded warehouses.**

General provisions, §§10-4-1 to 10-4-33.

**STATUTE OF FRAUDS.**

**Overseers.**

Parol contracts between employer and  
overseer, §10-6-121.

**STATUTE OF LIMITATIONS.**

**Art.**

Limited edition art reproductions,  
§10-1-435.

**Cemeteries.**

Purchaser's remedy for violations,  
§10-14-21.

**Deceptive trade practices.**

Fair business practices act of 1975,  
§10-1-401.

**Fair business practices act of 1975,**  
§10-1-401.

**Farm tractor warranty act,** §10-1-818.

**Gasoline below cost sales,** §10-1-255.

**Gasoline marketing practices,** §10-1-239.

**Lease-purchase agreements,** §10-1-688.

**Lemon law.**

Farm tractors, §10-1-818.

Motor vehicles.

Requesting arbitration to compel  
replacement or repurchase of  
vehicle, §10-1-786.

**Motor vehicle franchises,** §10-1-625.

**Retail installment and home solicitation  
sales act,** §10-1-14.

**Securities.**

Civil enforcement of violations, §10-5-58.

Predecessor provisions, actions under,  
§10-5-90.

**Trade secrets,** §10-1-766.

**STATUTE OF LIMITATIONS —Cont'd**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975,  
§10-1-401.

**Warehouses.**

State licensed and bonded warehouses.  
Actions on bonds, §10-4-14.

**STATUTORY FORM FOR FINANCIAL  
POWER OF ATTORNEY, §10-6-142.**

**STAYS.**

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.  
Cease and desist orders, §10-1-398.

**STOCK AND STOCKHOLDERS.**

**Agents.**

Effect of death or disability on pledge of  
stock with power of attorney,  
§10-6-34.

**Pledge of stock with power of attorney.**

Effect of death or disability, §10-6-34.

**Powers of attorney.**

Effect of death or disability on pledge of  
stock, §10-6-34.

**Securities.**

Uniform securities act of 2008, §§10-5-1  
to 10-5-90.

**STOLEN PROPERTY.**

**Secondary metals recyclers.**

Hold on regulated metal property  
believed to be stolen, §10-1-353.

**Recovery.**

Actions, §10-1-354.  
Restitution, §10-1-354.

**STOP ORDERS.**

**Securities.**

Coordination, registration by.  
Notice statement is effective, failure to  
provide, §10-5-22.  
Denial, suspension or revocation of  
registration, §10-5-25.  
Failure to comply with filing notice or  
fee requirement, §10-5-21.

**STOP-SALE ORDERS.**

**Antifreeze, §10-1-204.**

**Brake fluid, §10-1-186.**

**STORAGE.**

**Convenience warehousing, §§10-4-190 to  
10-4-193.**

**Cotton, §§10-4-70 to 10-4-81.**

**Gas.**

Liquefied petroleum gas.  
Sale and storage generally, §§10-1-260  
to 10-1-272.

**STORAGE —Cont'd**

**Liquefied petroleum gas.**

Sale and storage generally, §§10-1-260 to  
10-1-272.

**Self-service storage facilities.**

General provisions, §§10-4-210 to  
10-4-215.

**Tobacco.**

Leaf tobacco sales and storage.  
Carry-over storage and sale, §§10-4-140  
to 10-4-155.  
General provisions, §§10-4-100 to  
10-4-123.  
Warehousemen's associations.  
General provisions, §§10-4-170 to  
10-4-177.

**STORE GIFT CARDS.**

**Unfair or deceptive practices in consumer  
transactions, §10-1-393.**

**SUBPOENAS.**

**Cemeteries.**

Enforcement proceedings by Secretary of  
State, §10-14-19.  
Investigations by Secretary of State,  
§10-14-15.

**Commodities and commodity contracts or  
futures.**

Investigation, §10-5A-20.

**Securities.**

Powers of commissioner, §10-5-71.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.  
Administrator's subpoena powers,  
§§10-1-398, 10-1-404.

**SUBROGATION.**

**Geo. L. Smith II Georgia World Congress  
Center.**

**Revenue bonds.**

Enforcement of rights, §10-9-52.

**Suretyship.**

Control of execution and judgment by  
surety.  
Subrogation to plaintiff's rights,  
§10-7-47.  
Rights of creditors.  
Party priority of claim, §10-7-56.  
Securities held by creditor, §10-7-57.

**SUNDAYS.**

**Common day of rest.**

General provisions, §§10-1-570 to  
10-1-576.

**Tobacco.**

Leaf tobacco sales and storage.  
Limitation on sale hours and days,  
§10-4-112.

**SUPERIOR COURT CLERKS'**

**COOPERATIVE AUTHORITY.**

**Social security numbers appearing on document.**

Held harmless, §10-1-393.8.

**SUPERIOR COURTS.**

**Appeals to superior courts.**

Commodities and commodity contracts and options.

Judicial review of commissioner's orders, §10-5A-29.

Tobacco.

Warehousemen's associations.

Suspension or expulsion, §10-4-176.

**Brake fluid.**

Condemnation of adulterated or misbranded fluid, §10-1-186.

**Clerks of court.**

Notice.

Parties claiming protection under a payment bond or security deposit, §10-7-31.

Parties claiming protection under a payment bond or security deposit.

Notice of commencement filings, §10-7-31.

Social security numbers appearing on document.

Held harmless, §10-1-393.8.

Trade name registration.

Duties, §10-1-490.

**Commodities and commodity contracts and options.**

Judicial review of commissioner's orders, §10-5A-29.

**Geo. L. Smith II Georgia World Congress Center.**

Revenue bonds.

Jurisdiction over actions.

Superior court of Fulton county, §10-9-60.

Venue and jurisdiction of actions against authority under chapter.

Superior court of Fulton county, §10-9-11.

**Heavy equipment multiline dealers.**

Hearing and determination of causes and controversies under article, §10-1-739.

**Petroleum products sales.**

Enjoining marketing in violations of part, specifications or regulations, §10-1-156.

**SUPERIOR COURTS —Cont'd**

**Tobacco.**

Warehousemen's associations.

Appeals of suspension or expulsion, §10-4-176.

**Warehouses.**

State licensed and bonded warehouses.

Receivership and liquidation upon suspension or revocation of license, §10-4-30.

**SURETYSHIP.**

**Actions.**

Compelling contribution.

Controlling action on debt, §10-7-53.

Corporate sureties.

Bad faith refusal to perform suretyship contracts, §10-7-30.

Parties claiming protection under a payment bond or security deposit, §10-7-31.

Payment of debt past due by surety, §10-7-41.

Payment of debt pending action, §10-7-49.

Process sued out and judgment entered against surety, §10-7-28.

Refusal to sue principal after notice by surety.

Discharge of surety, §10-7-24.

**Attachment against principal, §10-7-40.**

**Attorneys' fees.**

Corporate surety's bad faith refusal to perform contract, §10-7-30.

**Bona fide purchasers.**

Protection when surety controls judgment, §10-7-55.

**Compounding with surety.**

Effect, §10-7-20.

**Contract of suretyship, §§10-7-1 to 10-7-4.**

Corporate sureties.

Bad faith refusal to perform, §10-7-30.

Defined, §10-7-1.

Form of contract immaterial, §10-7-4.

Implication.

Suretyship not extended by, §10-7-3.

Interpretation.

Suretyship not extended by, §10-7-3.

Liability generally, §10-7-1.

Liability not extended by implication or interpretation, §10-7-3.

Nature of obligation, §10-7-2.

Obligation accessory to that of principal, §10-7-2.



**SURETYSHIP —Cont'd**

**Contribution.**

- Compelling contribution, §10-7-50.
- Controlling action on debt and judgment, §10-7-53.
- Duty to account for indemnification, §10-7-52.
- Interest on sum recovered, §10-7-51.
- Transfer of security from principal, §10-7-52.

**Corporations.**

- Bad faith refusal of corporate surety to perform contract, §10-7-30.

**Costs.**

- Action for payment by surety of debt past due, §10-7-41.

**Damages.**

- Corporate sureties.
- Bad faith refusal to perform contract, §10-7-30.

**Debt past due.**

- Action for payment by surety, §10-7-41.

**Discharge of surety.**

- Increase of risk, §10-7-22.
- Promise to pay in ignorance of discharge, §10-7-26.
- Refusal to deliver evidence of debt and securities on tender of amount of debt, §10-7-23.
- Refusal to sue principal after notice by surety, §10-7-24.
- Uniform commercial code-negotiable instruments.
- Provisions relating to discharge to negotiable instrument to control, §10-7-27.

**Effect of judgment against surety.**

- Action for money paid, §10-7-42.

**Evidence.**

- Proof by parol, §10-7-45.

**Executions.**

- Control of execution by surety, §10-7-47.
- When sued separately, §10-7-48.
- Indorser's right to control judgment on debt and execution, §10-7-54.

**Extending liabilities, §10-7-25.**

**Foreclosures.**

- Mortgages, §10-7-44.

**Form of contract immaterial, §10-7-4.**

**Implication or interpretation.**

- Liability not extended by, §10-7-3.

**Increase of risk.**

- Discharge of surety, §10-7-22.

**Insolvency.**

- Compelling contribution after paying more than equal share.
- Effect of surety's insolvency, §10-7-50.

**SURETYSHIP —Cont'd**

**Interest.**

- Action by surety for payment of debt past due, §10-7-41.
- Recovery of usury paid by surety, §10-7-43.
- Sum recovered as contribution, §10-7-51.

**Judgments.**

- Action for money paid, interest and costs.
- Effect of judgment against surety, §10-7-42.
- Bona fide purchasers protected when surety controls judgment, §10-7-55.
- Compelling contribution.
- Controlling judgments, §10-7-53.
- Control of judgment by surety, §10-7-47.
- When sued separately, §10-7-48.
- Indorser's right to control judgment, §10-7-54.
- Judgment against principal and surety at same time, §10-7-29.
- Payment of debt pending action by surety.
- Judgment for plaintiff for use of surety, §10-7-49.
- Process sued out and judgment entered against sureties, §10-7-28.
- Proof after judgment, §10-7-46.

**Liability of surety extended, §10-7-25.**

**Mistake.**

- Promise to pay in ignorance of discharge, §10-7-26.

**Mortgages and deeds of trust.**

- Compelling cosurety to transfer mortgage, §10-7-52.
- Foreclosure, §10-7-44.

**Nature of obligation of surety, §10-7-2.**

**Negotiable instruments.**

- Discharge of parties to negotiable instruments.
- Provisions of commercial paper article to control, §10-7-27.

**Notice.**

- Parties claiming protection under a payment bond or security deposit.
- Action prerequisites, §10-7-31.
- Refusal to sue principal after notice by surety.
- Discharge of surety, §10-7-24.

**Novation.**

- Defined, §10-7-21.
- Effect on surety's liability, §10-7-21.

**Obligee.**

- Defined, §10-7-30.

**SURETYSHIP —Cont'd**

**Parol evidence.**

Proof of suretyship, §10-7-45.

**Parties claiming protection under a payment bond or security deposit.**

Rights, §10-7-31.

**Payment pending action, §10-7-49.**

**Priorities.**

Subrogation to rights of creditor.

Claims, §10-7-56.

**Process sued out and judgment entered against surety, §10-7-28.**

**Promise to pay in ignorance of discharge, §10-7-26.**

**Proof of suretyship.**

After judgment, §10-7-46.

Parol evidence, §10-7-45.

**Releases.**

Discharge of surety by increase of risk, §10-7-22.

Effect of release of or compounding with surety, §10-7-20.

Promise to pay in ignorance of discharge, §10-7-26.

Refusal to deliver evidence of debt and securities and tender on amount of debt.

Discharge of surety, §10-7-23.

Refusal to sue principal after notice by surety.

Discharge of surety, §10-7-24.

**Securities.**

Compelling transfer of security from principal, §10-7-52.

Enforcement of security given by principal, §10-7-44.

Subrogation to rights of creditors.

Securities held by creditor, §10-7-57.

**Subrogation.**

Control of execution and judgment by surety.

Subrogation to plaintiff's rights, §10-7-47.

Rights of creditors.

Party priority of claim, §10-7-56.

Securities held by creditor, §10-7-57.

**Tender of amount of debt.**

Refusal to deliver evidence of debt in securities as discharging surety, §10-7-23.

**Uniform commercial code-negotiable instruments.**

Discharge of party to negotiable instruments.

Provisions of articles to control, §10-7-27.

**SURETYSHIP —Cont'd**

**Usury.**

Recovery of usury paid by surety, §10-7-43.

**SURVIVAL OF ACTIONS.**

**Securities.**

Civil enforcement of violations, §10-5-58.

**SWAP MEET VENDORS'**

**RECORD-KEEPING, §10-1-360.**

**Exemptions, §10-1-361.**

**Local ordinances or regulations, §10-1-362.**

**SWEEPSTAKES.**

**Consumer protection, §10-1-393.**

**T**

**TANKS.**

**Flaxseed oil.**

Labeling tank cars, tanks, etc., §10-1-124.

**Linseed oil.**

Labeling tank cars, tanks, etc., §10-1-124.

**TAXATION.**

**Exemptions from taxation.**

Geo. L. Smith II Georgia World Congress Center, §10-9-10.

Revenue bonds, §10-9-43.

**Geo. L. Smith II Georgia World Congress Center.**

Exemption, §10-9-10.

Revenue bonds, §10-9-43.

**TELEMARKETING.**

**Deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

**Defined, §10-1-393.5.**

**Prohibited activities, §§10-1-393, 10-1-393.5.**

Criminal penalties, §10-1-393.6.

**TELEPHONES.**

**Advertising number with prefix of 976 or 900.**

Automatic imposition of per-call charge or cost.

Deceptive trade practices in consumer transactions, §10-1-393.

Suspension of charge, §10-1-397.

**Credit cards.**

Merchant requiring purchaser to provide personal or business telephone number, §10-1-393.3.

**TELEPHONES —Cont'd**

**Deceptive trade practices in consumer transactions.**

Telephone numbers with prefix of 976 or 900.

Automatic imposition of per-call charge or cost, §10-1-393.

Suspension of charge, §10-1-397.

**976 and 900 calls imposing per-call charge or cost.**

Deceptive trade practices in consumer transactions, §10-1-393.

Suspension of charge, §10-1-397.

**Sales.**

Retail installment contracts negotiated and entered into by mail, §10-1-5.

Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.

**Unfair or deceptive trade practices.**

Telephone directory listings.

Solicitations for, §10-1-393.1.

Telephone numbers with prefix of 976 or 900.

Automatic imposition of per-call charge or cost, §§10-1-393, 10-1-397.

**TELEPHONE SALES.**

**Retail installment contracts negotiated and entered into by mail, §10-1-5.**

**Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

**Actions.**

Private right of action for violations, §10-5B-6.

Applicability of provisions, §10-5B-5.

Construction of provisions, §10-5B-7.

Culpability as to unlawful activity, §10-5B-4.

Defined terms, §10-5B-2.

Exclusivity of provisions, §10-5B-7.

Legislative findings, §10-5B-1.

Offers to sell or buy made in state.

Determinations as to, §10-5B-8.

Penalties for provision violations, §10-5B-6.

Rules of statutory construction, §10-5B-2.

Rules promulgation, §10-5B-3.

Unlawful conduct, §10-5B-4.

**TELEVISION.**

**Advertising.**

False advertising of legal services.

Exemption for broadcasters acting in good faith, §10-1-427.

**TELEVISION —Cont'd**

**Advertising —Cont'd**

False or fraudulent statements in advertising.

Broadcasters excepted when acting in good faith, §10-1-421.

Liquidation, auction or going-out-of-business sales.

Misrepresenting ownership.

Broadcasters excepted when acting in good faith, §10-1-426.

Misrepresenting nature of business.

Broadcasters excepted when acting in good faith, §10-1-426.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Exemption of broadcasters from part, §10-1-396.

Uniform deceptive trade practices act.

Exemption of broadcasters from part, §10-1-374.

**TENDER OF CHATTELS.**

**Tobacco.**

Carry-over storage and sale.

Tender for storage not deemed sale, §10-4-150.

**TENDER OF PAYMENT.**

**Suretyship.**

Tender of amount of debt.

Refusal to deliver evidence of debt in securities as discharging surety, §10-7-23.

**TENDER OF SETTLEMENT.**

**Gasoline.**

Below cost sales.

Effect of written tender of settlement, §10-1-255.

**Unfair or deceptive trade practices.**

Fair business practices act of 1975.

Written tender of settlement, §10-1-399.

**THEATERS.**

**Bidding by motion picture exhibitors,**

§§10-1-290 to 10-1-294.

**THE COMMON DAY OF REST ACT OF 1974.**

General provisions, §§10-1-570 to 10-1-576.

Short title, §10-1-570.

**THEFT.**

**Horses or mules.**

Liability of auctioneer for sale of stolen horse or mule, §10-1-530.

Identity theft, §§10-1-910 to 10-1-915.



**THEFT —Cont'd**

**Secondary metals recyclers.**

Lawful owner recovering stolen property from recycler, §10-1-354.

**THEFT OF IDENTITY.**

**Business records.**

Disposal of business records containing personal information, §§10-15-1 to 10-15-7.

**THE RETAIL INSTALLMENT AND**

**HOME SOLICITATION SALES ACT.**

**General provisions,** §§10-1-1 to 10-1-16.

**Short title,** §10-1-1.

**THIRD PARTIES.**

**Agents.**

Agent receiving money for third persons, §§10-6-100 to 10-6-102.

Principal's rights and liabilities, §§10-6-50 to 10-6-64.

**Suretyship.**

Rights of surety against generally, §§10-7-40 to 10-7-57.

**THREAD.**

**Marks.**

Registration.  
Classes of goods, §10-1-443.

**TIE-IN SALES.**

**Books, magazines and newspapers,** §§10-1-330, 10-1-331.

**TIMBER.**

**Labeling requirements for timber-marking paints,** §10-1-126.

**Marking paint.**

Labeling requirements, §10-1-126.

**Measurements,** §10-2-23.

**Paint.**

Labeling requirements of  
timber-marking paint, §10-1-126.

**Sales.**

Timber-marking paint.  
Labeling requirements, §10-1-126.

**Weights and measures.**

Sale and measurements, §10-2-23.

**TIMBER-MARKING PAINT.**

**Labeling requirements,** §10-1-126.

**TIME PRICE DIFFERENTIAL.**

**Retail installment contract,** §10-1-3.

**TITLE.**

**Agents.**

Estoppel to dispute principal's title, §10-6-26.

**TITLE —Cont'd**

**Cotton storage.**

Investigation of adverse titles, §10-4-76.

**TOBACCO.**

**Carry-over storage and sale,** §§10-4-140 to 10-4-155.

**Bonds.**

Licensees, §10-4-144.

Certified public weighers provided by licensee, §10-4-151.

**Charges.**

Division of money received above contract sales price plus charges, §10-4-147.

Maximum charges, §10-4-145.

**Contract sales price.**

Division of money received above, §10-4-147.

Criminal penalty for violations, §10-4-155.

Definitions, §10-4-141.

Division of money received above contract sales price, §10-4-147.

Enforcement of part, §10-4-153.

**Expenses.**

Division of money received above contract sales price plus expenses, §10-4-147.

Maximum expenses, §10-4-145.

**Fees.**

Licenses, §10-4-142.

Injunctions, §10-4-154.

Inspection of premises, §10-4-152.

**Insurance.**

Fire and extended coverage insurance, §10-4-143.

Legislative finding, §10-4-140.

Legislative intent, §10-4-140.

Licenses, §10-4-142.

Bonds of licensees, §10-4-144.

Records and reports, §10-4-148.

Revocation or suspension, §10-4-153.

Statements upon receipt of tobacco, §10-4-146.

Maximum charges and expenses, §10-4-145.

Physical standards for premises, §10-4-152.

Publication of storage and sale records, §10-4-149.

**Receipt of tobacco.**

Statements by licensee, §10-4-146.

**Records, §10-4-148.**

Commissioner to keep storage and sale records, §10-4-149.

**TOBACCO —Cont'd**

**Carry-over storage and sale —Cont'd**

Records —Cont'd

Publication of storage and sale records, §10-4-149.

Regulations for premises, §10-4-152.

Reports, §10-4-148.

Sale not consummated before next season, §10-4-150.

Standards for premises.

Regulations and physical standards, §10-4-152.

Statements upon receipt of tobacco, §10-4-146.

Tender for storage not deemed sale, §10-4-150.

**Certified public weigher's official seal.**

Issuance to licensed tobacco warehousemen, §10-2-46.

**Leaf tobacco.**

Sales, storage, §§10-4-100 to 10-4-123.

Administrative decision review, §10-4-122.

Administrative review of objections to rules and regulations, §10-4-121.

Advisory board.

Duties, §10-4-111.

Meeting, §10-4-111.

Allocating sales opportunities among licensed warehouses, §10-4-104.

Appeals.

Judicial review of administrative decision, §10-4-122.

Auction tobacco dealers.

Licenses, §10-4-114.

Reports and records, §10-4-114.

Bonds.

Nonauction tobacco dealers, §10-4-115.

Carry-over storage and sale generally, §§10-4-140 to 10-4-155.

Certified public weighers.

Nonauction tobacco dealers to provide, §10-4-115.

Provided by licensee, §10-4-117.

Charges for handling and selling.

Itemized statements, §10-4-107.

Maximum charges, §10-4-106.

Clean-up sales.

Licenses, §10-4-101.

Condemnation of tobacco treated with unregistered pesticides, §10-4-117.1.

Correction of violations.

Suspension or revocation of license or registration pending, §10-4-119.

**TOBACCO —Cont'd**

**Leaf tobacco —Cont'd**

Sales, storage —Cont'd

Days of warehouses.

Limitations, §10-4-112.

Detention of tobacco, §10-4-117.1.

Early sales.

Revocation of license, §10-4-111.

Enforcement of part, §10-4-118.

Findings of legislature, §10-4-100.

Flue-cured leaf tobacco auction sales.

Licenses, §10-4-101.

General penalty for violation of part, §10-4-123.

Georgia tobacco marketing act of 1995.

Generally, §10-4-106.

Short title, §10-4-106.

Hearings.

Administrative review of objections to regulations, §10-4-121.

Revocation or suspension proceeding, §10-4-118.

Hours of warehouses.

Limitation, §10-4-112.

Injunctions, §10-4-120.

Inspection of premises, §10-4-116.

Insurance as prerequisite for license, §10-4-103.

Investigation of violations.

Suspension or revocation of license or registration pending, §10-4-119.

Itemized statements, §10-4-107.

Judicial review of administrative decision, §10-4-122.

Legislative intent, §10-4-100.

Licenses.

Allocating sales opportunities, §10-4-104.

Auction tobacco dealers, §10-4-114.

Refusal, suspension or revocation, §10-4-114.

Clean-up sales, §10-4-101.

Compliance with physical standards for warehouses prerequisite, §10-4-102.

Denial, §10-4-105.

Early sales.

Revocation, §10-4-111.

Flue-cured leaf tobacco auction sales, §10-4-101.

Insurance as prerequisite, §10-4-103.

Nonauction tobacco dealers, §10-4-115.

**TOBACCO —Cont'd**

**Leaf tobacco —Cont'd**

Sales, storage —Cont'd

Licenses —Cont'd

Revocation, §10-4-105.

Early sales, §10-4-111.

Notice and hearing, §10-4-118.

Pending investigation and  
correction of action,  
§10-4-119.

Suspension, §10-4-105.

Notice and hearing, §10-4-118.

Pending investigation and  
correction of violation,  
§10-4-119.

Limitation on sales hours and days of  
warehouses, §10-4-112.

Maximum charges for handling and  
selling, §10-4-106.

Itemized statements, §10-4-107.

Maximum rate of sales, §10-4-113.

Nonauction tobacco dealers.

Bond or trust fund agreement,  
§10-4-115.

Certified public weighers to be  
provided, §10-4-115.

Licenses, §10-4-115.

Records and reports, §10-4-115.

Notice of detention of tobacco treated  
with unregistered pesticides,  
§10-4-117.1.

Notice of revocation or suspension  
proceeding, §10-4-118.

Opening date of marketing season,  
§10-4-111.

Revocation of license for early sale,  
§10-4-111.

Pesticides.

Detention of tobacco, §10-4-117.1.

Physical standards for warehouses,  
§10-4-102.

Rate of sales, §10-4-113.

Records, §10-4-108.

Auction tobacco dealers, §10-4-114.

Commissioner of agriculture to keep  
sales records, §10-4-109.

Inspection, §10-4-116.

Nonauction tobacco dealers,  
§10-4-115.

Publication of sales records,  
§10-4-109.

Reports, §10-4-108.

Auction tobacco dealers, §10-4-114.

Nonauction tobacco dealers,  
§10-4-115.

**TOBACCO —Cont'd**

**Leaf tobacco —Cont'd**

Sales, storage —Cont'd

Rules and regulations.

Procedure for adopting or  
changing, §10-4-121.

Sales opportunity allocation, §10-4-104.

Saturdays.

No sale held on, §10-4-112.

Standards.

Physical standards for warehouses,  
§10-4-102.

Sundays.

Warehouses closed, §10-4-112.

Testing of tobacco treated with  
unregistered pesticides.

Costs, §10-4-117.1.

Tobacco contracts, §10-4-107.1.

Weighers.

Certified public weighers provided  
by licensee, §10-4-117.

Nonauction tobacco dealers to  
provide certified public  
weighers, §10-4-115.

Weighing by certified public weighers,  
§10-2-50.

**Sales.**

Leaf tobacco sales and storage.

Carry-over storage and sale, §§10-4-140  
to 10-4-155.

Generally, §§10-4-100 to 10-4-123.

**Storage.**

Leaf tobacco sales and storage.

Carry-over storage and sale, §§10-4-140  
to 10-4-155.

Generally, §§10-4-100 to 10-4-123.

Warehousemen's associations, §§10-4-170  
to 10-4-177.

**Warehousemen's associations, §§10-4-170 to  
10-4-177.**

Arbitration.

Organization of local boards of trade,  
§10-4-171.

Local boards of trade.

Appealing suspension or expulsion,  
§10-4-176.

Arbitrating organization, §10-4-171.

Authorized, §10-4-170.

Categories of membership, §10-4-175.

Liability for board's acts, §10-4-175.

Membership condition for operating  
warehouse, §10-4-174.

Membership fees, §10-4-173.

Participation in allocating sale time,  
§10-4-175.



**TOBACCO —Cont'd**

**Warehousemen's associations —Cont'd**

- Local boards of trade —Cont'd
  - Price fixing or restraint of trade not authorized, §10-4-177.
  - Rules and regulations, §10-4-172.
- Regulation of leaf tobacco selling unaffected, §10-4-177.
- State-wide organization.
  - Appealing suspension or expulsion, §10-4-176.
  - Authorized, §10-4-170.
  - Categories of membership, §10-4-175.
  - Membership condition for operating warehouse, §10-4-174.
  - Membership fees, §10-4-173.
  - Participation in allocating sale time, §10-4-175.
  - Price fixing or restraint of trade not authorized, §10-4-177.
  - Rules and regulations, §10-4-172.

**Weighers.**

- Certified public weighers.
  - Weighing of leaf tobacco, §10-2-50.
- Issuance of certified public weigher's official seal.
- Licensed tobacco warehousemen, §10-2-46.

**TOBACCO PRODUCT**

**MANUFACTURERS' FINANCIAL RESPONSIBILITY.**

**Burdens imposed on state by cigarette smoking, §§10-13-1 to 10-13-4.**

- Copies of settlement available to public, §10-13-4.
- Definitions, §10-13-2.
- Escrow fund.
  - Manufacturers selling cigarettes in state, §10-13-3.
- Legislative findings, §10-13-1.
- Master settlement agreement, §10-13-1.
  - Copies available to public, §10-13-4.
  - Manufactures selling cigarettes in state to participate, §10-13-3.
- Policy of state, §10-13-1.
- Reserve fund, manufacturers not participating in settlement, §10-13-1.

**Master settlement agreement enhancements, §§10-13A-1 to 10-13A-9.**

- Appeals.
  - Review of Attorney General's decision to remove from directory, §10-13A-9.

**TOBACCO PRODUCT**

**MANUFACTURERS' FINANCIAL RESPONSIBILITY —Cont'd**

**Master settlement agreement enhancements —Cont'd**

- Brand families.
  - Certification of compliance with master settlement agreement, §10-13A-3.
  - Defined, §10-13A-2.
- Certification of compliance with master settlement agreement, §10-13A-3.
- Appeals, requirements, §10-13A-9.
- Construction and interpretation.
- Conflicting provisions, §10-13A-9.
- Defined terms, §10-13A-2.
- Directory.
  - Affixing tax stamp to manufacturer or brand not in directory prohibited, §10-13A-5.
  - Availability, §10-13A-4.
  - Defined, §10-13A-2.
  - Foreign nonparticipating manufacturers, §10-13A-6.
  - Review of Attorney General's decision to remove from directory, §10-13A-9.
- Enforcement.
  - Cooperation between commissioner and Attorney General, §10-13A-7.
  - Remedies for noncompliance, §10-13A-8.
- Foreign nonparticipating manufacturers, §10-13A-6.
- Injunctions.
  - Remedies for noncompliance, §10-13A-8.
- Legislative findings, §10-13A-1.
- Noncompliance.
  - Remedies, §10-13A-8.
- Nonparticipating manufacturers.
  - Certification of compliance with master settlement agreement, §10-13A-3.
  - Defined, §10-13A-2.
  - Foreign nonparticipating manufacturers, §10-13A-6.
- Participating manufacturers.
  - Certification of compliance with master settlement agreement, §10-13A-3.
  - Defined, §10-13A-2.
- Prohibited acts.
  - Affixing tax stamp to manufacturer or brand not in directory, §10-13A-5.

**TOBACCO PRODUCT**

**MANUFACTURERS' FINANCIAL RESPONSIBILITY —Cont'd**

**Master settlement agreement enhancements —Cont'd**

Purpose of chapter, §10-13A-1.  
Records.

Documentation provided by distributors, §10-13A-7.

Maintenance, §10-13A-3.

Rules and regulations.

Authority to promulgate, §10-13A-7.

Severability of provisions, §10-13A-9.

Suspension of distributor's license.

Remedies for noncompliance, §10-13A-8.

Updates, §10-13A-4.

**TOBACCO WAREHOUSING.**

**Carry-over storage and sale**, §§10-4-140 to 10-4-155.

**Leaf tobacco sales and storage**, §§10-4-100 to 10-4-123.

**Warehousemen's association**, §§10-4-170 to 10-4-177.

**TOLL-FREE TELEPHONE CALLING.**

**Credit report security freezes.**

Method for requesting, §10-1-914.

**TORTS.**

**Agents**, §10-6-85.

Liability of principal for injuries by other agents, §10-6-39.

Neglect and fraud of agent, §10-6-60.

Willful trespass.

Principal liable for, §10-6-61.

**TOYS.**

**Marks.**

Registration.

Classes of goods, §10-1-443.

**TRACTION ENGINES.**

**Motor vehicles.**

Exceptions to definition of motor vehicle, §§10-1-2, 10-1-31.

**TRACTORS.**

**Farm tractors.**

Lemon law.

Farm tractor warranties, §§10-1-810 to 10-1-819.

**TRADEMARKS AND SERVICE MARKS,**

§§10-1-440 to 10-1-454.

**Counterfeiting**, §10-1-454.

**Definitions**, §§10-1-371, 10-1-440.

Forged or counterfeited trademark, service mark, or copyrighted or registered design, §10-1-454.

**TRADEMARKS AND SERVICE MARKS**

—Cont'd

**Forfeitures.**

Forged or counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.

**Forgery**, §10-1-454.

**Fraud.**

Registration, §10-1-449.

**Infringement**, §§10-1-450, 10-1-451, 10-1-454.

**Petroleum products sales.**

Substitution or misbranding, §10-1-162.

Violations, §10-1-163.

**Registration**, §§10-1-440 to 10-1-454.

Action for infringement, §10-1-450.

Application, §10-1-442.

Fees, §10-1-442.

Limited to one class, §10-1-443.

Assignment, §10-1-446.

Cancellation, §10-1-448.

Fee for voluntary cancellations, §10-1-448.

Certificates, §10-1-444.

New certificate on assignment of registration, §10-1-446.

Classes of goods and services, §10-1-443.

Application limited to one class, §10-1-443.

Common-law rights and marks not affected, §10-1-452.

Counterfeited trademarks, service marks, or copyrighted or registered designs, §10-1-454.

Destruction or disposal, §10-1-451.

Seizure of counterfeit goods, §10-1-451.

Damages for fraud or false representation, §10-1-449.

Damages in action for infringement, §10-1-450.

Damages in injunction actions against infringement, §10-1-451.

Damages to persons having financial interest in seized goods.

Person causing seizure of goods not counterfeit, §10-1-451.

Deceitful use of name or seal, §10-1-453.

Duration, §10-1-445.

Evidence.

Certificates, §10-1-444.

False representations.

Damages, §10-1-449.

Forged trademarks, service marks, or copyrighted or registered designs, §10-1-454.

**TRADEMARKS AND SERVICE MARKS**

—Cont'd

**Registration —Cont'd**

Fraud.

Damages, §10-1-449.

General classes of goods and services,  
§10-1-443.

Goods.

General classes, §10-1-443.

Ineligibility, §10-1-441.

Infringement.

Civil actions, §10-1-450.

Injunctions, §10-1-451.

Injunctions against infringement,  
§10-1-451.

Order of seizure of counterfeit goods,  
§10-1-451.

Profit and damages from infringement,  
§10-1-451.

Record, §10-1-447.

Recordation of assignment, §10-1-446.

Fees, §10-1-446.

Renewal, §10-1-445.

Fees, §10-1-445.

Record, §10-1-447.

Secretary of state.

Cancellation, §10-1-448.

Issuance of certificates, §10-1-444.

Records, §10-1-447.

Service of order of seizure of counterfeit  
goods, §10-1-451.

Services.

General classes, §10-1-443.

Unauthorized and deceitful use of name  
or seal, §10-1-453.

When marks ineligible, §10-1-441.

**TRADE NAMES.**

**Defined,** §10-1-371.

**Petroleum products sales.**

Substitution or misbranding, §§10-1-162,  
10-1-163.

**Registration,** §§10-1-490 to 10-1-493.

Actions by unregistered business.

Costs to be paid if name not  
registered, §10-1-491.

Contracts of unregistered business valid,  
§10-1-491.

Costs to be paid if name not registered,  
§10-1-491.

Exemptions, §10-1-492.

Failure to register, §10-1-493.

Filing of statement of registration,  
§10-1-490.

Indexing of statement of registration,  
§10-1-490.

**TRADE NAMES —Cont'd**

**Registration —Cont'd**

Notice of filing statements, §10-1-490.

Statement of registration, §10-1-490.

**TRADE PRACTICES.**

**Advertising.**

False advertising, §§10-1-420 to 10-1-427.

**Antifreeze sales,** §§10-1-200 to 10-1-211.

**Art.**

Limited edition art reproductions.

General provisions, §§10-1-430 to  
10-1-437.

**Benevolent organizations.**

Emblem or name, §§10-1-470 to  
10-1-472.

**Books, periodicals or magazines.**

Tie-in sales, §§10-1-330, 10-1-331.

**Brake fluid sales.**

General provisions, §§10-1-180 to  
10-1-189.

**Business opportunity sales.**

General provisions, §§10-1-410 to  
10-1-417.

**Buying clubs or services.**

General provisions, §§10-1-590 to  
10-1-605.

**Charities.**

Emblem or name, §§10-1-470 to  
10-1-472.

**Common day of rest.**

General provisions, §§10-1-570 to  
10-1-576.

**Cooking fuels.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

**Copper purchases by junk or metal  
dealers.**

Records, §10-1-351.

**Disaster related violations,** §10-1-438.

**Elderly or disabled persons.**

Unfair or deceptive practices towards,  
§§10-1-850 to 10-1-857.

**Emblems.**

Benevolent organizations, charities,  
fraternal organizations, etc.,  
§§10-1-470 to 10-1-472.

**Fair business practices act of 1975,**

§§10-1-390 to 10-1-407.

**False advertising,** §§10-1-420 to 10-1-427.

**Farm tractor warranty act.**

General provisions, §§10-1-810 to  
10-1-819.

**Fraternal organizations.**

Emblem or name, §§10-1-470 to  
10-1-472.



**TRADE PRACTICES —Cont'd**

**Gasoline.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

Retail petroleum products dealers,  
§§10-1-720, 10-1-721.

**Gasoline below cost sales,** §§10-1-250 to  
10-1-256.

**Gasoline marketing practices.**

General provisions, §§10-1-230 to  
10-1-241.

**Heating fuels.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

**Heavy equipment multiline dealers.**

General provisions, §§10-1-730 to  
10-1-740.

**Illuminating fuels.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

**Junk dealers.**

Recordkeeping, §10-1-351.

**Kerosene.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

**Lease-purchase agreements,** §§10-1-680 to  
10-1-689.

**Lubricating oils.**

Petroleum products sales generally,  
§§10-1-140 to 10-1-169.

**Marine manufacturers,** §§10-1-675 to  
10-1-678.

**Metal dealers.**

Recordkeeping, §10-1-351.

**Motion pictures.**

Bidding by exhibitors, §§10-1-290 to  
10-1-294.

**Motor vehicle financing.**

Retail installment sales contracts.

General provisions, §§10-1-30 to  
10-1-42.

**Motor vehicle franchises.**

General provisions, §§10-1-620 to  
10-1-670.

**Motor vehicle warranties.**

Lemon law, §§10-1-780 to 10-1-797.

**Names.**

Benevolent organizations, charities,  
fraternal organizations, etc.,  
§§10-1-470 to 10-1-472.

Trade names.

Registration generally, §§10-1-490 to  
10-1-493.

**Petroleum product sales.**

General provisions, §§10-1-140 to  
10-1-169.

**TRADE PRACTICES —Cont'd**

**Petroleum products retail dealers,**  
§§10-1-720, 10-1-721.

**Referral sales.**

Furnishing names of prospective  
purchasers.

Sales contract required to state  
consideration, §10-1-70.

**Remanufactured or rebuilt items.**

Labeling requirements, §§10-1-80 to  
10-1-83.

**Retail installment sales contracts and  
revolving accounts.**

General provisions, §§10-1-1 to 10-1-16.

Motor vehicle financing, §§10-1-30 to  
10-1-42.

**Rifles.**

Interstate purchase, §§10-1-100, 10-1-101.

**Secondary metals recyclers.**

General provisions, §§10-1-350 to  
10-1-358.

**Shotguns.**

Interstate purchase, §§10-1-100, 10-1-101.

**Social organizations.**

Emblem or name, §§10-1-470 to  
10-1-472.

**Tie-in sales.**

Books, periodicals or magazines,  
§§10-1-330, 10-1-331.

**Trademarks and service marks registration,**  
§§10-1-440 to 10-1-454.

**Trade names.**

Registration, §§10-1-490 to 10-1-493.

**Trade secrets.**

General provisions, §§10-1-760 to  
10-1-767.

**Uniform deceptive trade practices act.**

General provisions, §§10-1-370 to  
10-1-375.

**Unsolicited or unordered merchandise,**  
§§10-1-50, 10-1-51.

**Weapons.**

Interstate purchase of rifles and  
shotguns, §§10-1-100, 10-1-101.

**Wholesale distribution by out-of-state  
principal.**

General provisions, §§10-1-700 to  
10-1-704.

**TRADE SECRETS,** §§10-1-760 to 10-1-767.

**Actions for recovery of damages for  
misappropriation,** §10-1-763.

**Applicability of article,** §10-1-767.

**Attorneys' fees in misappropriation  
proceedings,** §10-1-764.

**Definitions,** §10-1-761.

**TRADE SECRETS —Cont'd**

**Discovery.**

Protection of trade secrets during misappropriation actions, §10-1-765.

**Georgia trade secrets act of 1990.**

Short title, §10-1-760.

**Injunctive relief, §10-1-762.**

Attorneys' fees, §10-1-764.

Protection of secret during action, §10-1-765.

**Limitation of actions, §10-1-766.**

**Other laws of state providing civil remedies for misappropriation.**

Article to supersede, §10-1-767.

**Protection of trade secrets during misappropriation proceedings, §10-1-765.**

**Short title.**

Georgia trade secrets act of 1990, §10-1-760.

**TRADE SECRETS ACT OF 1990.**

**General provisions, §§10-1-760 to 10-1-767.**

**Short title.**

Georgia trade secrets act of 1990, §10-1-760.

**TRADE SHOWS.**

**Geo. L. Smith II Georgia World Congress Center.**

General provisions, §§10-9-1 to 10-9-61.

**TRAVELING SALESMEN.**

**Door-to-door sales.**

Cancellation of home solicitation sales.  
Buyer's right, §10-1-6.

**Patent rights, copyrights or proprietary rights.**

Consideration to be stated on contract of sale, §10-3-3.

Penalty for violations, §10-3-5.

Purchaser takes subject to equities, §10-3-4.

**TRESPASS.**

**Agents.**

Principal liable for agent's willful trespass, §10-6-61.

**TRUSTS AND TRUSTEES.**

**Accounts and accounting.**

Account by trustee required, §10-6-30.

**Art.**

Consignment of art.

Consigned work of art as trust property, §§10-1-524, 10-1-525.

**Cemeteries.**

Preconstruction trust funds, §10-14-29.

**TRUSTS AND TRUSTEES —Cont'd**

**Cemeteries —Cont'd**

Trust fund, §10-14-6.

Perpetual care cemeteries, §§10-14-4, 10-14-6, 10-14-7, 10-14-12.

**Conveyances by attorneys in fact, §10-6-4.**

**Signatures.**

Liability of persons signing instrument as fiduciary, §10-6-86.

**U**

**UNDERSERVANTS.**

**Torts.**

Principals' liability, §10-6-85.

**UNEMPLOYMENT COMPENSATION.**

**Fraud.**

Fair business practices act of 1975, §10-1-392.

Uniform deceptive trade practices act, §10-1-372.

**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES, §§10-1-370 to 10-1-407.**

**Advertising.**

Fair business practices act of 1975, §10-1-393.

Uniform deceptive trade practices act, §10-1-372.

**Art.**

Limited edition art reproductions.  
General provisions, §§10-1-430 to 10-1-437.

**Benevolent organizations.**

Emblem or name, §§10-1-470 to 10-1-472.

**Business opportunity sales, §10-1-417.**

General provisions, §§10-1-410 to 10-1-417.

**Charities.**

Emblem or name, §§10-1-470 to 10-1-472.

**Elderly or disabled persons, §§10-1-850 to 10-1-857.**

Additional civil penalty for violations, §10-1-851.

Cause of action, §10-1-853.

Complaints, §10-1-857.

Confidentiality of information, §10-1-856.

Construction of provisions, §10-1-856.

Damages, §10-1-853.

Definitions, §10-1-850.

Educational initiatives as to consumer crimes, §10-1-854.

Intervention and assistance, §10-1-855.

**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES —Cont'd**

**Elderly or disabled persons —Cont'd**

- Investigations, §10-1-857.
- Penalties.
  - Additional civil penalty, §10-1-851.
  - Amount, §10-1-852.
  - Determination to impose, §10-1-852.
- Referral procedures.
  - Providing intervention and assistance, §10-1-855.
- State-wide educational initiatives, §10-1-854.

**Emblems.**

- Benevolent organizations, charities, fraternal organizations, etc., §§10-1-470 to 10-1-472.

**Emergencies and disasters, §10-1-438.**

**Fair business practices act of 1975, §§10-1-390 to 10-1-407.**

- Actions by individuals, §10-1-399.
- Limitation on recovery in case of bona fide error, §10-1-400.

**Administrative resolution.**

- Administrator.
  - Consumer preventive education plan.
    - Authority to establish, §10-1-381.
  - Defined, §10-1-380.
  - Filings in court, §10-1-381.
  - Reports, §10-1-382.
- Consumer preventive education plan.
  - Administrator authorized to establish, §10-1-381.

**Judgments.**

- Collection, §10-1-381.
- Fees, §10-1-382.
- Venue of filing, §10-1-381.

**Administrator.**

- Administrative resolution.
  - Generally, §§10-1-380 to 10-1-382.
- Adoption of rules and regulations, §10-1-394.
- Appeal from order, §10-1-398.1.
- Appointment by governor, §10-1-395.
- Authority to impose civil penalty, §10-1-397.
- Authority to issue cease and desist orders, §10-1-397.
- Complaints received by, §10-1-395.
- Defined, §10-1-392.
- Duties formally performed by consumer services unit, §10-1-395.
- Initiation or intervention by, §10-1-397.1.

**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES —Cont'd**

**Fair business practices act of 1975 —Cont'd**

**Administrator —Cont'd**

- Service of complaint on, §10-1-399.
- Subpoena and hearing powers, §10-1-404.

**Advertising.**

- Unlawful consumer transactions generally, §10-1-393.

**Appeals from orders of administrator, §10-1-398.1.**

**Assurances of voluntary compliance, §10-1-402.**

**Bait and switch, §10-1-393.**

**Bona fide error.**

- Limitation on recovery in case of, §10-1-400.

**Buying clubs or services.**

- Applicability of act, §10-1-602.

**Campground membership facilities.**

- Deceptive practices in consumer transactions, §10-1-393.

**Defined, §10-1-392.**

**Career consulting firms.**

- Deceptive practices in consumer transactions, §10-1-393.

**Defined, §10-1-392.**

**Cease and desist orders, §10-1-397.**

**Appeals, §10-1-398.1.**

**Stay and hearing, §10-1-398.**

**Child support collectors, private.**

- Contract requirements, §10-1-393.10.

**Registration, §10-1-393.9.**

**Citation of part as fair business practices act of 1975, §10-1-390.**

**Civil or equitable remedies by individuals, §10-1-399.**

**Civil penalties, §10-1-397.**

- Violating injunction, §10-1-405.

**Complaints received by administrator, §10-1-395.**

**Compliance with part.**

- Assurances of voluntary compliance, §10-1-402.

**Compromise and settlement.**

- Penalties, §10-1-405.
- Written tender of settlement, §10-1-399.

**Confidentiality of information, §10-1-404.**

**Construction of part, §10-1-391.**

**Consumer advisory board.**

- Appointment by governor, §10-1-395.
- Chairman, §10-1-395.



**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES —Cont'd**

**Fair business practices act of 1975**

**—Cont'd**

- Consumer advisory board —Cont'd
  - Created, §10-1-395.
  - Duties, §10-1-395.
  - Expenses, §10-1-395.
  - Meetings, §10-1-395.
  - Number of members, §10-1-395.
  - Ratification or veto of rules, §10-1-394.
  - Terms of members, §10-1-395.
  - Vacancies, §10-1-395.
- Consumer transactions considered deceptive practices, §10-1-393.
- Credit cards.
  - Prohibited use of information by merchants, §10-1-393.3.
  - Unsolicited offer to apply by mail.
    - Address on application in response not substantially same as address on solicitation.
    - Verification of applicant's address required, §10-1-393.
- Cumulative effect of part, §10-1-407.
- Deceptive practices in consumer transactions, §10-1-393.
  - Business opportunity sales, §10-1-417.
- Declaratory judgments, §10-1-397.
- Definitions, §10-1-392.
  - Merchant, §10-1-393.3.
- Duty of prosecuting attorneys, §10-1-406.
- Dwellings of debtors.
  - Purchase when loan in default.
    - Deceptive practices in consumer transactions, §10-1-393.
- Emergencies.
  - Prohibited pricing practices during state of emergency, §10-1-393.4.
- Evidence.
  - Demand for evidence in investigation, §10-1-403.
- Examples of consumer transactions.
  - Considered unlawful, §10-1-393.
- Exclusivity of part.
  - Part not exclusive, §10-1-407.
- Exemptions from part, §10-1-396.
- False or misleading statements.
  - Consumer transactions unlawful, §10-1-393.
- Federal rules prohibiting unfair or deceptive practices, §10-1-394.
- Final judgment admissible as prima facie evidence, §10-1-397.
- Going-out-of-business sales.
  - Deceptive practices in consumer transactions, §10-1-393.

**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES —Cont'd**

**Fair business practices act of 1975**

**—Cont'd**

- Going-out-of-business sales —Cont'd
  - Defined, §10-1-392.
- Health benefit plans, §10-1-393.
- Health spas.
  - Consumer transactions unlawful, §10-1-393.
  - Defined, §10-1-392.
  - Requirements for, §10-1-393.2.
- Hearing powers of administrator, §10-1-404.
- Hearings on cease and desist orders, §10-1-398.
- Home repair or home improvement work.
  - Prohibited activities, criminal penalty, investigations, §10-1-393.5.
- Hospital or long-term care facilities.
  - Deceptive practices in consumer transactions, §10-1-393.
- Immunity from self-incrimination, §10-1-404.
- Individual liability for intentional violation, §10-1-405.
- Injunctions, §10-1-397.
  - By individuals, §10-1-399.
  - Civil penalties for violations, §10-1-405.
- Intentional violations, §10-1-392.
  - Individual liability, §10-1-405.
- Intent of general assembly, §10-1-391.
- Internet.
  - Prohibited activities, §10-1-393.5.
- Investigations, §10-1-403.
- Liability of manufacturers or suppliers.
  - For act or omission under part.
    - Damages assessed against or suffered by retailers, §10-1-399.
- Limitation of actions, §10-1-401.
- Marine membership facilities.
  - Deceptive practices in consumer transactions, §10-1-393.
  - Defined, §10-1-392.
- Misrepresentation.
  - Consumer transactions considered unlawful, §10-1-393.
- Nonlocal business publishing local number in classified telephone directory.
  - Nondisclosure of nonlocal location, §10-1-393.
- Notice of intentional violation of part, §10-1-392.

**UNFAIR OR DECEPTIVE TRADE PRACTICES —Cont'd**

**Fair business practices act of 1975**

—Cont'd

- Notice that proceeding seeking judicial relief contemplated, §10-1-397.
- Odometers on motor vehicles.
  - Consumer transactions, §10-1-393.
- Office suppliers.
  - Defined, §10-1-392.
  - Transactions unfair or deceptive, §10-1-393.1.
- Preneed service contracts.
  - Solicitation during final illness to seek refund, §10-1-393.7.
- Promotions.
  - Deceptive practices in consumer transactions, §10-1-393.
  - Defined, §10-1-392.
- Prosecuting attorneys.
  - Duties, §10-1-406.
- Publishers, newspapers, periodicals or radio or television stations.
  - Exemptions from part, §10-1-396.
- Purposes of part, §10-1-391.
- Real estate transactions.
  - Issuance of check or draft by lender in connection with, §10-1-393.
- Receivers, auditors or conservators.
  - Appointment, §10-1-397.
- Restitution to persons adversely affected, §10-1-397.
- Rules and regulations, §10-1-394.
- Self-incrimination, §10-1-404.
- Service of process on administrator, §10-1-399.
- Setoff of damages or penalties, §10-1-401.
- Short title, §10-1-390.
- Social security numbers.
  - Protection, prohibited display or posting, §10-1-393.8.
- Stay of cease and desist orders, §10-1-398.
- Subpoena powers of administrator, §10-1-404.
- Telemarketing.
  - Prohibited activities, §§10-1-393, 10-1-393.5.
  - Criminal penalties, §10-1-393.6.
- Telephone calls imposing per-call charge or cost.
  - Deceptive practices in consumer transactions, §10-1-393.
  - Suspension of charges by administrators, §10-1-397.

**UNFAIR OR DECEPTIVE TRADE PRACTICES —Cont'd**

**Fair business practices act of 1975**

—Cont'd

- Telephone directory listings.
  - Solicitations for, §10-1-393.1.
- Vacations or holidays.
  - Deceptive practices in consumer transactions, §10-1-393.
- Violations of part.
  - Intentional violation, §10-1-392.
  - Individual liability, §10-1-405.
- Voluntary compliance.
  - Assurances, §10-1-402.
- False advertising.**
  - General provisions, §§10-1-420 to 10-1-427.
- Fraternal organizations.**
  - Emblem or name, §§10-1-470 to 10-1-472.
- Gasoline marketing practices.**
  - Blenders.
    - Defined, §10-1-232.
    - Suppliers not to inhibit distributors from being, §10-1-234.1.
  - Selling controlled product to another distributor for retail sales, §10-1-234.
  - Selling to other dealers at distress prices, §10-1-234.
- Humane organizations.**
  - Emblem or name, §§10-1-470 to 10-1-472.
- Marine manufacturers.**
  - Termination of contractual relationship between dealer and manufacturer, §10-1-677.
- Motion pictures.**
  - Bidding by exhibitors, §§10-1-290 to 10-1-294.
- Motor vehicle fair practices act, §§10-1-660 to 10-1-664.1.**
- Names.**
  - Benevolent organizations, charities, fraternal organizations, etc., §§10-1-470 to 10-1-472.
  - Trade names.
    - Registration generally, §§10-1-490 to 10-1-493.
- Social organizations.**
  - Emblem or name, §§10-1-470 to 10-1-472.
- Social security numbers.**
  - Protection, prohibited display or posting, §10-1-393.8.
- Telemarketing deception, fraud or abuse, §§10-5B-1 to 10-5B-8.**

**UNFAIR OR DECEPTIVE TRADE**

**PRACTICES —Cont'd**

**Tobacco master settlement agreement enhancements.**

Unlawful sale or distribution of noncomplying cigarettes, §10-13A-8.

**Trademarks and service marks.**

General provisions, §§10-1-440 to 10-1-454.

**Trade names.**

Registration generally, §§10-1-490 to 10-1-493.

**Uniform deceptive trade practices act, §§10-1-370 to 10-1-375.**

Advertising generally, §10-1-372.

Bait and switch, §10-1-372.

Citation of part as uniform deceptive trade practices act, §10-1-370.

Common law and other remedies unaffected by part, §10-1-372.

Construction of part, §10-1-375.

Cumulative effect of part, §10-1-373.

Deceptive trade practices generally, §10-1-372.

Definitions, §10-1-371.

Exemptions from part, §10-1-374.

False or misleading statements generally, §10-1-372.

Injunctions, §10-1-373.

Misrepresentation.

Deceptive practices generally, §10-1-372.

Publishers, broadcasters, printers, etc.

Exemptions from part, §10-1-374.

Short title, §10-1-370.

**UNIFORM DECEPTIVE TRADE PRACTICES ACT.**

General provisions, §§10-1-370 to 10-1-375.

Short title, §10-1-370.

**UNIFORM ELECTRONIC TRANSACTIONS ACT.**

General provisions, §§10-12-1 to 10-12-20.

Short title, §10-12-1.

**UNIFORM SECURITIES ACT OF 2008.**

General provisions, §§10-5-1 to 10-5-90.

Short title.

Georgia uniform securities act of 2008, §10-5-1.

**UNITED STATES.**

**Warehouses.**

State licensed and bonded warehouses.

Special rates for United States, §10-4-26.

**UNIVERSITIES AND COLLEGES.**

**Identity theft.**

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**Personal information.**

Identity theft.

Breach of security regarding personal information.

Notification requirements, §10-1-912.

Data collector defined, §10-1-911.

**Retail installment and home solicitation sales act.**

Inapplicability of article to educational entities and student loan transactions, §10-1-16.

**UNIVERSITY SYSTEM OF GEORGIA.**

**Board of regents.**

Seed capital fund.

General provisions, §§10-10-1 to 10-10-7.

**Retail installment and home solicitation sales act.**

Inapplicability of article to educational entities and student loan transactions, §10-1-16.

**UNJUST ENRICHMENT.**

**Business opportunity sellers or multilevel distribution companies.**

Remedies of purchaser or participant.

Not entitled to unjust enrichment by exercising remedies, §10-1-417.

**Trade secrets, misappropriation.**

Recovery of damages for unjust enrichment, §10-1-763.

**UNSOLICITED MERCHANDISE.**

Not to be sent, §§10-1-50, 10-1-51.

**UTILITY CONTRACTORS.**

**Telemarketing deception, fraud or abuse, §10-5B-5.**

Required and prohibited telephone conduct and activities, §10-5B-4.

**V**

**VENUE.**

**Cemeteries.**

Civil war criminal actions, §10-14-13.

**Commodities and commodity contracts and options.**

Civil and criminal actions, §10-5A-23.



**VENUE —Cont'd**

**Fair business practices act of 1975.**

Administrative resolution.

Filing by administrator, §10-1-381.

**Geo. L. Smith II Georgia World Congress Center.**

Actions against authority under chapter, §10-9-11.

**Heavy equipment multiline dealers.**

Cases and controversies arising under article, §10-1-739.

**Motor vehicle franchise practices act.**

Actions against corporate manufacturer, franchisor or distributor, §10-1-623.

**VERIFICATION.**

**Trade name registration,** §10-1-490.

**VEXATIOUS ACTIONS AND DEFENSES.**

**Wholesale distribution by out-of-state principal.**

Actions for timely payment of commission, §10-1-702.

**VICARIOUS LIABILITY.**

**Securities.**

Agents, broker-dealers, investment advisers and investment adviser representatives.

Discipline of person controlling, §10-5-41.

Joint and several liability, §10-5-58.

**VIRGIN ISLANDS.**

**State.**

Defined, §10-5-2.

**W**

**WAIVER.**

**Agents.**

Wholesale distribution by out of state principal.

Waiver of law, §10-1-703.

**Lemon law.**

Motor vehicles.

Waiver of rights by consumer prohibited, §10-1-797.

**Securities.**

Registration of securities.

Waiver of requirements by commissioner, §10-5-26.

**WAR.**

**Powers of attorney.**

Death of armed forces personnel.

Effect, §10-6-35.

**WAREHOUSE ACT.**

**General provisions.**

State licensed and bonded warehouses, §§10-4-1 to 10-4-33.

**Short title.**

Georgia state warehouse act, §10-4-1.

**WAREHOUSEMEN'S ASSOCIATIONS.**

**General provisions,** §§10-4-170 to 10-4-177.

**WAREHOUSES.**

**Convenience warehousing,** §§10-4-190 to 10-4-193.

**Cotton.**

Storage generally, §§10-4-70 to 10-4-81.

**Indorsements.**

Obligation of warehousemen to deliver.

Demand accompanied by indorsements, §10-4-21.

**Prudent person rule.**

Obligation of warehouseman to deliver agricultural product, §10-4-21.

**Self-service storage facilities.**

General provisions, §§10-4-210 to 10-4-215.

**State licensed and bonded warehouses,** §§10-4-1 to 10-4-33.

Actions on bonds, §10-4-14.

Adequate measures regarding goods.

Duty of persons accepting warehouse receipts, §10-4-33.

Administrative procedure.

Judicial review of administrative decision, §10-4-9.

Rules and regulations.

Administrative review of objections, §10-4-6.

**Appeals.**

Judicial review of administrative decisions, §10-4-9.

**Bond.**

Actions, §10-4-14.

Additional bond, §10-4-12.

Breach, §10-4-14.

Designated as state bonded, §10-4-13.

Examiners, §10-4-16.

Grain dealers, §10-4-12.

Immunity of sureties for criminal penalties, §10-4-32.

Inspectors, §10-4-16.

Required, §10-4-12.

Supervisor of state warehouse section, §10-4-3.

Care required in protection of products, §10-4-21.

Certified public weighers to be provided, §10-4-27.

**WAREHOUSES —Cont'd**

**State licensed and bonded warehouses —Cont'd**

- Charges.
  - Changes, §10-4-26.
  - Duplication prohibited, §10-4-26.
  - Schedule to be filed, §10-4-26.
  - Special rates for United States, §10-4-26.
- Commissioner of agriculture.
  - Appointment of supervisor of state warehouse section, §10-4-3.
  - Duties, §10-4-5.
  - Powers, §10-4-5.
- Criminal penalties for violations, §10-4-32.
- Definitions, §10-4-2.
- Delivery of products.
  - Products described on receipt.
    - Obligation of warehouseman, §10-4-21.
  - Surrender and cancellation of receipts, §10-4-22.
- Delivery to warehouse.
  - Presumed to be delivered for storage, §10-4-18.
- Designated as state bonded, §10-4-13.
- Effect of loss or damage, §10-4-21.
- Election to be covered by article, §10-4-4.
  - License for person electing, §10-4-11.
- Evidence.
  - Inspection reports, §10-4-15.
- Examiner's bond, §10-4-16.
- Exemption from convenience warehousing act, §10-4-191.
- Exemptions from article, §10-4-4.
- Fees.
  - License fees, §10-4-17.
  - Uniform application, §10-4-7.
- Findings as to violations, §10-4-31.
- Georgia state warehouse act.
  - Short title, §10-4-1.
- Grain dealers as warehousemen.
  - Bond, §10-4-12.
- Immunity of sureties for criminal penalties, §10-4-32.
- Impoundment of records and commodities.
  - Pending investigation or correction of violation, §10-4-29.
- Impoundment of unused receipts upon suspension or revocation of license, §10-4-30.
- Inspections, §10-4-15.
  - Bond of inspector, §10-4-16.

**WAREHOUSES —Cont'd**

**State licensed and bonded warehouses —Cont'd**

- Inspections —Cont'd
  - Records, §10-4-24.
- Insurance on stored products.
  - When required, §10-4-25.
- Interstate commerce regulations not affected, §10-4-8.
- Investigation of violations.
  - Impoundment of records and commodities pending investigation, §10-4-29.
  - Suspension of license pending investigation, §10-4-29.
- Judicial review of administrative decisions, §10-4-9.
- Licenses.
  - Application, §10-4-10.
  - Designated as state bonded, §10-4-13.
  - Fees, §10-4-17.
  - Issuance, §10-4-10.
  - List of terminations, §10-4-31.
  - Persons electing to comply with article and regulations, §10-4-11.
  - Renewal, §10-4-10.
  - Required, §10-4-10.
  - Suspension or revocation for violation, §10-4-30.
    - Suspension pending investigation or correction of violation, §10-4-29.
- Liquidation proceedings.
  - Suspension or revocation of license for violation, §10-4-30.
- List of licensed and bonded warehouses, §10-4-31.
- Loss or damage of product.
  - Effect, §10-4-21.
- Notice of breach of bond, §10-4-14.
- Obligation of warehouseman to deliver products, §10-4-21.
- Orders.
  - Uniform application, §10-4-7.
- Presumption of delivery for storage, §10-4-18.
- Prudent man rule.
  - Care required in protection of property, §10-4-21.
- Receipts.
  - Cancellation on delivery, §10-4-22.
  - Duty of persons accepting warehouse receipts.
    - Adequate measures regarding goods, §10-4-33.
  - Electronic receipts.
    - Use authorized, §10-4-19.

**WAREHOUSES —Cont'd**

**State licensed and bonded warehouses —Cont'd**

**Receipts —Cont'd**

- Essential terms, §10-4-20.
- Impoundment of unused receipts upon suspension or revocation of license, §10-4-30.
- Liability for omission of terms, §10-4-20.
- Obligation to deliver product described on, §10-4-21.
- Obtaining printed forms, §10-4-19.
- Required, §10-4-19.
- Surrender on delivery, §10-4-22.

**Receivership.**

- Suspension or revocation of license for violation, §10-4-30.

**Records, §10-4-23.**

- Impoundment pending investigation or correction of violation, §10-4-29.
- Inspection, §10-4-24.
- Preservation when license terminated, §10-4-24.

**Reports, §10-4-5.**

- Inspection reports as evidence, §10-4-15.

**Rules and regulations, §10-4-5.**

- Administrative review of objections, §10-4-6.
- Interstate commerce regulations not affected, §10-4-8.
- Procedure for adopting or changing, §10-4-6.
- Uniform application, §10-4-7.

**Scales.**

- Disapproved scales not to be used, §10-4-28.
- Examinations, §10-4-28.
- Provided, §10-4-28.

**Short title.**

- Georgia state warehouse act, §10-4-1.

**State warehouse section.**

- Established within marketing division of department of agriculture, §10-4-3.
- Supervisor, §10-4-3.

**Uniform application of orders, fees, rules and regulations, §10-4-7.**

**United States.**

- Special rates for, §10-4-26.

**Weighers.**

- Certified public weighers to be provided, §10-4-27.

**WAREHOUSES —Cont'd**

**State warehouse commissioner, §§10-4-50 to 10-4-60.**

- Acquisition of property, §10-4-55.
- Actions by and against commissioner, §10-4-53.
- Bond of commissioner, §10-4-51.
- Bond of employees, §10-4-52.
- Commissioner of agriculture. Designated as, §10-4-50.
- Compress plant by commissioner. Purchase or lease of or contracting for, §10-4-56.
- Cooperation with other states, §10-4-59.
- Cotton on storage. Duties of commissioner generally, §10-4-54. Limitations on liability, §10-4-53. Linters not to be stored, §10-4-53.
- Designation of commissioner, §10-4-50.
- Duties of commissioner, §10-4-54.
- Employees. Appointment and bonding, §10-4-52.
- Erection of warehouses. Encouraging, §10-4-55.
- Fire insurance, §10-4-57.
- Insurance. Fire insurance, §10-4-57.
- Interstate board. Cooperation with other states in operation and promotion, §10-4-59.
- Report, §10-4-58.
- Rules and regulations, §10-4-52.
- State debt not created, §10-4-60.
- Venue. Actions by and against commissioner, §10-4-53.

**Tobacco.**

- General provisions, §§10-4-100 to 10-4-155.
- Warehousemen's associations, §§10-4-170 to 10-4-177.

**WARRANTIES.**

**Agriculture.**

- Farm tractor warranty act. General provisions, §§10-1-810 to 10-1-819.

**Art.**

- Limited edition art reproductions. Express warranties, §10-1-433.

**Assistive technology warranties, §§10-1-870 to 10-1-875.**

**Disabled persons.**

- Assistive technology warranties, §§10-1-870 to 10-1-875.



## INDEX

### **WARRANTIES —Cont'd**

#### **Express warranties.**

Limited edition art reproductions,  
§10-1-433.

#### **Farm tractors.**

Motor vehicle fair practices act,  
§10-1-661.

Warranty service and repair of  
predelivery transportation damages.

General provisions, §§10-1-640 to  
10-1-645.

#### **Lemon law.**

Farm tractors, §§10-1-810 to 10-1-819.

Motor vehicles, §§10-1-780 to 10-1-797.

#### **Motorized wheelchair warranties,**

§§10-1-890 to 10-1-894.

#### **Motor vehicles.**

Attorneys' fees, §10-1-643.

Franchises generally, §§10-1-620 to  
10-1-670.

Lemon law, §§10-1-780 to 10-1-797.

Recreational vehicle dealers.

Warranty work and service,  
§10-1-679.10.

Warranty service and repair of  
predelivery transportation damages,  
§§10-1-640 to 10-1-645.

#### **Recreational vehicle dealers.**

Warranty work and service, §10-1-679.10.

### **WARRANTS.**

#### **Agriculture.**

Inspections, §10-1-148.

#### **Petroleum storage.**

Inspections, §10-1-148.

### **WEAPONS.**

#### **Business records, §§10-11-1 to 10-11-3.**

#### **Firearms.**

Interstate purchase of rifles or shotguns.

Georgia residents, §10-1-100.

Nonresidents in Georgia, §10-1-101.

#### **Firearms dealers.**

Interstate purchase of rifles and  
shotguns.

Georgia residents, §10-1-100.

Nonresidents in Georgia, §10-1-101.

#### **Interstate purchase of rifles or shotguns.**

Georgia residents, §10-1-100.

Nonresidents in Georgia, §10-1-101.

#### **Records.**

Business records generally, §§10-11-1 to  
10-11-3.

#### **Rifles.**

Interstate purchase, §§10-1-100, 10-1-101.

### **WEAPONS —Cont'd**

#### **Sales.**

Interstate purchase of rifles or shotguns,  
§§10-1-100, 10-1-101.

Georgia residents, §10-1-100.

Nonresidents in Georgia, §10-1-101.

#### **Shotguns.**

Interstate purchase, §§10-1-100, 10-1-101.

Georgia residents, §10-1-100.

Nonresidents in Georgia, §10-1-101.

### **WEIGHERS.**

**Certified public weighers, §§10-2-40 to  
10-2-54.**

**WEIGHTS AND MEASURES, §§10-2-1 to  
10-2-54.**

#### **Advertisements of packaged commodities.**

Quantity with retail price stated,  
§10-2-13.

#### **Appeal of imposition of penalty, §10-2-21.**

#### **Bulk sales.**

Heating fuel delivery tickets, §10-2-10.

**Certified public weighers, §§10-2-40 to  
10-2-54.**

Administrative penalty for violation of  
article, §10-2-53.

Appeals of imposition of  
administrative penalty, §10-2-53.

Application for license, §10-2-41.

Coal or coke.

Sale by itinerant dealers without  
having weight certified, §10-2-51.

Commissioner of agriculture.

Administration of article, §10-2-52.

Criminal penalties for violations,  
§10-2-54.

Duration of license, §10-2-42.

Duties, §10-2-48.

Fees for license, §10-2-42.

Forfeiture of seals, §10-2-54.

Hearing on revocation of license,  
§10-2-43.

Hearings on imposition of administrative  
penalty, §10-2-53.

Issuance of certificates of weight,  
measure and count.

Duties, §10-2-48.

Issuance of license, §10-2-41.

Leaf tobacco sales and storage.

Nonauction tobacco dealers to  
provide, §10-4-115.

Provided by licensees, §10-4-117.

Livestock.

Regulation of auction barn, §10-2-52.

Weighing, §10-2-50.

**WEIGHTS AND MEASURES —Cont'd**

**Certified public weighers —Cont'd**

Malfeasance or violation.

Revocation of license, §§10-2-43,  
10-2-54.

Persons who may be licensees and  
known as, §10-2-40.

Requirement of license, §10-2-41.

Revocation of license, §10-2-43.

Malfeasance or violation, §10-2-54.

Rules and regulations, §10-2-52.

Seals.

Costs, §10-2-42.

Forfeiture, §10-2-54.

Issuance to licensed tobacco  
warehousemen, §10-2-46.

Official seal, §10-2-45.

Return on termination of duties,  
§10-2-47.

State licensed and bonded warehouses to  
provide, §10-4-27.

Title of licensed person, §10-2-40.

Tobacco.

Carry-over storage and sale.

Provided by licensee, §10-4-151.

Issuance of official seals to licensed  
tobacco warehousemen, §10-2-46.

Weighing leaf tobacco, §10-2-50.

Untested weight, measure or device.

Use, §10-2-49.

Warehousemen.

Issuance of official seal to licensed  
tobacco warehousemen, §10-2-46.

**Coal or coke.**

Sale by itinerant dealers without having  
weight certified, §10-2-51.

**Commercial weighing and measuring  
devices.**

Technical requirements, §10-2-4.

**Commissioner of agriculture.**

Administration of article, §10-2-52.

Commissioner defined, §10-2-1.

Duties, §10-2-5.

Inspection of premises and vehicles,  
§10-2-6.

Powers, §§10-2-5, 10-2-6.

Secondary standards, §10-2-3.

Seizure of illegal weights, measures or  
commodities, §10-2-6.

Stop-use or stop-sale, hold and removal  
orders, §10-2-6.

**Compressed natural gas.**

Manner of display of measurements on  
dispensing devices, §10-2-19.

**Confiscation.**

Seizure of illegal weights, measures or  
commodities, §10-2-6.

**WEIGHTS AND MEASURES —Cont'd**

**Deception in pricing by weight, measure or  
count, §10-2-8.**

**Definitions, §10-2-1.**

**Devices.**

Compressed natural gas.

Display of measurement on dispensing  
devices, §10-2-19.

Grain moisture testing devices, §§10-2-15,  
10-2-16.

Presumption of use in business, §10-2-18.

Technical requirements for commercial  
devices, §10-2-4.

**Fraud.**

Deception in pricing by weight, measure  
or count, §10-2-8.

**Gasoline pumps.**

Condemnation of inaccurate pumps,  
§10-1-159.

Inspection of self-measuring pumps,  
§10-1-159.

Operating condemned self-measuring  
pumps, §10-1-167.

Operating short-measure gasoline  
pumps, §10-1-168.

Sealing accurate pumps, §10-1-159.

**Grain moisture testing equipment.**

Operator to obtain permit, §10-2-16.

Standards and inspections, §10-2-15.

**Hearings on imposition of penalty,  
§10-2-21.**

**Heating fuel.**

Delivery tickets for bulk sales and bulk  
deliveries, §10-2-10.

**Incorrect weight or measure.**

Using or possessing, §10-2-14.

**Injunctions, §10-2-20.**

**Inspections.**

Grain moisture testing equipment,  
§10-2-15.

Power of commissioner, §10-2-6.

Scales used in intrastate shipments,  
§10-2-17.

**Judgment on imposition of administrative  
penalty, §10-2-21.**

**Liquid form commodities.**

Permissible methods of selling, §10-2-9.

**Marks.**

Removal, §10-2-14.

**Metric system.**

Recognized systems, §10-2-2.

**Misrepresentation.**

Pricing by weight, measure or count,  
§10-2-8.

Quantity in selling or buying, §10-2-7.

**WEIGHTS AND MEASURES —Cont'd**

**Natural gas.**

Compressed gas dispensing devices,  
manners of display of  
measurements, §10-2-19.

**Obstruction of enforcement of laws  
dealing with weights and measures,**  
§10-2-14.

**Orders.**

Power of commissioner, §10-2-6.

**Packages.**

Advertisements to state quantity with  
retail price, §10-2-13.  
Information required, §10-2-11.  
Unit price on packages with random  
weights, §10-2-12.

**Permits.**

Grain moisture testing equipment  
operators, §10-2-16.

**Petroleum products sales.**

Calibration of measures and  
condemnation of inaccurate  
measures, §10-1-160.

**Pumps.**

Condemnation of inaccurate pumps,  
§10-1-159.  
Inspection of self-measuring pumps,  
§10-1-159.  
Operating condemned self-measuring  
pumps, §10-1-167.  
Operating short-measure gasoline  
pumps, §10-1-168.  
Sealing accurate pumps, §10-1-159.

**Poles,** §10-2-23.

**Presumption of use of device in business,**  
§10-2-18.

**Prices.**

Advertisements of packaged commodities  
to state quantity with retail price,  
§10-2-13.  
Misrepresentation or deception by  
weight, measure or count, §10-2-8.  
Packages with random weights.  
Unit price required, §10-2-12.

**Primary standards,** §10-2-3.

Defined, §10-2-1.

**Pulpwood,** §10-2-23.

**Quantity.**

Misrepresentation in selling or buying,  
§10-2-7.  
Permissible methods of selling, §10-2-9.

**Recognized systems,** §10-2-2.

**Right of entry.**

Power of commissioner to inspect,  
§10-2-6.

**WEIGHTS AND MEASURES —Cont'd**  
**Rules and regulations.**

Criminal penalty for violating, §10-2-22.

**Sawtimber,** §10-2-23.

**Scales used in intrastate shipments.**

Inspection, §10-2-17.

**Seals.**

Certified public weighers.  
Costs, §10-2-42.  
Forfeiture, §10-2-54.  
Issuance to licensed tobacco  
warehousemen, §10-2-46.  
Official seal, §10-2-45.  
Return on termination of duties,  
§10-2-47.  
Removal, §10-2-14.

**Secondary standards.**

Defined, §10-2-1.  
Prescribing and verifying, §10-2-3.

**Solid form commodities.**

Permissible methods of selling, §10-2-9.

**Standards.**

Primary standards, §10-2-3.  
Defined, §10-2-1.  
Secondary standards.  
Defined, §10-2-1.  
Prescribing and verifying, §10-2-3.

**Stop-use or stop-sale orders,** §10-2-6.

**Systems.**

Recognized systems, §10-2-2.

**Tags.**

Removal, §10-2-14.

**Timber,** §10-2-23.

**Unit price.**

Required on packages with random  
weights, §10-2-12.

**Using or possessing incorrect weight or  
measure,** §10-2-14.

**WELL PUMPS.**

**Labeling remanufactured or rebuilt items,**  
§§10-1-80 to 10-1-83.

**WHEAT.**

**Warehouses.**

State licensed and bonded warehouses.  
General provisions, §§10-4-1 to 10-4-33.

**WHEELCHAIRS.**

**Motorized wheelchair warranties,**

§§10-1-890 to 10-1-894.  
Action for damages, §10-1-894.  
Citation of article, §10-1-890.  
Definitions, §10-1-891.  
Duration, §10-1-892.  
Express written warranties.  
Duration, §10-1-892.



**WHEELCHAIRS —Cont'd**

**Motorized wheelchair warranties —Cont'd**

Express written warranties —Cont'd

Required, §10-1-892.

Failure to furnish, §10-1-893.

Nonconforming wheelchairs.

Repairs, §10-1-893.

Other rights and remedies under other laws or contracts, §10-1-894.

Refund or replacement of wheelchair, §10-1-893.

Repairs of nonconforming wheelchairs, §10-1-893.

Sale or lease of returned wheelchair, §10-1-893.

Short title, §10-1-890.

Waivers void, §10-1-894.

**WHOLESALE DISTRIBUTION BY  
OUT-OF-STATE PRINCIPAL,**

§§10-1-700 to 10-1-704.

**Action for failure to make timely payments  
of commissions, §10-1-702.**

**Commissions.**

Timely payment upon termination of contract, §10-1-702.

**Definitions, §10-1-700.**

**Doing business in state for purposes of  
personal jurisdiction.**

Principal not resident of state entering into contract subject to article, §10-1-704.

**Frivolous actions.**

For failure to make timely payments of commissions, §10-1-702.

**Jurisdiction of court, §10-1-704.**

**Prohibited waiver of laws, §10-1-703.**

**Sales representatives.**

Rights, §10-1-702.

**Termination of contract between principal  
and sales representative.**

Timely payment of commissions, §10-1-702.

**Waiver of law prohibited, §10-1-703.**

**WHOLESALEERS.**

Wholesale distribution by out of state principal, §§10-1-700 to 10-1-704.

**WITNESSES.**

**Agents.**

Competency as witness, §10-6-64.

**Cemeteries.**

Enforcement powers of Secretary of State, §10-14-19.

Investigations.

Powers of Secretary of State, §10-14-15.

**Commodities and commodity contracts or  
futures.**

Investigation, §10-5A-20.

**Expert witnesses.**

Fees.

Limited edition art reproductions, §10-1-435.

Limited edition art reproductions.

Fee in actions to enforce provisions of part, §10-1-435.

**Fees.**

Commodities and commodity contracts and options.

Investigations, §10-5A-20.

Expert witnesses.

Limited edition art reproductions.

Actions to enforce part, §10-1-435.

**WOOD CUTS.**

**Limited edition art reproductions**

generally, §§10-1-430 to 10-1-437.

**Rights in works of fine art, §10-1-510.**

**WORLD CONGRESS CENTER.**

**Geo. L. Smith II Georgia World Congress  
Center.**

General provisions, §§10-9-1 to 10-9-61.

**WRITINGS.**

**Parol contracts, §10-6-121.**

**Retail installment contract, requirements,  
§10-1-3.**

**Y**

**YACHT CLUBS.**

**Boats and other watercraft.**

Marine membership facilities, §§10-1-392, 10-1-393.























